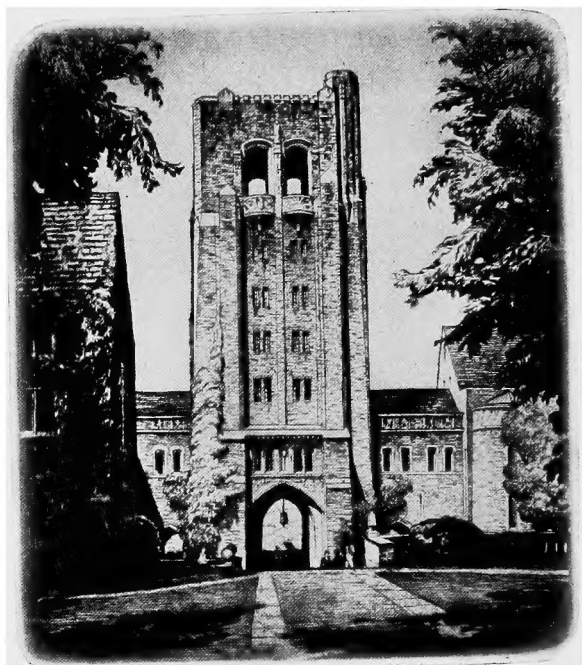


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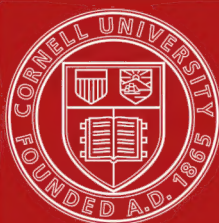
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A TREATISE

ON

EQUITY JURISPRUDENCE,

With particular reference to the present conditions of Jurisprudence
in the United States.

BY

CHRISTOPHER G. TIEDEMAN,

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ST. LOUIS:
THE F. H. THOMAS LAW BOOK CO.
1893.

LA. 4158.

Entered according to Act of Congress, in the year 1893, by
CHRISTOPHER G. TIEDEMAN,
In the Office of the Librarian of Congress, at Washington.

St. Louis, Mo.:
Press of Continental Printing Co.

PREFACE.

In this one volume, the author has succeeded, with the ingenious aid of the publishers, in presenting the entire subject of equity jurisprudence, as it now obtains in the United States. All temptations to enter into historical and philosophical disquisitions upon this remarkable branch of law have been successfully resisted, in order to bring within the compass of one portable volume, an exposition of all the principles of equity jurisprudence which now control human action, and determine civil rights. Inasmuch as the entire remedial law has undergone a radical change in a majority of the states, and has been materially modified in the remaining states, and in consideration of the demand for space in the presentation of the substantive principles of equity, which have not been materially affected by this modern legislation, the author has contented himself with a general discussion of equitable remedies and their nature, and has left the details of equity procedure and practice, as modified by statute, to be found in works upon procedure and practice. It is believed that the book has thereby been made more acceptable to the profession, as well as to the student.

C. G. T.

UNIVERSITY OF THE CITY OF NEW YORK,

APRIL 3, 1893.

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A TREATISE

ON

EQUITY JURISPRUDENCE.

CHAPTER I.

THE ORIGIN AND DEVELOPMENT OF EQUITY JURISPRUDENCE.

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§ 1. **The meaning of equity in general.**—I have elsewhere ¹ more fully explained, how every legal rule, when reduced to its fundamental elements, will be found to be the expression of the popular sense of right, the resultant of all the social forces at play in an organized society. The legal rule is, however, a reflection of the popular sense, which prevails at the time when the rule was enunciated, and not necessarily a reflection of the popular sense of right at any subsequent time, except so far as the blind obedience of precedent, enforced by the popular sense of right as a rule of law, compels a compliance with a previously enunciated principle or rule of law in subsequently occurring cases, notwithstanding such principle or rule ceases to represent the untrammelled sense of right of the people. The private interests, that are always built up around an enunciated principle of law and in reliance upon the continuance of its application to future cases, exert all their influence in the direction of rigidity and unchangeableness of the law. They oppose the

¹ Tiedeman's Unwritten Constitution, Ch. 1.

slightest deviation from the enunciated rule or principle, and often give to the law in general a conservative character far beyond what is really necessary to the conservation of well-founded rights, and which often is the cause of infliction of rank injustice.

This evil tendency of conservatism in the law is most marked in the earliest stages of development of a system of jurisprudence. At that time, which is always coeval with popular ignorance and barbaric customs, the word is taken for the thought or principle which it really only imperfectly represents, and the letter of the law is alone considered, while its underlying spirit is altogether ignored, in its application to subsequent causes of litigation. As has been stated by Dr. v. Jhering in his "*Geist des Roemischen Rechts*":¹ "A close adherence to the letter is a mark of unripeness everywhere, and especially so in law. The history of law might write over its first chapter, as a motto. 'In the beginning was the word.' To all rude peoples the word appears something mysterious, whether it be written or solemnly uttered as a formula, and their simple faith fills it with supernatural power."² A literal interpretation of the law is rigidly adhered to, and the result is very often a frustration, instead of a furtherance, of justice. If it were possible to put all one's meaning into the words we employ, and by careful qualification of them prevent others from infusing into them a meaning one did not intend, a blind adherence to the letter of the law might not produce such disastrous results. But the ability of giving exact expression in words of the popular will and sense of right is always in inverse proportion to the degree of respect, which is shown to the letter of the law and the disregard of its spirit. The more enlightened the people become, the better they understand the poverty and unreliability of language as a vehicle of thought, and the less they rely upon the phraseology of the law in determining the rule of civil conduct. But this extension of knowledge of the true rules of interpretation is ordinarily of very slow growth, and the prevalence of the erroneous literal interpretation has had time to create a conservative sentiment in opposition to the innovation of the more liberal interpretation according to the spirit and hidden meaning of the law, and to give to the law a rigid and irrational formalism. When that untoward result is effected, the popular sense of justice is violated, and is often so aroused as to produce a popular objection to the offending rule of law, strong enough to secure in some way, that is not inconsistent with the binding force of the existing law, a conformance of the rule of positive law to the popular sense of what it ought to be. This popular sense of what the law ought to be is what is known in universal law as equity. It is not a part of positive law, but rather a branch of legal ethics. It is a legal ideal, the *jus naturale* of the Romans, and becomes a part of positive law only so far as it reflects and conforms

¹ Band II, Thell 2, 427.

² Translation of Dr. W. G. Hammond in

appendix to his edition of Lieber's *Hermeneutics*, p. 262.

to the moral habits of the people. This is the meaning of equity, when applied to universal jurisprudence, and in that sense alone can that term be properly applied, except as a branch of English and American jurisprudence.

§ 2. **The *æquitas* in the Roman law.**—Whatever Blackstone, and many other common law writers and judges, may think of the common law's independence of the influence of the Roman law, it is undeniable that whatever is best and most worthy of preservation in our existing private law, has been derived in a more or less modified form from the Roman jurisprudence. Hence, in this particular connection, it is of importance to start out with the consideration of the important branch of law, which constitutes the subject of this volume, with a general understanding of the meaning of equity in the Roman system. In regard to the relation of law in general to the doctrine of equity, as was explained in the first section, the Roman law constitutes no exception. Notwithstanding the high development which the Roman jurisprudence attained in the days of the empire, culminating in the most remarkable body of law which the world has ever known, its beginnings were as simple and crude as any other system of law known to history. In the earliest stages of the Roman jurisprudence there was the same blind adherence to the literal interpretation of the law, and the same superstitious observance of the word rather than the intelligent consideration of its spirit, which were claimed to be the characteristics of the early stages of every system of jurisprudence. "Nowhere was this faith in the word more powerful than in the ancient Rome. The *cultus* of the word pervades all relations of public and private life, of religion, of morals, and of law. To the ancient Roman the word is power; it binds and looses; it has the power, if not to move mountains, at least to remove crops into another field. With what rigid pedantry, therefore, the letter was treated by the ancient jurists, we might infer from the whole tone of national thought. There was a time, and a long one, when the same word-catching of the jurists, which afterwards furnished so happy a theme for the ridicule of Cicero, and was gravely condemned by jurists and emperors, passed in the people's eyes as a proof of acuteness and superiority in the lawyer who employed it; and when on the other hand, that freer interpretation which the later law employed, especially upon contract of the *jus gentium*, would not only have failed to be understood, but would have met with the most decided opposition. It took many centuries to bring the law and the people alike to the capacity for this freer kind of interpretation."¹

With this understanding of the early condition of the Roman law and this narrow-minded respect for the word and strict adherence to the literal construction and interpretation, one would expect the

¹ Dr. Hammond's condensed translation on v. Jhering's *Geist des Roemischen Rechts*, Band II, Theil 2, pp. 427-455.

same conflict in the course of the development of the law between the positive law and its ethical criticism, as was displayed in the course of the development of the English jurisprudence. Certainly in the very earliest stages of the development of the Roman jurisprudence that was the fact, as is very fully explained by v. Jhering, and more particularly by Gaius in his institutes. And there likely would have been the same distinct separation of the law and equity in the Roman jurisprudence, had the conditions of civilization and the character of the legal procedure of the Romans been the same.

It must be observed that the first form of the Roman law was that of a system of rules of conduct, designed only to determine the legal rights and obligations of Roman citizens with each other, and was very technical in all its forms and limitations. The early Roman looked upon a foreigner, whether he was resident or non-resident, as possessing no rights which he was bound to respect or accord. The *jus civile* bore no relation whatever to the foreigners, either in their disputes between themselves or with Roman citizens. As, however, the international and commercial intercourse of Rome with other countries increased in importance and extent, and the number of foreign visitors within the Roman provinces became larger, it was necessary for the government of Rome to provide for some mode of settling disputes and enforcing claims between Romans and foreigners and between the foreigners themselves. In order that provision may be made, a special judicial officer was created whose duty was to settle all of these disputes. In consequence of the fact that the parties litigant came from all parts of the world, and therefore had varying conceptions of legal right and wrong, this judicial officer, called the prætor, who was given charge of this litigation, disregarded the technicalities of the *jus civile*. For to apply this technical and arbitrary law in all its strictness to the adjudication of the rights of strangers, would have resulted often in the infliction of wrong rather than the attainment of justice. Instead, therefore, of deciding these causes of action according to the *jus civile*, the Roman prætor rendered his judgments in accordance with those rules and principles of law which he found to be the common property of all nations. In the course of his judicial experience, there grew up alongside of the *jus civile* a distinct and separate system of jurisprudence, which was known as the *jus gentium* or the law of nations. The determined purpose of the prætor to render his decisions in these causes of action according to the common sense of right, which he found prevalent among nations in general, gave to the *jus gentium* a far more rational and less technical character than what distinguished the *jus civile*. The greater rationality of the *jus gentium* undoubtedly gave to that system of law an advantage in the contest for supremacy between the two systems of jurisprudence; and if the consciousness of national life and the powers of the judicial officers had been the same among the Romans as was

the case in early England, these two superior systems of law would have probably continued as separate and distinct systems of jurisprudence for a much longer period than was actually the case. But the prætors were authorized at the beginning of their term of office to issue edicts whereby they would announce to the people the principles and rules of law by which they would be governed in their adjudication of the causes of action brought before them. Each prætor would in his edict make whatever modifications his sense of justice or the popular sense of right through its influence upon him, compelled him to make in the edicts of his predecessors, retaining whatever of the last edict conformed to the prevalent sense of right. This power of the prætor was subject to no legal limitations whatever, and he was permitted to make whatever changes in the prior law that were necessary to make it conform to his own sense of legal propriety. The popular will seemed to be in favor of a liberal and intelligent exercise of this power, hence we find in the course of years that the wall of partition between the *jus civile* and the *jus gentium* was completely broken down, and the Roman law emerged therefrom as one inseparable and organic system of jurisprudence. About the same time the Roman lawyers, together with other serious and thoughtful men of the day, revolting from the prevalent profligacy, became infatuated with the stoic philosophy, and drew from that philosophy the Greek idea of natural law. Instead of the *jus gentium* being received as a body of rules found to be generally enforced by all nations, it became, in its reduction to the forms of a science, the *jus naturale*, an ideal law which one in his imagination would conceive to be in force in a state of perfect nature. *Jus naturale* is the scientific, idealized form of the *jus gentium*.

The *jus naturale* was nothing more than the ethical conception of equity, which has been already explained to be the character of equity in general, and as apart from the use of the term in the English and American jurisprudence. It may be, therefore, stated in conclusion that the Roman equity, or *jus naturale*, constitutes that ideal law which the ethical conception of the people from time to time held up for imitation and guidance in the creation and development of positive law, and that the Roman equity only became a part of the actual law, so far as its conceptions represent the spontaneous practice and general habits of the people. Inasmuch as the Roman procedure and the national characteristics of the Romans threw no obstacles in the way of the gradual and natural absorption by the positive law of the improvements and growth in the ethical conceptions of the people as to the question of right and wrong; we find the Roman law naturally and gradually eliminating everything that was harsh, technical and barbarous, and gradually becoming more rational and more just in its regulations as to the protection of private rights. until finally it reached its final state of comparative perfection in the *Corpus Juris Civilis* of Justinian.

§ 3. **Equity in the English law.**—Inasmuch as the Roman law attained its final state of growth before the English nation acquired its national consciousness, and therefore when its jurisprudence was in its crudest state, we are inclined to compare one with the other to the great disadvantage of the English law; forgetting that the true parallel is to be drawn when one compares the Roman jurisprudence, prior to the twelve tables, with the early conditions of the English law. As stated in the opening paragraph, crudity and gross technicality are the characteristics of the early days of every system of jurisprudence; and the struggle of the national consciousness to free itself from this barbaric conception, will vary, as to the time consumed in the attainment of success, with the conditions of civilization and the peculiarities of the national character. It is not expected, in this connection, to give any very extensive historical account of the struggles against the barbaric common law of the Anglo-Saxon and Normans, and the efforts to substitute therefor the more equitable and more just principles of the Roman law. Within the limitations which necessarily circumscribe the author of an elementary book upon existing equity jurisprudence, nothing more than a mere summary of the important facts of legal history in connection with the subject can be attempted. It suffices to say that the English common law, like the early Roman law, was barbarously technical and crude. Our English ancestors knew no rule which would involve the recognition of anything more than the literal construction of the law. The jurisdiction of the common law courts was declared to emanate from the crown, somewhat in the form of a special grant of royal prerogative, and therefore must be subject to the strictest construction against the extension by implication of the powers of the judicial officer. The Courts of Common Law, the Courts of King's Bench, Common Pleas and of Exchequer, derived their authority for adjudicating causes of action directly from royal grants or writs. Never had these courts had the authority to decide a cause of action, until each party plaintiff had obtained from a member of the King's Council, known as the chancellor, a writ running in the king's name, directing the judge of one of these three courts to hear the cause of action and render judgment between the parties. In consequence of the barbaric conception of law prevailing at the time, these writs assumed a very technical form, and were rigidly adhered to and were limited in number. Whenever an application was made for a writ, the clerks in chancery would issue a writ to the common law courts, only when they could find a form which would correspond to the cause of complaint which arose between the parties. These writs, however, being crude and limited in scope, did not provide for the increasing complications and developments of causes of action, and the result was that the parties litigant frequently failed to attain any redress whatever. This marked difference between the form of procedure of the early English law and the

Roman prætor's right to issue edicts and his freedom from all royal or executive control, in very large measure explains the difficulty which was experienced at this early day to secure a rational development of the English law. But that in itself will not be a satisfactory explanation; for in recognition of the defects in the English procedure and the necessity of an enlargement of the scope of the English courts, in the reign of Edward the First, the following statute was passed: "Whensoever from henceforth it shall fortune in chancery that in one case a writ is found, and in a like case falling under like law and requiring like remedy is found none, the clerks of the chancery shall agree in making the writ, or the plaintiff may adjourn it into the next Parliament, and let the cases be written in which they are not agreed, and let them refer themselves to the next Parliament, and by consent of men learned in the law a writ shall be made, lest it should happen after, that the court should long time fail to administer justice unto complainants."

Had the same unusual liberality prevailed among the early English, as that found to be the case among the early Romans, in respect to the power of the prætor to modify the existing law by his edict, there would have been very little occasion for the creation and establishment of a separate court and separate system of jurisprudence, in order to attain the ends of justice. But the common law judges influenced by the national conservatism and opposition to change, which is almost as marked now as it was then, subjected the statute to the most narrow and the strictest construction, and held that no writs were permitted under the statute, except in cases "falling under like law and requiring like remedy." Although the chancellor's clerks, under the more liberal influence of the legal members of the privy council, had devised a great number of new writs, which would have enlarged the jurisdiction of the common law courts, and liberalized the common law, the judges of the common law courts, asserting their authority to decide upon the validity of those writs, refused to recognize any cause which did not fall under like law or require a like remedy, and thus a beneficent provision for reform was largely shorn of its beneficial results. Notwithstanding, however, this opposition to reform in the procedure, the law was finally permitted to operate beneficially so far as to create the three new writs, viz., of trover, assumpsit and trespass on the case, which all writers upon pleading never fail to extol as the chief instruments for the extension of the common law jurisdiction.

Writers attempt to explain more fully the obstacles in the way of a rational development of the law on lines of equity, by referring to the influence of the feudal system and to the peculiar character of the procedure. But all these are mere manifestations of a prevalent national characteristic, viz., that of hostility to everything of foreign extraction; even the Englishman of to-day opposes everything of foreign

origin, and is a slave to the power of precedent in law as well as in public policy. The Roman, with his desire to absorb every nation and to make his own other people and other habits of life, would under the same circumstances and limitations have no doubt wrought out a different result. As it is, however, the English objection to foreign influence, and the obstacles thus thrown in the way of their absorption in a natural way of the principles of equity, which were to be found already made for them in the Roman jurisprudence, simply postponed instead of preventing the adoption and thorough amalgamation of the two systems of jurisprudence into one.

There are some historical facts, such as the contest between the Roman church and the English government, even in the days of Stephen and the early Edwards, which will account for the rejection of the influence of the Roman jurisprudence in the development of their own law, which had at an early day been exerted to a most marked degree. For, when Bracton wrote his law book on the laws and customs of the English nation, he was able in the presentation of that law to write a book one-third of which was almost a literal translation from the institutes of Justinian. At the University of Oxford, a distinguished civilian was appointed a professor and charged with the giving of instruction in the Roman law. The school of Roman law established by him at the University of Oxford rose to be second in eminence in Europe, only to those in Paris and Bologna. But the contest between the English government and people and the Roman pontiff, and pecuniary exactions by the latter, made the Roman law—which was represented in England, as well as elsewhere on the continent of Europe, during the middle ages by ecclesiastics—odious and objectionable to the English. Their strong sense of national independence revolted at the acceptance of even a benefit at the hands of those whom they detested. This same national conceit prevented the common law judges and the common law lawyers, even at a very late date, from appreciating the superiority of the Roman law, as it became adopted by the courts of equity and incorporated by them in the English equity jurisprudence as a branch of the English law. Mr. Spence, in his work on equity jurisdiction, refers to a writer of the reign of James I., who styles himself a sergeant, who, criticising the equity jurisdiction as being against the common “weal of the realm,” declares that the common law “commandeth all that is good to be done.” Among other things that he criticises is the judgment of a court of equity, that a debtor whose debt is represented by a bond or other instrument under seal, cannot be compelled to pay a second time the same debt because he had failed to obtain a release of the bond; the common law rule being that a bond can be recovered on any number of times, as long as it has not been formally canceled or released or surrendered up. In criticism of the different ruling of a court of equity, this writer proceeds to say, “When a bill

has been made to the chancellor that such a man should have great wrong to be compelled to pay two times for one thing, the chancellor, not knowing the goodness of the common law (?), has temerously directed a subpoena to the plaintiff (in the action of law); and the chancellor, regarding no law, but trusting to his own wit and wisdom, giveth judgment as it pleaseth him."¹

It is not surprising, therefore, that the national objection to the more liberal and more advanced principles of equity should have been strong enough at an earlier day to have prevented their gradual absorption into the ordinary common law of the land. It would probably be more surprising, if that absorption had taken place. The fact was that the national character had not been sufficiently removed at that time from the days of barbarism, to be able to appreciate the superiority of the Roman jurisprudence and of its principles over the prevalent rules of law. In other words, the principles of right and wrong of the Roman law did not reflect the popular sense of right; and having a strong sense of national independence and a vigorous national consciousness, they resisted any attempt on the part of foreign powers or of foreign influence to change the national jurisprudence. This great obstacle to the natural and gradual development of the English law, instead of successfully preventing the exclusion from the kingdom of the influence of the Roman jurisprudence, served only to direct that influence into a different and separate channel. It compelled the establishment of a separate court of equity and a distinct system of equity jurisprudence.

§ 4. **Establishment of separate court of equity and system of jurisprudence.**—Under the early Norman kings, in the exercise of its prerogatives, the crown was aided by two councils, one, known as the general council, which only assembled occasionally, and was the original form of the more modern Parliament; and the other known as the special council, smaller in number, in more or less constant attendance upon the king, and which corresponds to the modern privy council. This privy council was composed of several officers, among them being the chancellor and the chief justiciary. It was the duty of the members of this council to assist the crown in the active performance of its various duties and in the exercise of its many prerogatives. As was explained in a different connection, the early Norman king claimed to be, and he actually constituted, the original source of judicial power; and whenever any other branch of the government, or any other officer exercised the judicial power, it had to rest upon a writ issuing from the crown, authorizing such exercise of judicial power. The chancellor was the special member of the privy council, who was charged with the superintendence of judicial affairs, and the writs which authorized the trial of causes in the common law courts proceeded from the chancellor, and were issued by the clerks who

¹ 1 Spence Eq. Jurisd , p. 347.

were known as clerks in chancery. Inasmuch as the crown was considered to be the court of ultimate resort, the fountain of justice, whenever there was any failure of justice in the ordinary common law courts, or these courts refused under their narrow and technical construction of their powers to administer justice or provide an ample and adequate remedy to the parties litigant, the disappointed ones were in the habit of appealing directly to the crown to provide some additional or extraordinary remedy, as a matter of royal grace. In the very earliest days of the Norman rule, when the executive affairs of the kingdom were not sufficiently grave and important to occupy the entire time of the king, these pleas for extraordinary judicial remedy were made directly to him, and he would himself hear and decide the matter. When, however, the cares of government increased, and it became impossible and inconvenient for the king to hear the pleas in person, he would direct some member of the privy council to act in his stead and to furnish the extraordinary aid. Usually the matter was referred to the chancellor, and in the course of time the practice of referring all such cases to the chancellor became a fixed and established one. Still it was necessary that the appeal for extraordinary aid of this kind should be made in the first instance to the king, and in each particular case there would be a reference to the chancellor. But in the twenty-second year of the reign of Edward III., the king issued a general writ in which he ordered that all judicial matters that were of grace, should be referred to and disposed of by the chancellor or by the keeper of the privy seal. From this writ, it is generally claimed, that the court of chancery as a separate and independent court is dated; and this is certainly true, so far as the origin of the court of chancery depends for its beginning upon the royal decree of a general character. But this royal decree succeeded instead of preceding the practice of referring all such cases to the chancellor, or other member of the council. It simply confirmed as a general rule, what had already become the custom and dispensed with the necessity of first formally making an appeal to the king in quest of the extraordinary aid. The court of chancery, thus established and filled, as it was until a very late date, by ecclesiastics who were thoroughly versed in the Roman law, constituted a ready means for supplying the deficiencies of the common law, occasioned, as already explained, by the narrow-mindedness of the common law judges in refusing to loose themselves from the barbarous technicalities of the early law. When the common law judges refused to decide causes of action according to their natural justice, and violated the public conscience by blind adherence to the ancient precedents, the parties suffering from this mistaken zeal would apply to the chancellor, or other member of the court of chancery, for extraordinary aid and relief. Justices of the court of chancery were through their education as priests well versed in the fundamental principles of the Roman law and the canon

law of the church. And in deciding the cases that were brought before them, these judges would resort to the Roman and canon law for the principles which should guide them in their adjudications. This is, in short, the way in which the court of chancery became established as a court having parallel jurisdiction with common law courts. And through these courts of chancery arose a separate and distinct system of jurisprudence, in which the harsh exactions of the common law were relieved against and a closer conformity to natural justice and reason established.

§ 5. **The meaning of equity as a branch of American and English jurisprudence.**—In a preceding section, it was explained that in universal law the term, *equity*, means the ideal conception of justice and right which stands outside of positive law, and serves only as tests for the ethical criticism of the rules of positive law. In the Roman law, *æquitas* is only another name for the *jus naturale*. Inasmuch as the Roman prætor had at the beginning of his term the authority to modify by his edict the rules of positive law, so as to bring such law into stricter conformity with the popular sense of right then prevalent, under the influence of the philosophy of the *jus naturale*, he exercised this authority to the extent that such changes were necessary, to bring the positive law into conformity with "*Arbitrium boni viri*." In the English and American jurisprudence, the word represents a distinct and separate system, not of ethics but of positive law, and hence a different conception must prevail in this connection as to the scope of equity. The Roman jurist in discussing what was equity was limited by nothing but natural reason and logic, and the fact that a particular rule of law did not comport with natural reason and justice, was sufficient to justify his condemnation of the inequity of the rule of law. If the prætor agreed with the jurisprudent in his condemnation of the rule of law under inquiry, he would in the edict which he published at the beginning of his term of office change the rule so as to conform to the agreed-upon conception of what was equitable. Undoubtedly the same conception of equity was also entertained by the earlier chancellors of England and the writers of English law in the early days of the court of chancery, as can be ascertained from the passages quoted in the note below.¹ Undoubt-

¹ In the "Doctor and Student" (Dial. 1, Ch. 16), equity is thus described: "In some cases it is necessary to leave the words of the law, and to follow what justice and reason requireth, and to that extent equity is ordained, that is to say, to temper and mitigate the rigor of the law. * * * And so it appeareth that equity taketh not away the very right, but only that such seemeth not to be right by the general words of the law. * * * Equity is righteousness that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy." In Finch's Law (p. 20), it is said: "The nature

of equity is to amplify, enlarge, and add to the letter of the law." "Chancery is ordained to supply the law, and not to subvert the law." In Fonblanque on Equity (Bk. 1, Ch. 1, § 3), it is stated: "So there will be a necessity of having recourse to natural principles, that what is wanting to the definite may be supplied out of that which is indefinite. And this is properly what is called equity in opposition to strict law. * * * And thus in chancery every particular case stands upon its own particular circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce

edly, these quotations constitute a reasonable and accurate description of the character of equity and the scope of the powers of the court of chancery, in modifying and departing from the rules of law, in the earlier days of the existence of the court of chancery. For, in these days, the court of chancery sat as a court of extraordinary power, bound by no particular rules of law, and having by the general writ of Edward III. the full authority to modify the requirements of the common law, whenever they were compelled to do so, in securing to parties litigant the just relief from the exactions of the common law. Naturally, the personality of the chancellor was an extremely important element in determining, how far he would depart from the positive law of the land, and to what extent he would adopt in its stead rules of law based upon the principles of justice as he understood them. Selden's criticism of the rules of equity, which is so commonly quoted, if applied to the court of chancery in its earliest days, would be more or less reliable.¹

But the court of chancery, as well as the common law courts, was influenced by the national characteristics of conservatism and blind adherence to precedents; and under that influence the original character of the court, and the unlimited power of the chancellor in controlling the developments of the court's jurisdiction, could not remain unchanged. In the course of time, the judicial precedents of the court of chancery became as numerous as the precedents of the courts of law, and each successive chancellor felt himself more or less bound by the judgments of his predecessors, in determining when and how far the court would go in modifying the limitations and harsh exactions of the common law. And while the older modes of expression of the courts were retained; as for example, where it was described to be a court of conscience; instead of meaning that the case would be decided according to the personal conscience and sense of right of the particular chancellor who heard the cause, it would mean simply that the chancellor decided the questions according to those prin-

not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to anything contrary to the law of nature; and indeed, no man in his senses can be presumed willing to oblige another to it. But if the law hath determined a matter with all its circumstances, equity cannot intermeddle." So likewise in *Dudley v. Dudley*, Prec. in Ch. 241, 244, Sir John Trevor, M. P., said: "Now equity is no part of the law, but a moral virtue which qualifies, moderate, and reforms the rigor, hardness and edge of the law, and is a universal truth. It does also assist the law where it is defective and weak in the constitution, which is the life of the law; and defends the law from crafty evasions, delusions, and new subtleties invented and contrived to evade

and delude the common law, whereby such as have undoubted right are made remediless. And this is the office of equity, to protect and support the common law from shifts and contrivances against the justice of the law. Equity does not, therefore, destroy the law, nor create it, but assists it."

¹ Table Talk, tit. Equity: "Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him who is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing to the chancellor's conscience."

ciples, which had been established by the judgment of the long line of chancellors, and which serve as precedents, setting forth and limiting the powers and the jurisdiction of the court. "With such a conscience as is only *naturalis* and *interna*, this court has nothing to do; the conscience by which I am to proceed is merely *civilis* and *politica*, and tied to certain measures."¹ But the development from the ancient idea of equity as a system of legal ethics to a branch of positive law, and the consequent curtailment of the liberty of the jurists of the court of chancery, as to the principles upon which they would decide a cause of action, is one of slow and gradual growth. And the exact point when the modern conception was fully adopted is difficult, if at all possible, to determine; as may be demonstrated by the difference of opinion which was shown to prevail among the judges in the old case of *Fry v. Porter*.² During the argument C. J. Key-linge cited an old case at which C. J. Vaughan said: "I wonder to hear of citing precedents in matter of equity, for if there be equity in a case, that equity is a universal truth, and there can be no precedent in it, so that any precedent that can be produced, if it be the same with this case, the reason and equity is the same with itself; and if the precedent be not the same case with this, it is not to be cited." To this Lord Keeper Bridgman replied: "Certainly precedents are very necessary and useful to us, for in them we may find the reason of the equity to guide us; and besides the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration and weighing of the matter, and it should be very strange and very ill if we should disturb and set aside what has been the course for a long series of time and ages."

The modern equity court is not like the ancient court of chancery, free from the binding effect of precedent in its adjudications. They are as much bound by the rules of positive law as any other court, the only difference between the two separate courts, where they still continue to be separate and parallel courts, is, that the common law court is bound by the rules of the common law; while the court of equity is controlled in its determinations by those principles which the court of chancery laid down ages ago for the determination of the scope of equity jurisprudence.³ The truth of these statements will be very fully understood as the whole subject of equity jurisprudence is unfolded, and particularly when we come to the consideration of the general principles of equity and the equitable maxims which serve as guides in the determination of the scope

¹ *Cook v. Fountain*, 13 Sw. 585, 600.

² 1 Mod. 300 & 307 (22 Car. II.).

³ Lord Rosedale, in *Bond v. Hopkins*, 1 Sch. & Lef. 413, 429, said: "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no

more discretionary power than courts of common law. They decide new cases as they arise, but the principles on which former cases have been decided, and may thus illustrate and enlarge the operation of these principles, but the principles are as fixed and certain as the principles on which the courts of common law proceed."

of equity. In the present connection, one needs but read Blackstone's Criticisms of the Court of Equity and of Equity Jurisprudence, in modifying and abating the exactions and cruelties of the common law.

§ 6. **Subdivision of equity jurisprudence.**—It has been made to appear in the course of the historical inquiry into the origin of English and American equity jurisprudence, that the inefficiency of the common law, both substantive and remedial, is the occasion for the existence, in America as well as in England, of a separate court of equity, and a separate system of positive law known as equity jurisprudence. Equity jurisprudence, therefore, must consist of all those rules and principles of law which are enforced by a court of equity and which do not find recognition in the common law, and which are not enforced by the common law courts. Equity jurisprudence, must, therefore, consist not only of a statement of the extraordinary remedies for the enforcement of rights existing at common law, but likewise of equitable rights and interests which only the court of equity will recognize, and which are unknown to the common law. And furthermore, it would include principles of justice, which are applied by the court of equity to substantive and remedial rights, and which do not obtain any recognition in the common law. Hence, equity jurisprudence will be divided into three distinct parts: *First*, principles of right which courts of equity recognize and enforce, and which do not involve the creation or recognition of any distinct or special right or interest; but which affect the character of other special rights and interests whether legal or equitable in origin, and control the character of the remedial rights in equity. *Second*, all those distinct interests or rights of person or property, which the court of equity have recognized, and which were denied by the common law courts. *Third*, equity includes all remedies which a court of equity considers necessary to the attainment of justice between parties on account of the inadequacy or absence of common law remedies.

§ 7. **Nature and extent of equity jurisdiction.**—Jurisdiction of a court may be defined to be the limitations within which the court has the power to adjudicate individual causes of action. It is to be distinguished from the jurisprudence which the court administers; the jurisprudence being the rules and principles of law which govern the court in rendering its judgment, while the question of jurisdiction

1 "It is said that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is contended for. Hard was the case of a bond creditor whose debtor devised away his real estate; rigorous and unjust the rule which puts the devisee in a better condition than the heir; yet a court of equity has no power to interfere. Hard is the common law still subsisting that land devised or descending to the

heir should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in the purchase of the very land; and that the father shall never immediately succeed as an heir to the real estate of his son. But a court of equity can give no relief, though in both instances the artificial reason of the law, arising from feudal principles, has long since ceased." 3 Black. Com. vol. 3, p. 430.

involves an inquiry into the power of the court to entertain the suit at all. Equity jurisprudence, therefore, is not to be taken as a synonym of equity jurisdiction, and the failure to distinguish one from the other at times makes confusion in respect to the meaning of terms, and the force and effect of the principles of equity jurisprudence. Thus, for example, if a party applies to a court of equity for a specific performance of a contract, or its cancellation or rescission, the fact that the party asks for that peculiar kind of relief, which can be granted by a court of equity alone, at once determines the fact that the case falls within the jurisdiction of the court of equity. But whether the relief shall be granted in that particular case or not, is not a question involved in the inquiry into the equity jurisdiction, but it is a question of equity jurisprudence; and the court may conclude in that particular case that the relief shall be denied because the facts of the case do not come within the limitations of the principles of equity which control the extent to which the relief asked for shall be granted, without at the same time reaching the conclusion that the case does not come within the jurisdiction of the court of equity. In this sense is the term jurisdiction employed in this connection.¹

The historical sketch of the growth and development of a separate court of equity, and, of a separate equity jurisprudence, furnished the explanation of the existence of a separate equity jurisdiction and shows the necessity for that jurisdiction. The scope of the equity jurisdiction can only be determined by the consideration of the historical facts which made the court of equity as a separate court a necessity. The jurisdiction extends, or was made to extend, as far as the necessities of the judicial situation required. Now, it will be borne in mind what has been stated in the preceding paragraph, that the distinctions between the jurisdiction of the common law and of the equity law courts were of a two-fold character, viz.: A difference in the recognition or rejection of sound rules of right and justice and of private interests, which ought to be recognized and protected on the one hand, and on the other a failure of the court to provide ample remedy for the protection of rights in general. It is manifest, that, where the provisions of the common law fail to recognize or concede a right or interest which the public conscience requires to be recognized and protected, the court of equity could alone be expected to take charge of, and to furnish for the protection of such rights, the necessary remedial aid. Equitable estates or rights could find protection only in the equity procedure and necessarily, therefore, the court of equity would have jurisdiction over such rights. In determining the extent of the jurisdiction of the court of equity, which rests upon the inefficiency of the common law remedies for the protection and enforcement of rights, a different consideration suggests itself. Here the ground for the assumption of jurisdiction is the inade-

¹ See 1 Pom. Eq. Jur., § 129.

quacy of the common law remedy. That fact or circumstance is the general reason for the court of equity to assert jurisdiction over that class of cases; and if that expression is used in the broadest sense, it might be taken as an all-sufficient reason for the assumption by the court of equity of jurisdiction over causes of action in aid and support of legal rights and interests. For while authors frequently speak of the avoidance of a multiplicity of suits as being one of the reasons for the court of equity to assume jurisdiction over suits;—as for example, in suits for quieting titles and preventing a repetition, of successive actions of ejectment, in relation to the same title of the same property;—after all, that is but one of many manifestations of the inadequacy of the common law procedure, upon which rests the justification for the existence of the equity jurisdiction; and hence the statement may be taken as being without qualification, that whenever the remedy at law proves to be inadequate, whether that inadequacy relates to the inefficiency of the judgment of the court or the increase in the cost of proceedings at law through the multiplicity of suits, the court can claim the assumption of the jurisdiction on the ground of inadequacy of consideration.¹ As will be explained in a subsequent paragraph, a number of equitable remedies are ancillary or auxiliary to the many causes of action; as for example, the equitable bill of discovery, which was formerly frequently resorted to for the purpose of discovering information in the possession of a defendant which was necessary to the successful maintenance of the plaintiff's cause of action. And because it could not be obtained in any common law proceeding, the court of equity would issue a decree of discovery. Now, the general rule has been held to be, that whenever a court of equity has assumed jurisdiction of a cause of action for any limited purpose, as like the cause for a suit for discovery; or where a suit is entertained for the foreclosure of a mortgage; instead of leaving the parties to resort to a court of law for the further prosecution of their claims, the court would proceed to settle the entire cause of action between the parties and render judgment in accordance with the rights of the parties, notwithstanding the fact that but for the partial remedy, which gives to the court its jurisdiction over the cause of action, the ultimate remedy secured by the action could not have been obtained from a court of equity.² Hence a court of equity could not take

¹ *Bolman v. Overall*, (Ala.) 2 So. Rep. 624; *Green v. Spaulding*, 76 Va. 411; *Youngblood v. Youngblood*, 54 Ala. 486; *Huff v. Ripley*, 58 Ga. 11; but compare *Smith v. Griswold*, 6 Oreg. 440; *Hartford v. Chipman*, 21 Conn. 488; *Scott v. Scott*, 38 Ga. 102; *Church v. Church*, 26 How. Pr. (N. Y.) 72; *McConihay v. Wright*, 121 U. S. 201; *Hunt v. Danforth*, 2 Curt. (U. S. C. C.) 592; *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 481; *Wilder v. Arnett*, 8 Ark. 57; *McDaniels v. Lee*, 37 Mo. 204; *Morris v. Thomas*, 17 Ill. 112; *McAlpine v. Tourtelotte*, 24 Fed. 69; *Jenkins v. Hannan*, 26 Fed. Rep. 657; *Allen v. Halliday*,

28 Fed. Rep. 261; *M. Etc. R. Co. v. Woodruff*, 26 Ark. 649; *Seago v. Harrison*, 42 Ga. 189; *Huff v. Ripley*, 58 Ga. 11; *Cavedo v. Billings*, 16 Fla. 261; *Knight v. Ashland*, 61 Wis. 246; *Denison Co. v. Robinson Co.*, 74 Me. 118; *Galveston, Etc. R. Co. v. Hume*, 59 Tex. 47; *Perkins v. Hendryx*, 23 Fed. Rep. 418; *Sultan of Turkey v. Tool Co.*, 23 Fed. Rep. 572; *Appeal of Brush Electric Light Co.*, 114 Pa. St. 574.

² *Trotter v. Hecksher*, 42 N. J. Eq. 254; *Collins v. Colley*, (N. J.) 11 Atl. Rep. 118; *Hawley v. Simons*, (Ill.) 14 N. E. Rep. 7; *Pool v. Docker*, 92 Ill. 501; *Blakey v. Blakey*, 9 Ala.

jurisdiction of cases in tort¹ or criminal cases,² or where it is a mere question of damages;³ or any other case in which the legal remedy is shown to be adequate to the attainment of the ultimate relief.⁴

§ 8. **Exclusive, concurrent and auxiliary jurisdiction.**—The jurisdiction of a court of equity may be subdivided into three classes or kinds, designated by the names of exclusive, concurrent and auxiliary jurisdiction.

The exclusive jurisdiction, as its name implies, includes all those cases in which the jurisdiction of a court of equity over the cause of action is exclusive of a similar jurisdiction by the court of law.

The concurrent jurisdiction includes on the other hand all those cases in which the jurisdiction of a court of equity is concurrent and parallel with the similar jurisdiction on the part of the court of law.

The auxiliary jurisdiction includes all those cases in which the court of equity has no jurisdiction over the ultimate cause of action, but assumes jurisdiction only for the purpose of providing an auxiliary remedy, which is to be employed in aid of the enforcement of the pending cause of action; the jurisdiction over the pending cause of action being in the common law courts, except for the reason that this auxiliary interference by the court of equity is needed, for the advancement of the interests of the party plaintiff. The auxiliary jurisdiction includes the bills for discovery and suits for the perpetuation of testimony, preliminary injunctions and the like.

The concurrent jurisdiction would include all those cases in which the cause of action is legal in its origin, and in respect to which a

391; *Pearson v. Darrington*, 21 Ala. 169; *Martin v. Tidwell*, 36 Ga. 332; *Keeton v. Spradling*, 13 Mo. 321; *Sounder's Appeal*, 57 Pa. St. 498; *Sanborn v. Kittredge*, 20 Vt. 632; *Barnes v. Dow*, 59 Vt. 530; *McMurray v. Van Gilder*, 56 Iowa, 605; *Bouldin v. Reynolds*, 50 Md. 171; *Stevenson v. Buxton*, 15 Abb. Pr. (N. Y.) 352; *McFarlan v. Morris Canal & Banking Co.*, 34 N. J. Eq. 369; but compare *Barlow v. Scott*, 24 N. Y. 40; *Chambers v. Cannon*, 62 Tex. 693; *Hebert v. Ins. Co.*, 8 Sawyer, (U. S.) 198; and see *Hayden v. Snow*, 14 Fed. Rep. 70; *Whiting v. Root*, 52 Iowa, 292; *Osborne v. Barge*, 30 Fed. Rep. 805; *Keeton v. Spradling*, 13 Mo. 321, 323; *State of Mo. v. McKay*, 43 *Id.* 594, 598; *Sounder's Appeal*, 57 Pa. St. 498, 502; *Sanborn v. Kittredge*, 20 Vt. 632, 636; *Zetelle v. Mers*, 19 Gratt. 62, 67; *Ferguson v. Water*, 3 Bibb, 303; *Middleton Bk. v. Russ*, 3 Conn. 135, 140; *Isham v. Gilbert*, 3 *Id.* 165, 170, 171; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424, 430, 431; *Hawley v. Cramer*, 4 Cow. 717; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Clarke v. White*, 12 Pet. 178, 187, 188; *Hepburn v. Dunlop*, 1 Wheat. 179, 197; *Phelps v. Harris*, 51 Miss. 789, 794; *Ezelle v. Parker*, 41 *Id.* 520, 526, 527; *Jesus Coll. v. Bloom*, 3 Atk. 262, 263; *Ambl. 54*; *Yates v. Hambly*, 2 Atk. 237, 360; *Ryle v. Haggie*, 1 J. & W. 234, 237; *Corp'n of Carlisle v. Wilson*, 13 Ves. 276, 278, 279; *Adley v. Whitstable Co.*, 17

Id. 315, 534; *McKenzie v. Johnston*, 4 Madd. 373; *Rathbone v. Warren*, 10 Johns. 587, 596; *King v. Baldwin*, 17 *Id.* 384; *Cornelius v. Morrow*, 12 Heisk. 630; *Farrar v. Payne*, 73 Ill. 82, 91; *Pratt v. Northam*, 5 Mason, 95, 105; *Thompson v. Brown*, 4 Johns. Ch. 619, 631-643; *Walker v. Morris*, 14 Ga. 323, 325; *Handley's Ex'r v. Fitzhugh*, 1 A. K. Marsh. 24.

¹ *Meres v. Chrisman*, 7 B. Mon. (Ky.) 422; *Brown v. Wabash Ry. Co.*, 96 Ill. 297; *Bank v. Debolt*, 1 Ohio St. 591; *Foundry v. Ryall*, 62 Cal. 416; *Scott v. Means*, 80 Ky. 460; *Kennedy v. Guise*, 62 Ga. 71.

² *State v. Uhrig*, 14 Mo. App. 413.

³ *Stanford v. Lyon*, 37 N. J. Eq. 94.

⁴ *Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Heilman v. Canal Co.*, 37 Pa. St. 100; *Wolcott v. Robbins*, 26 Conn. 236; *Doggett v. Hart*, 5 Fla. 215; *Dickerson v. Stott*, 8 N. J. Eq. 294; *Topp v. Williams*, 7 Humph. (Tenn.) 569; *Bresler v. Pitts*, 58 Mich. 347; *Behn v. Young*, 21 Ga. 207; *Massee v. Sneed*, 29 Ga. 51; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24; *Turnpike Co. v. Jewell*, 8 B. Mon. (Ky.) 140; *Perkins v. Perkins*, 16 Mich. 161. *Raley v. Umatilla County (Oregon)*, 13 Pac. Rep. 890; *Lanier v. Alison*, 31 Fed. Rep. 100; and see *Leonard v. Hart*, (N. J.) 7 Atl. Rep. 865; *Ambler v. Chouteau*, 107 U. S. 586; *Husband v. Aldrich*, 135 Mass. 317.

remedy is provided at the common law; but on account of the inadequacy of such common law remedy, or because it is not possible at the common law to join a great many parties in one suit for the settlement of their conflicting interests and in order to avoid a multiplicity of suits, it is necessary to resort to a court of equity. Examples of the concurrent jurisdiction would involve a reference to equitable suits for protection of joint estates, assignment of dower, creditor's suits and the like.

The exclusive jurisdiction would involve all those suits in equity which could not be maintained at all in a court of law. There are two kinds; viz., the jurisdiction of equity over equitable rights and interests, and the jurisdiction which a court of equity assumes over legal rights and interests for the purpose of affording to the owners of them remedies which can alone be employed in the court of equity. The enforcement of trusts would be one example of the first branch of the exclusive jurisdiction; and a suit for specific performance of a contract would be an illustration of the second branch of the exclusive jurisdiction.

§ 9. **Equity jurisdiction in the United States.**—When the American colonies became independent states, statutes were passed in a great many of them declaring, that the English law as it obtained at a certain day, together with the statutes passed modifying such law prior to the mentioned day, would be adopted by the American courts as American common law. And along with this declaration as to the common law, in many states a similar declaration was made recognizing and adopting the equity jurisdiction of the English courts of chancery. In other states, the foundation for the American jurisprudence upon the English jurisprudence has been left for settlement to the adjudication of the courts. But it may be stated that, with the exception of four states in the union, the extraordinary jurisdiction of the English courts of chancery has been transferred to and adopted by the courts of the American states without limitation as to scope and nature. The four exceptions were originally, Massachusetts, Maine, New Hampshire and Pennsylvania. In New Hampshire and Massachusetts later statutes have removed the limitations of the equity jurisdiction within their borders, so that the states of Pennsylvania and Maine are probably the only states now in which the general jurisdiction of the court of equity is still limited. There have been a number of statutory modifications of the jurisdiction in many of the states; as for example, in regard to the jurisdiction of the court of equity over suits for administration of decedents' estates.¹ But in this connection, it would be an impossibility to do anything more than to give a general subdivision or classification of the states, in respect to their equity jurisdiction. The details of such jurisdiction in any particular state

¹ See *post*, §§ 260, 261.

can only be ascertained by the close study of the decisions and statutes of that state. In this general classification, bearing in mind the limited character of the jurisdiction in the few states already mentioned, the states will be divided into three classes. In the first class would be included all those states in which separate courts of equity are still existing; viz., New Jersey, Delaware, Tennessee, Mississippi, Alabama and Vermont. In each the court of equity has general jurisdiction throughout the state as a court of *nisi prius*, but there is but one appellate court for the consideration of all appeals. In Kentucky and Virginia, there are special chancery courts for particular circuits or counties, whereas in Arkansas the constitution of the state provides for separate chancery courts, wherever the legislature considers them to be needed. In the second class of states will be found all those in which the separate court of equity has been abolished, the same court and same judge administering both law and equity; but the distinctions as to form of action and of procedure, as well as to the principles of the substantive law, are retained; the common law forms of actions being employed by such courts in the maintenance of common law actions, and the chancery practice being resorted to in the maintenance of equitable suits. These states are, Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, Maryland, Virginia, West Virginia, Georgia, Illinois, Texas, Michigan, Florida, Iowa, Arkansas, Pennsylvania, Oregon and New Mexico. The third class of states includes all those states, in which not only have the separate courts of equity been abolished, but also all distinctions as to forms of action and of pleadings between actions at law and in equity; and the code of procedure adopted in the place of both of them, which declares that all forms of action heretofore known in law or in equity are thereby abolished, and but one action be entertained in their place, which shall be known as a civil action. This third class includes, New York, North Carolina, South Carolina, Ohio, Wisconsin, Minnesota, Indiana, Missouri, Nevada, Nebraska, California, Colorado, Kansas, Louisiana, Dakota, Idaho, Wyoming, Montana, Utah and Washington.

As can be very well understood, the greatest change in the equity jurisdiction has been effected in those states in which the reformed procedure thus explained has been adopted; for there, not only does the one court exercise the legal and equitable jurisdiction; but both have been blended into one jurisdiction, and all distinctions between them as to forms of procedure have been abolished.

The natural impulse, upon a consideration of these facts, is to conclude that with this abolition of all distinction between legal and equitable jurisdiction, there is a necessary abolition of equity jurisprudence. But this is not the case; it has had only the effect of changing the rules of procedure. This reform in procedure is expressly declared, and held by the courts, to have been intended to

secure no interference or modification of the existing rules and principles of equity, so far as these rules and principles do not involve questions of equity pleading and procedure; or so far as their enforcement and recognition do not rest upon the separate and distinct character of the equity jurisdiction. So while equity jurisdiction, as separate and distinct from legal jurisdiction, cannot be treated as existing in those states in which the reformed procedure has been adopted, yet in these states, as well as in the others in which the distinctions as to forms of procedure are retained, although the separate court of equity has been abolished, the principles of equity jurisprudence still remain a part of the law, and are applied under the reformed procedure to all cases, to which they would have been applied in the olden days by a separate court of equity. "To sum up this result in one brief statement, all equitable estates, interests, and primary rights, and all the principles, doctrines, and the rules of the equity jurisprudence by which they are defined, determined and regulated, remain absolutely untouched, and in their full force and extent, as much as though a separate court of chancery were still preserved. In like manner all equitable remedies and remedial rights—that is, the equitable causes of action, and the rights to obtain the relief appropriate therefor—and the doctrines and rules of equity jurisprudence which define and determine these remedies and remedial rights, and the doctrines and rules of equity jurisdiction which govern and regulate, not the mere mode of obtaining them, but the fact of obtaining such remedies, also remain wholly unchanged, and still control the action of courts in the administration of justice."¹

§ 10. **Equity jurisdiction in the United States courts.**—It remains to be stated, that the United States courts have by the statutes of the United States the same equity jurisdiction which was accorded to the English courts of chancery; and in the exercise of that jurisdiction it may employ any of the remedies and apply all the principles which were found to have been developed by the English courts of chancery. In consequence of the fact that the United States courts have by the acts of Congress and by the provisions of the constitution of the United States, jurisdiction over many causes of action on account of foreign citizenship, which but for that fact would fall within the exclusive jurisdiction of the state courts, frequent cases of conflict between the state and federal regulations of equity jurisdiction will arise. As has already been explained, in some of the states the equity jurisdiction is limited as to scope; in some, separate courts of equity are still retained; while in still others again, the entire distinction, as to procedure and practice, between law and equity has been abolished, all materially affecting in each state the scope and nature of the equity jurisdiction. But in the presence of this conflict and variation of equity jurisdiction in the different states, the United States

¹ 1 Pom. Eq. Jur. 381.

courts have held that, although on account of the foreign citizenship of the plaintiff, or for some other cause, the United States courts may assume jurisdiction over causes of action, which under the statutory modification in the particular state would bring such cause of action within the legal jurisdiction, the question as to equity jurisdiction, as applied to that case by the United States courts will be determined by the general provisions of the United States constitution and the acts of Congress, and be unaffected by any state legislation in respect to it. In other words, the equity jurisdiction of the United States courts over causes of action, over which the state courts have concurrent jurisdiction, will be in nowise affected by state legislation. The equity jurisdiction of the United States courts cannot be thereby curtailed or limited.¹

On the other hand, while the state legislation, limiting the equity jurisdiction, cannot limit the scope of the equity jurisdiction of the United States courts, yet if in a particular state the equity jurisdiction has been enlarged by legislation, and a case falling under that jurisdiction is brought into the United States courts on some constitutional grounds, the United States court is permitted to take advantage of the enlargement of the equity jurisdiction by the state legislation; and administer under this new equity jurisdiction the remedy thus provided for under the state laws.²

§ 11. **Divisions of the subject of equity jurisprudence and order of discussion.**—In the presentation of the subject of equity jurisprudence in the following pages, it is deemed to be wise to adopt the following order of discussion. At the outset, the principles and maxims of equity will be explained and unfolded. Secondly, the rules of equity which materially affect a great many rights and interests and causes of action in general. Third, the equitable estates or interests. And fourth, the equitable remedies.

¹ *Bodley v. Taylor*, 5 Cranch, 191, 221, 222; *Livingston v. Story*, 9 Pet. 632; *Clark v. Smith*, 13 Pet. 195, 203; *Watkins v. Holman*, 16 *Id.* 25, 26, 58, 59; *Bennett v. Butterworth*, 11 How. 669, 674, 675; *Stinson v. Dousman*, 20 *Id.* 461, 464; *Greer v. Mezes*, 24 *Id.* 268, 277, *per* Grier, J.; *Lessee of Smith v. McCann*, 24 *Id.* 398, 403; U. S. Rev. Stat. § 914 (Laws of 1872, Ch. 255, § 5; Stat. at Large, vol. 17, p. 197); *Barber v. Baerber*, 21 Pet. 582, 591, 592; *Noonan v. Lee*, 2 Black, 499, 509; *Thompson v. Railroad Co.*, 6 Wall. 134, 137; *Dunphy v. Kleinsmuth*, 11 *Id.* 610, 614; *Walker v. Dreville*, 12 *Id.* 440; *Basey v. Gallagher*, 20 *Id.* 670, 679; S. C., 1 Mont. Ter. 457; *Case of Broderick's Will*, 21 Wall. 503; *Shuford v. Cain*, 1 Abb. U. S. 302, 305; *Loring v. Downer*, 1 McAll. 360, 362; *Mezes v. Greer*, 1 *Id.* 401,

402; *Byrd v. Badger*, 1 *Id.* 443, 444; *Lorman v. Clarke*, 2 McLean, 568; *Putnam v. City of Albany*, 4 Biss. 365; *Shuford v. Cain*, 1 Abb. U. S. 302, 305; *Parons v. Bedford*, 3 Pet. 447; *Robinson v. Campbell*, 3 Wheat. 212; U. S. v. Howland, 4 *Id.* 108; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 519.

² *Noonan v. Lee*, 2 Black, 499, 509; *Livingston v. Story*, 9 Peters, 632; *Clark v. Smith*, 13 Pet. 195, 203; *Putnam v. New Albany*, 4 Biss. 365; *Pratt v. Northam*, 5 Mason, 95, 105; *Lorman v. Clarke*, 2 McLean, 568; *Livingston v. Van Ingen*, 1 Paine, 45; *Canal Co. v. Gordon*, 6 Wall. 561, 568; *Barber v. Barber*, 21 How. 582, 591, 592; *Case of Broderick's Will*, 21 Wall. 503; *Robinson v. Campbell*, 3 Wheat. 212; *United States v. Howland*, 4 Wheat. 108, 115.

CHAPTER II.

THE FUNDAMENTAL PRINCIPLES AND MAXIMS OF EQUITY JURISPRUDENCE.

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§ 12. **General propositions.**—As has been explained in the historical sketch, presented in the preceding chapter, Equity Jurisprudence is the result of a successful struggle against the rude and unbending formalism of the common law, which aimed more at the defence of the rules of logic and the literal interpretation of the law, than at the doing of justice between man and man. In the pursuit of the remedy for this undoubted evil, the English Courts of Chancery enunciated from time to time certain maxims, setting forth fundamental principles of judicial morality, by which they claimed to be, and were, governed in their contests with the courts of law for jurisdiction. And while, already explained, this contest of the courts is now at an end in most of the states and in England, since in these states the one trial court assumes both legal and equitable jurisdiction, the equity jurisprudence which grew up in consequence of this contest still remains, and its principles very sensibly influence the course of judicial legislation. At the very threshold of the subject, the student is confronted with the maxims of equity, the careful study and digestion of which is essential to a thorough understanding and appreciation, not only of the principles of equity jurisprudence; but also of its importance and relation to what is known as the law. The principles, contained in the maxims, are fundamental in character, and the more important of them apply to almost every branch of equity jurisprudence.

§ 13. ***Ubi jus, ibi remedium*—Where there is a right, there is a remedy.**—Unquestionably the first promptings for the assumption by the court of chancery of jurisdiction over causes of action proceeded from the inefficiency or absolute want of a remedy in the

law courts. As a justification of his assumption of jurisdiction, the chancellor laid down the broad proposition of law, that wherever there is a right an efficient remedy should be provided, and claimed the right, as the keeper of the king's judicial conscience, to supply that remedy whenever the courts of law failed to do so.

But in the consideration of the effect of this maxim in determining the scope of equity jurisprudence, caution should be observed in the study of its meaning. *In the first place*, the court of chancery would supply a remedy for the infringement, not of moral claims of one person upon another, but of legal rights. A legal right must first be established before any court, either legal or equitable, will furnish a remedy for its protection. Under the operation of other maxims of equity, even a court of equity does not recognize every moral right as entitled to its protection. There are limitations on the power of the court of equity in this regard, which will be unfolded as we proceed. But whenever a right is recognized as legal or equitable, the court of equity, under this maxim, stands pledged to supply a remedy.¹ But, *in the second place*, the court of equity will supply a remedy, only when the courts of law, either do not furnish any remedy at all, or they offer an inadequate remedy. If the legal remedy is ample for the protection of the right, there is no ground for the interference of equity.

§ 14. **Equity follows the law.**—This maxim is to be understood and applied in two senses, viz.: *First*, that equity will obey the law and the conclusions of courts of law, in its assumption of jurisdiction over causes of action based upon legal rights;² *Secondly*, that in the construction of equitable estates and rights, and the ascription of characteristics and limitations to them, equity follows the law.³ But if

¹ *Rees v. Watertown*, 19 Wall. 121; *Heine v. Levee*, Com'rs, 19 Wall. 658; *Finnegan v. Fernandina*, 15 Fla. 379.

² *Heard v. Stamford*, Cas. Temp. Tabl. 173. In this case the court refused to compel the husband to pay the wife's debts after her death, in consequence of his having acquired a fortune from her. The failure of the creditors to bring action against the husband during lifetime of the wife, debarred, at law, the recovery of judgment against him. Lord Chancellor Talbot said: "There are instances, indeed, in which a court of equity gives a remedy, where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and to extend it further than the law allows."

³ *Cowper v. Cowper*, 2 P. Wms. 720, 752. In this case, the court of chancery hesitatingly applied to equitable estates, the legal canon of descent which prefers the whole to the exclusion of the half-blood, although the latter may be more nearly related to the ancestor. In making this ruling, Sir Joseph Jekyll, for the

court, said: "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* the answer is *qui consulta patrum, qui leges juraque servat*. And it is said in *Rooke's Case* (5 Co. Rep. 99b.) that discretion is a science not to act arbitrarily according to men's wills and private affections. So the discretion which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it: but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this, nor any other court, not even the highest, acting in any judicial capacity, is by the constitution intrusted with."

the student were to apply this maxim, as just explained, to every question of equity jurisdiction, the maxim would only prove misleading. It is true that in the two cases, which have been cited, and in very many others, which will be explained or stated in the proper place, equity does follow the law, and the courts have refused to depart therefrom at the solicitation of one, on whom the legal rule has worked a hardship.¹ But equity abounds with cases, in which the court of equity has not only refused to follow the law, but has openly repudiated the rule of law, whenever such rule is considered in its operation to violate some fundamental principle of equity. For example, equity ignores the rule of law which makes the mortgagee's estate absolute upon breach of the condition, and grants to the mortgagor the power to redeem his property by payment of the debt and interest;² *Thirdly*, equity refused to permit all the technicalities of the common law in respect to the seisin of lands, to be applied to the equitable estates, permitting curtesy to attach to the same, and denying the wife's dower therein.³ Indeed the maxim is perhaps not properly considered as a fundamental principle of equity, certainly not in the form in which it has been presented in the judicial utterances which have already been quoted. It may, however, be safely stated, as a general and fundamental principle, that equity aims to deviate as little as possible from the principles and doctrines of the common law, and wherever the court of equity, in the pursuit of the ends of justice and equity, does not consider itself obliged to depart from the law, it will follow the law in the enunciation of its decrees.⁴

§ 15. **Vigilantibus non dormientibus, æquitas subvenit—Equity relieves the vigilant, not those who sleep upon their rights.**—A court of equity professes always to be loath to interfere with the operations of the law and of the courts of law, and will interfere only when there is great urgency. Where the party, who ultimately appeals to the court for its aid, has not been impelled to a speedy resort to the court of equity, the presumption is against his case being one of urgency or great severity; and hence the maxim, that equity relieves the vigilant, but not those who sleep upon their rights. Where, therefore, the case is not one of peculiar and manifest wrong and severity, the courts of equity will refuse their aid to parties who have not been reasonably diligent in the pursuit of their equitable remedy.⁵ This principle is employed, not only as ground for presumption against the urgency and need of equita-

¹ See, for another striking illustration, the rule of equity, in respect to contingent uses having the peculiar characteristics of contingent remainders. Tiedeman Real Prop. § 482 and *post*, § 280.

² Tiedeman Real Prop. §§ 299-301 and *post*, § 411-414.

³ Tiedeman Real Prop. §§ 447-451, *post*, § 263; Pomeroy Eq. Jur. § 426.

⁴ Tiedeman Real Prop. § 447.

⁵ "A court of equity which is never active in relief against conscience or public convenience, has always refused its aid to ~~state~~ demands where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." Lord Camden, in *Smith v. Clay*, 3 Bro. Ch. 638.

ble relief, but also as a means of applying by analogy to equitable actions, the limitations which are provided by statute for actions at law. Although in many of the states, the statutes of limitation are made expressly to apply alike to equitable and legal actions; in other states now, and at an earlier day everywhere, the statutes of limitation operated as a bar only to legal actions. But in pursuance of the equitable maxim under discussion, the courts of equity have adopted the limitations prescribed for actions at law, and applied them to the corresponding equitable actions. Under the influence of this maxim, limitations as to time have been imposed upon all sorts of equitable causes of action,¹ with one possible exception, in favor of actions against trustees for the enforcement of express trusts.²

§ 16. **He who comes into equity, must come with clean hands.—He that hath committed iniquity shall not have equity.**—The headlines of this paragraph present the one fundamental principle and maxim under two different forms. Inasmuch as a court of equity professed to exert its extraordinary jurisdiction and powers in the furtherance of justice, untrammelled by the technicalities of the law, it was a manifest propriety to withhold its aid from one who had himself been guilty of unrighteous or inequitable conduct towards the person, against whom the powers of a court of equity were asked to be exerted. If, in the dealings with each other, the petitioner for equitable interference had been guilty of unconscionable conduct, he has failed to display his own respect for the principles of equity and good conscience, which he is asking the court of equity to require of the other party. This the court will not do. It will refuse its aid to one who cannot show a clean record, one not stained by his own violation of any principle of equity. In sustaining this principle, the court enforces in a modified form the golden rule, *do unto others as you would have them do unto you.*³ But it must not be understood by the foregoing statement, that the court of equity will refuse its aid

¹ Great Western Ry. v. Oxford, &c. Ry., 3 De G. M. & G. 341; Derbshire v. Home, 3 De G. M. & G. 80; Att'y-Gen. v. Sheffield Gas Co., 3 De G. M. & G. 304; Coles v. Sims, 5 De G. M. & G. 1; Kay, 58, 70; Buxton v. James, 5 De G. M. & G. 80; Gordon v. Cheltenham Ry., 5 Beav. 229, 237; Rockdale Canal Co. v. King, 2 Sim. N. S. 78; Senior v. Pawson, L. R. 3 Eq. 330; Bankart v. Houghton, 27 Beav. 425, 428; Bassett v. Salisbury Mfg. Co., 47 N. H. 426, 439; Fuller v. Melrose, 1 Allen, 166; Briggs v. Smith, 5 R. I. 213; Little v. Price, 1 Md. Ch. 182; Burden v. Stein 27 Ala. 104; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Cal. 50; Pillow v. Thompson, 20 Tex. 206; Binney's Case, 2 Brand Ch. 99; Grey v. Ohio & Pa. R. R. Co., 1 Grant's Cas. 412; Tash v. Adams, 10 Cush. 252; Peabody v. Flint, 6 Allen, 52; Odlin v. Gove, 41 N. H. 465; Att'y-Gen. v. Lunatic Asylum, L. R. 4 Ch. 146; Wood v. Sutcliffe, 2 Sim. N. S. 78; Att'y-Gen. v. Eastlake, 11 Hare,

205, 228; Cooper v. Hubback, 30 Beav. 160; Graham v. Birkenhead, &c. Ry., 2 Macn. & G. 146; Wright v. Vanderplank, 8 De G. M. & G. 133; Lacon v. Briggs, 3 Atk. 105; Ellison v. Mofatt, 1 Johns. Ch. 46; Germantown, &c. Co. v. Felter, 60 Pa. St. 124, 133; Neely's Appeal, 85 Pa. St. 387; Colwell v. Miles, 2 Del. Ch. 110; Barnes v. Taylor, 27 N. J. Eq. 259; King v. Wilder, 75 Ill. 275; Hathaway v. Noble, 55 N. H. 508; Blanchard v. Williamson, 70 Ill. 647; Hull v. Russell, 3 Sawyer, 506; Butler, *in re*, 2 Hughes, 247; Paschall v. Hinderer, 28 Ohio St. 568; Johnson v. Diversey, 82 Ill. 446; Preston v. Preston, 95 U. S. 200; Philips v. Prevost, 4 Johns. Ch. 205.

² Colwell v. Miles, 2 Del. Ch. 110. See *post*, § 393.

³ Overton v. Banister, 3 Hare, 503; Johns v. Norris, 7 C. E. Green, 102; Walker v. Hill, 7 C. E. Green, 513; Bleakley's Appeal, 66 Pa. St. 187; Weakley v. Watkins, 7 Humph. 356, 357;

to anyone, who is shown to have been at some time guilty of some immoral or wrongful conduct towards his neighbors. Such a rule would, if its attempted enforcement did not prove nugatory, involve the enforcement of the golden rule without modifications. The court of equity limits its aim to the more practical requirement that the plaintiff in an equitable suit must not have done any inequitable thing to the defendant in the same transaction, out of which the supposed cause of action arose.¹

The common case for the application of the principle arises in disputes between persons, who have been engaged in fraudulent practices, over the results of the fraud. If one of the parties has the possession of the entire proceeds of the fraudulent transaction, the court of equity will not aid the other in recovering his share of the same, but will leave him to his own resources.² Nor will it afford to such parties any other equitable relief, such as cancellation of agreements or restoration of property or funds, which had been embarked in the fraudulent enterprise.³ Equity will also refuse its aid in the enforcement of a contract, not only to one who has in the same transaction successfully practiced a legal fraud upon the other party⁴ but, likewise, to one who had been guilty of unconscionable conduct, which, while it offends the ordinary moral sense, does not amount to a legal fraud. And even where the inequity of his conduct is not sufficiently great to warrant the court in granting to the other party any relief looking to a cancellation of the contract, or other prevention of its enforcement in a court of law, yet the court will refuse to enforce the contract at the petition of the guilty party. In such cases, ordinarily the plaintiff asks for specific performance of the contract. And although the contract may be enforceable at law, the court of equity will refuse its decree for specific performance, if the contract is an unconscionable bargain, or had its inception in trickery or deception.⁵

Another application of the same principle is to the case of illegal

Gannett v. Albree, 103 Mass. 372; *Paine v. Lake Erie, &c. R. R. Co.*, 31 Ind. 283; *Marcy v. Dunlap*, 5 Laus. 385; *Atwood v. Fisk*, 101 Mass. 363; *Creath v. Sims*, 5 How. (U. S.) 192; *Wilson v. Bird*, 28 N. J. Eq. 352; *Lewis' Appeal*, 67 Pa. St. 166.

¹ *Lewis' Appeal*, 67 Pa. St. 166; *Meyer v. Yesser*, 32 Ind. 294.

² *Johns v. Norris*, 7 C. E. Green, 102; *Walker v. Hill*, 7 C. E. Green, 513; *Musselman v. Kent*, 33 Ind. 452; *Hibernia, &c. Soc. v. Ordway*, 38 Cal. 679; *Hershey v. Weiting*, 14 Wright, 244; *Odessa Tramways Co. v. Mendel*, L. R. 8 Ch. D. 235; *Hunt v. Rowland*, 28 Iowa, 349; *Bleakley's Appeal*, 66 Pa. St. 187.

³ *Reynell v. Sprye*, 1 De G. M. & G. 660, 688; *Paine v. Lake Erie, &c. R. R. Co.*, 31 Ind. 283; *White v. Crew*, 16 Ga. 416, 420; *Stewart v. Iglehart*, 7 Gill & J. 132; *Stark's Ex'rs v. Littlepage*, 4 Rand. 372; *Janey v. Bird's Adm'rs*, 3 Leigh,

510; *Bolt v. Rogers*, 3 Paige, 156; *Freeman v. Sedwick*, 6 Gill, 28; *Creath v. Sims*, 5 How. (U. S.) 192; *Wheeler v. Sage*, 1 Wall. 518.

⁴ *Marcy v. Dunlap*, 5 Laus. 365; *Wright v. Snowe*, 2 De G. & Sm. 321; *Nelson v. Stocker*, 4 De G. & J. 458; *Cory v. Gertchen*, 2 Madd. 40; *Evroy v. Nicholas*, 2 Eq. Cas. Abr. 488; *Overton v. Banister*, 3 Hare, 503.

⁵ *Willard v. Tayloe*, 8 Wall. 557, 565; *Fish v. Leser*, 69 Ill. 394, 395; *Quinn v. Roath*, 37 Conn. 16, 24; *Bruck v. Tucker*, 42 Cal. 346; *Weise's Appeal*, 72 Pa. St. 351, 354; *Blackwilder v. Loveless*, 21 Ala. 371, 374; *Eastman v. Plumer*, 46 N. H. 464; *Plummer v. Kepler*, 26 N. J. Eq. 481; *Smoot v. Rea*, 19 Md. 398; *Auter v. Miller*, 18 Iowa, 405; *Miss. &c. R. R. Co. v. Cromwell*, 91 U. S. 643; *Lamare v. Dixon*, L. R. 6 H. H. L. 414; *Burke v. Seely*, 46 Mo. 334; *Phillips v. Stanch*, 20 Mich. 369; *Sherman v. Wright*, 49 N. Y. 227; *Crane v. De Camp*, 21 N. J. Eq. 414;

contracts and transactions. The general rule is that, if parties enter into an illegal contract or transaction, and one party receives, in the course of the transaction, some benefit or thing of value from the other, or takes undue advantage of, or commits a fraud upon, the other, in all such cases, as a general rule, the court of equity will refuse to give relief to the party who has been wronged. The court requires such a party to suffer the wrong as the merited penalty of engaging in illegal transactions.¹ Where, however, the parties are not *in pari delicto*, one being more guilty than the other, and more especially where the illegality consists of a *malum prohibitum* and not an innate offense against morality, and the public interest in the enforcement of the prohibition is subserved by granting the equitable remedy to the less guilty party, the relief will be granted, notwithstanding the maxim under inquiry. The public interest requires that the remedy be given to the one whose hands are comparatively clean, or less unclean.²

Another apparent exception to the general application of this maxim to illegal contracts is, when the court of equity grants an appropriate remedy to the party to an illegal contract, after it has been performed, for the recovery from a third party money or property, which has been delivered to such third party by the other party, in performance of the illegal contract. The court would not enforce such an illegal contract. But when, in the performance of the illegal contract, property is delivered to a third party, a carrier, for example, by one of the parties for the benefit of the other party, notwithstanding the illegal source of the property, the court will compel its delivery to the party for whose benefit it was received by such third person. That is not, however, the enforcement of an illegal contract, but of a strictly legal

Seymour v. De Lancey, 6 Johns. Ch. 222, 224; Snell v. Mitchell, 65 Me. 48, 50; Aston v. Robinson, 49 Miss. 348, 351; Cooper v. Pena, 21 Cal. 403, 411; Stone v. Pratt, 25 Ill. 25, 34; Marble Co. v. Ripley, 10 Wall. 339, 356, 357. See *post*, §§ 216, 222, 231, 232.

¹ Aubin v. Holt, 2 K. & J. 66, 70; Johnson v. Shrewsbury, &c. Ry., 3 De G. M. & G. 914; Carey v. Smith, 11 Ga. 539, 547; Regby v. Connol, L. R. 14 Ch. D. 482, 491; Thomson v. Thomson, 7 Ves. 470; Skykes v. Beadon, L. R. 11 Ch. D. 170, 183, 197; South Wales, &c. Co., *in re*, L. R. 2 Ch. D. 763; Arthur Average Ass'n, *in re*, L. R. 10 Ch. 542; Swartzer v. Gillette, 1 Chand. (Wis.) 207, 209, 210; Atwood v. Fisk, 101 Mass. 363; Harrington v. Bigelow, 11 Paige, 349; Pyke, *ex parte*, 8 Ch. D. 754, 756, 757; Paine v. France, 26 Md. 46; Weakley v. Watkins, 7 Humph. 356, 357; Hall v. Palmer, 3 Hare, 532; Marchionness of Annandale v. Harris, 2 P. Wms. 432; Clark v. Periam, 2 Atk. 333; Robinson v. Cox, 9 Mod. 263; Matthew v. Hanburg, 2 Vern. 187; Knye v. Moore, 1 S. & S. 61; Sismey v. Eley, 17 Sim. 1; Gray v. Mathias, 5 Ves. 286; Hill v. Spencer, Amb. 641, 836; Cray v. Rooke, Forest Cas. Temp. Talb. 153; Priest v. Parrot, 2 Ves. Sr. 160; Smyth v. Griffin, 13 Sim. 245; Batty v.

Chester, 5 Beav. 103; Franco v. Bolton, 3 Ves. 368; Dillon v. Jones, 5 Ves. 290; Bainham v. Manning, 2 Vern. 242; Whaley v. Norton, 1 Vern. 482; Benyon v. Nettlefold, 3 Macn. & Gord. 94, 102, 103. See *post*, § 327, 530.

² Reynoll v. Spyre, 1 De G. & M. & G. 660, 679; Knight Bruce, L. J., saying: "But where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so,) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities." See, also, to the same effect, Tracy v. Talmage, 14 N. Y. 162; Osborne v. Williams, 18 Ves. 379; White v. Franklin Bank, 22 Pick. 186; Bellamy v. Bellamy, 6 Fla. 62, 103; Eastabrook v. Scott, 3 Ves. 456; McNeill v. Cahill, 2 Bligh, 228; Benyon v. Nettlefold, 3 Macn. & G. 94; Davis v. London, &c. Co., 8 Ch. D. 469; Pyke, *ex parte*, 8 Ch. D. 754; Odessa Tramways Co. v. Mendel, 8 Ch. D. 235; Worthington v. Curtis, L. R. 1 Ch. D. 419; Cullingworth v. Lloyd, 2 Beav. 385, 390; Lowell v. Boston, &c. R. R. Co., 23 Pick. 32; Prescott v. Norris, 32 N. H. 101; Curtis v. Leavitt, 15 N. Y. 9.

and unexceptionable contract, viz.: the transfer of goods or other property from one party to another.¹

It may be stated in conclusion, that the refusal of the court to enforce a fraudulent or illegal contract is not peculiar to the court of equity. Courts of law will also refuse their remedies for the enforcement of such contracts. The doctrine only assumes the peculiar form of a principle of equity, when it is applied to a contract, which, being neither illegal nor fraudulent, is enforceable in a court of law, but which will not be enforced by the employment of equitable remedies, because it is tainted by some phase of inequity, falling short of a legal fraud. Such a contract can be enforced in a court of law, but the right to a resort to equity is denied.²

§ 17. **He who seeks equity must do equity.**—This maxim is the affirmative complement of the maxim, which was explained and discussed in the preceding paragraph: **HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.** Not only must the petitioner for equitable relief be free from any charge of iniquitous conduct towards the defendant in the same transaction, out of which his own cause of action grows; but he must also have satisfied, or be willing and ready to satisfy, every legal or equitable counter-claim of the defendant, as a condition precedent to his procurement of the equitable relief which he is seeking of the defendant. The court will compel him to do equity, before he can himself receive equity.³

But it must not be understood that the plaintiff can be required in an equitable action to satisfy every equitable or moral claim, which the defendant may hold against him. Although it has been held by some of the authorities, that every such claim, must be satisfied before a court of

¹ *Sykes v. Beadon*, L. R. 11 Ch. D. 170, 193, 197, Sir George Jessel saying: "You cannot ask the aid of a court of justice to carry out an illegal contract; but in cases where the contract is actually at an end, or is put an end to, the court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons, on the representations that the contract was legal, from keeping that money. * * * It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that the contract was legal, and which belong to the persons who seek to recover them." See, also, in support of the text, *Tenant v. Elliott*, 1 B. & P. 3; *Thomson v. Thomson*, 7 Ves. 470; *Farmer v. Russell*, 1 B. & P. 196; *Joy v. Campbell*, 1 Sch. & Lef. 328, 339; *McBlair v. Gibbes*, 17 How. (U. S.) 237; *Tracy v. Talmage*, 14 N. Y. 162; *Sharp v. Taylor*, 2 Phil. 801; *Worthington v. Curtis*, L. R. 1 Ch. D. 419, 423, 424; *Davies v. London, &c. Ins. Co.*, L. R. 8 Ch. D. 469, 477; *Williams v. Bayley*,

L. R. 1. H. L. 200; *Osbaldiston v. Simpson*, 13 Sim. 513; *Powell v. Knowler*, 2 Atk. 224; *Brooks v. Martir*, 2 Wall. 81.

² See *post*, Chapt. XIII, on Constructive Fraud.

³ *Lewis v. Baird*, 3 McLean, 56, 83; *Linden v. Hepburn*, 3 Sandf. 668; *Munford v. Am. Life Ins. & T. Co.*, 4 N. Y. 463, 483; *Richardson v. Linney*, 7 B. Mon. 574; *Lanning v. Smith*, 1 Pars. Eq. 16; *Peacock v. Evans*, 16 Ves. 512; *Elibank v. Montolieu*, 5 Ves. 737; *Kirkham v. Smith*, 1 Ves. Sr. 258; *Shish v. Foster*, 1 Ves. Sr. 88; *Bradburne v. Amand*, 2 Carth. 87; *Towers v. Davys*, 1 Vern. 480; *Smithson v. Thompson*, 1 Atk. 520; *Shuttleworth v. Laycock*, 1 Vern. 244; *Anon. 2 Shower*, 282; *Murray v. Elibank*, 10 Ves. 84; 1 Eq. Lead. Cas. 623, 639, 670; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Cosby v. Bean*, 44 Mo. 379; *Sporrer v. Eiffler*, 1 Heisk. 636; *N. Y. & Harlem R. R. Co. v. Mayor, &c.*, 1 Hilt. 562, 587; *Creath's Adm'r v. Sims*, 5 How. U. S. 192, 204; *Phillips v. Phillips*, 50 Mo. 603; *Boskowitz v. Davis*, 12 Nev. 446; *Anderson v. Little*, 26 N. J. Eq. 144; *Lanning v. Smith*, 1 Pars. Eq. 16; *Lohman v. Crouch*, 19 Cratt. 331; *Scammon v. Kimball*, 5 Biss. 431; *Kinney v. Con. Virg. M. Co.*, 4 Saw. 383.

equity will grant the relief asked, it matters not whether such counterclaim has or has not any connection whatever with the transaction, out of which the direct cause of action grows:¹ it is nevertheless the general and better rule, that a court of equity will require of the plaintiff, as a condition precedent to the procurement of the equitable relief which he is seeking, only to satisfy the claims of the defendant, which grow out of the plaintiff's cause of action, or out of the same transaction, which is the common source of both claims or classes of claims. If the claims grow out of different transactions, and are in nowise connected as to origin, the court will not require the plaintiff to satisfy the one held against him, before it will give him equitable relief on the other which he holds against the defendant.²

In very many cases, in which the maxim is applied, the plaintiff is required to satisfy claims, which the defendant could successfully enforce against him in an appropriate action;³ and according to some of the authorities, these are the only claims which a court of equity can require the plaintiff to satisfy, before he secures the desired equitable relief.⁴ But it is unquestionably the more correct rule that equity will

¹ *Secrest v. McKenna*, 1 Strobb. Eq. 356, where in an action for specific performance, the court refused to grant a decree in favor of the vendee, although he had paid the purchase price in full, until he had paid to the vendor a debt which he owed on account of an altogether different obligation. See, also, *Walling v. Aiken*, 1 McMull. Eq. 1, where a mortgagor was refused a decree for the redemption of his property from the mortgage, until he had paid certain other independent debts which the mortgagee held against him. See, also, to the same effect, *Com. Dig. Lit. Chancery*, 3 F. 3, *Bradburn v. Amand*, 2 Ch. Cas. 87.

² "The rule referred to will be applied where the adverse equity grows out of the very transaction before the court, or out of such circumstances as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges." *Church, C. J.*, in *Comstock v. Johnson*, 46 N. Y. 615, in which the plaintiff was denied the decree for the removal of obstruction to his mill-race privileges, until he had removed a buzz-saw, to which he was applying the water-power, in excess of the rights granted to him, and to the detriment of the defendant, who had a right to the use of the same water-power, and over whose land the water privileges of the plaintiff rested as a servitude. See, also, to the same effect, *Finch v. Finch*, 10 Ohio St. 501, 507; *Casler v. Shipman*, 35 N. Y. 533; *McDonald v. Neilson*, 2 Cow. 139; *Whitaker v. Hall*, 1 Glyn. & Jam. 213; *Tripp v. Cook*, 26 Wend. 143; *Hanson v. Keating*, 4 Hare, 1, 5, 6; *Calvin v. Hartwell*, 5 Ch. & Fin. 484; *N. Y. & N. H. R. R. Co. v. Schuyler*, 38 Barb. 534, 554.

³ Thus, for example, a court will refuse specific performance to a vendee, unless he has first paid or tendered payment of, the consideration of the contract. *Hanson v. Keating*, 4 Hare, 1, 4, 5. So, also, an equitable decree for partition will not be granted to one co-tenant, until he has made provision for the payment of his proportion of a mortgage debt which incumbers the whole property. *Campbell v. Campbell*, 21 Mich. 338. And where a court of equity grants injunctions for restraining the collection of illegal assessments and taxes, the injunction will be refused until the lawful tax or assessment is paid. *Board of Com'rs. v. Elston*, 32 Ind. 27; *Merrill v. Humphrey*, 24 Ind. 170; *Dean v. Charlton*, 23 W. S. 590; *Morrison v. Hershire*, 32 Iowa, 271; *Smith v. Auditor-General*, 20 Mich. 398. So, likewise, will the court refuse decree for specific performance, where the vendor has misdescribed the property to the injury of the vendee, until the misdescription has been corrected, or compensation made to the vendee. *Foley v. Crow*, 27 Md. 51; *Shaw v. Vincent*, 54 N. C. 690; *Scott v. Hanson*, 1 Russ. & My. 128; *Hughes v. Jones*, 3 De G. F. & J. 307, 315; *Knatchbull v. Grueber*, 1 Madd. 153; *Richardson v. Smith*, L. R. 5 Ch. 643; *Davison v. Perrine*, 22 N. Y. Eq. 87.

⁴ "My opinion is, that the court can never lawfully impose merely arbitrary conditions upon a plaintiff, only because he stands in that position upon the record, but can only require him to give the defendant that which by the law of the court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit. A party, in short, does not, by becoming plaintiff in equity, give up any of his rights or submit those rights to the arbitrary disposition of the court. He submits only to

compel the plaintiff in many cases to do equity when the court would not grant any independent or affirmative aid in the enforcement of such an equity. The court either could or would not enforce the equity against the plaintiff at the independent suit of the defendant; but the court will compel the plaintiff to do such equity as a condition precedent to the procurement of his own relief against the delinquency of the defendant. This position is abundantly supported by authorities.¹ Thus, for example, a court of equity recognized the husband's common law right of absolute appropriation of his wife's general property so far as to deny to her any direct remedy or protection against his claims or those of his creditors over her property. But if, in order to secure the possession or control of the wife's property, the husband or his creditors had to resort to a court of equity for aid, the court would refuse its aid, until the plaintiff husband or husband's creditors had done equity to the wife by setting apart out of the property in question sufficient to constitute a comfortable provision for her support.² In England and in most of the United States, the husband's

give the defendant his rights in respect of the subject-matter of the suit, on condition of the plaintiff obtaining his own. Cases may perhaps be suggested in which a question never can arise except against plaintiff; but as a general proposition, it may, I believe, be correctly stated, that a plaintiff will never, in that character, be compelled to give a defendant anything but what the defendant might, as plaintiff, enforce, provided a cause of suit arose." *Wigram, V. C.*, in *Hanson v. Keating*, 4 Hare, 1, 4, citing *Elbank v. Montolieu*, 5 Ves. 737; *Sturgis v. Champneys*, 5 My. & Cr. 102.

¹ "There are many cases in which this court will not interfere with a right, which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such as in cases of subsequent incumbrances without notice gaining a preference over a prior incumbrance by procuring the legal estate. It may be to be regretted that the rights of property should thus depend upon accident, and be decided upon, not according to any merits, but upon grounds purely technical. This, however, has arisen from the jurisdiction of law and equity being separate, and from the rules of equity, though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the courts of common law. Hence arises the extensive and beneficial rule of this court, that he who asks for equity must do equity; that is, this court refuses its aid to give to the plaintiff what the law would give him, if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one

which this court would not otherwise enforce." If, therefore, this court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband who claims against both, in recovering the property of the wife, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with a rule by which it regulates its proceedings in other cases." Lord Cottenham, in *Sturgis v. Champneys*, 5 My. & Cr. 97, 101. In *Comstock v. Johnson*, 46 N. Y. 615, Chief Justice said: "It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him."

² *Jewson v. Moulson*, 2 Atk. 417; *Bosvil v. Brander*, 1 P. Wms. 459; *Smith v. Kane*, 2 Paige, 303; *Short v. Moore*, 10 Vt. 446, 451; *Tucker v. Andrews*, 13 Me. 124, 128; *Duval v. Farmer's Bk.*, 4 Gill & J. 283, 290; *Gardner v. Hooper*, 3 Gray, 398; *Page v. Estes*, 19 Pick. 269, 271; *Howard v. Moffatt*, 2 Johns. Ch. 206, 208; *Haviland v. Bloom*, 6 Johns. Ch. 173, 180; *Carter v. Taggart*, 1 De G. M. & G. 286; *Ford, in re*, 32 Beav. 621; *Dunkley v. Dunkley*, 2 De G. M. & G. 390, 396; *Scott v. Spashett*, 3 Macn. & G. 599; *Pugh, ex p.*, 1 Drew, 202; *Coster v. Coster*, 9 Sim. 597; *Gleaves v. Paine*, 1 De G. J. & S. 87; *Tidd v. Lister*, 10 Hare, 140; 3 De G. M. & G. 857, 870; *Stanton v. Hall*, 2 Russ. & My. 175; *Elliott v. Cordell*, 5 Madd. 149; *Mitford v. Mitford*, 9 Ves. 87; *Brown v. Clark*, 3 Ves. 166; *Ball v. Montgomery*, 4 Bro. Ch. 338; *Turner's Case*, 1 Vern. 7; *Burdon v. Dean*, 2 Ves. 607; *Macauley v. Philips*, 4 Ves. 19; *Oswell v. Probert*, 2 Ves. 680; *Pryor v. Hill*, 4 Bro. Ch. 139; *Freeman v. Parsley*, 3 Ves. 491; *Wright v. Morley*, 11 Ves. 12; *Vaughan v. Buck*, 13 Sim. 404; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Norton, ex p.*, 8 De G. M. & G. 258; *Spirett v. Williams*, 3 De G. J. & S.

common law rights in and to his wife's general property have been abolished by statute to a greater or less degree, and the wife's belongings are declared to be her sole and separate property without any special settlement on her. This application of the maxim does not now possess the importance it once did, although in some of the states the law still remains unchanged.¹

The principle, involved in the maxim now under discussion, finds modern application in the case of the borrower, in an usurious loan, seeking the aid of equity for the recovery and cancellation of the bond or other obligation, which the usury law declares to be void. The court of equity, ignoring the purpose and express direction of the law for the prevention of usury, will refuse to give such aid to the borrower, unless he first does equity by paying the lender the principal of the loan and lawful interest to date, even though the statutes declares the whole obligation void, as a penalty for the exaction of an usurious rate of interest. A court of equity considers it iniquitous to inflict such a penalty and will not assist in enforcing it,² although it will not assist the lender to escape the penalty and recover his money in a direct suit.³ The same rule is applied to all petitions for equitable aid by an obligor of an illegal obligation, where the obligor has received a valuable consideration for the same. Equity refuses its aid to such a person, until he has made restitution of the benefits which he has received under the illegal contract.⁴

In application of this maxim, it is also held that where a contract for the sale of land, made when the currency of the country was gold and silver, and the vendee tenders in payment of the price the depreciated treasury notes, which have been declared by law to be legal tender in payment of all public and private debts, the court of equity

293; L. R. 1 Ch. 520, 522; *Bagshaw v. Winter*, 5 De G. & Sm. 486; *Napier v. Napier*, 1 Dree. & War. 407; *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Barrow v. Barrow*, 5 De G. M. & G. 782; *Marshall v. Fowler*, 16 Beav. 249; *Kenny v. Udall*, 5 Johns. Ch. 464; *Davis v. Newton*, 6 Met. 544; *Glen v. Fisher*, 6 Johns. Ch. 33, 36; *Gassett v. Grout*, 4 Met. 486, 489; *Durr v. Bowyer*, 2 McCord Eq. 368, 372; *Groverman v. Diffeenderffer*, 11 Gill & J. 15, 22; *Chase v. Palmer*, 25 Me. 342, 348; *Barron v. Barron*, 24 Vt. 375. According to a few of the English authorities, the wife was subsequently given the right to affirmatively claim this provision for her support. See *Elibank v. Montolieu*, 5 Ves. 737; *Hanson v. Keating*, 4 Hare, 1, 6; *Osborn v. Morgan*, 9 Hare, 432, 434; *Eedes v. Eedes*, 11 Sim. 569; *Sturgis v. Champneys*, 5 My. & Cr. 101, 105. But the authorities generally deny to the wife any independent remedy in this connection.

¹ See *post*, Ch. XVIII.

² *Fanning v. Dunham*, 5 Joons. Ch. 122, 142, 143, 144; *Williams v. Fitzhugh*, 37 N. Y. 444; *Ware v. Thompson*, 2 Beasley, 66; *Noble v. Walker*, 32 Ala. 456; *Mason v. Gardiner*, 4 Bro.

Ch. 436; *Sporrer v. Eiffer*, 1 Heisk. 633, 636; *Ruddell v. Ambler*, 18 Ark. 369; *Ballinger v. Edwards*, 4 Ired. Eq. 449; *Rogers v. Rathburn*, 1 Johns. Ch. 367; *Corby v. Bean*, 44 Mo. 370.

³ *Mason v. Gardiner*, 4 Bro. Ch. 437; *Kuhner v. Butler*, 11 Iowa, 419; *Smith v. Robinson*, 10 Allen, 130; *Sporrer v. Eiffer*, 1 Heisk. 633, 636; *Hart v. Goldsmith*, 1 Allen, 145; *Union Bank v. Bell*, 14 Ohio St. 200.

⁴ *Mumford v. Am. Life Ins. & T. Co.*, 4 N. Y. 463, 483. In a bill for restraining the collection of an illegal tax or assessment, the injunction will be refused, unless the plaintiff first pays the lawful tax or assessment. *Board of Com'rs v. Elston*, 32 Ind. 27; *Merrill v. Humphrey*, 24 Mich. 170; *Dean v. Charlton*, 23 Wis. 590; *Morrison v. Hershire*, 32 Iowa, 271; *Smith v. Auditor-General*, 20 Mich. 398. See, for other instances of the same kind, *Richardson v. Linney*, 7 B. Mon. 574 (suit of ward for cancellation of deeds to guardian); *McLaughlin v. McLaughlin*, 5 C. E. Green, 190 (widow suing for dower); *Creed v. Scruggs*, 1 Heisk. 590 (co-security seeking to be relieved from a judgment obtained against him for the whole debt); *Tongue v. Nutwell*, 31 Md. 302; *Reed v. Tyler*, 58 Ill. 288.

—waiving the question of constitutionality of a law which makes such notes legal tender¹—will refuse to decree specific performance, unless the vendee pays the price in coin.²

Not only does this principle furnish a rule for the control of the bestowal of equitable relief in general, as has already been explained, but it is likewise the origin of some of the distinct equitable doctrines, notably that of election between two or more benefits, which were intended to be substitutional,³ and that of the marshaling of assets.⁴

§ 18. **Equity looks to the intent rather than to the form.**—One of the great evils of the ancient common law, which the court of chancery undertook to abolish or at least to diminish, was its barbarous formalism, with all its attending unjust consequences. The court did not have the power to abolish this formalism outright; but whenever its observance in any particular case operated to the oppression of one, or to the violation of what would be his rights in or under some contract or legal rule, if the intent of such contract or law were followed rather than its form; a court of equity would follow the intent, and by ignoring the legal consequences of the form, do substantial justice to all the parties to the transaction. Hence the equitable maxim, **EQUITY LOOKS TO THE INTENT RATHER THAN TO THE FORM.** It has a very general application, inasmuch as formalism was the distinctive feature of the early common law. This formalism is not now so pronounced or so unjust in its consequence, as it once was; but the change in the common law in this regard is due to the reflex influence of this once exclusively equitable principle. But with this change in the law, the principle has become of universal application. All courts now profess to be governed by it in their judgments, and they all do in fact, more or less. The most common and best known illustrations of the application of this maxim, are in the case of the enforcement of penalties and forfeitures for the breach of contracts. If the obligation of the contract consists of the payment of a liquidated sum of money, the court of equity would disregard the formal obligation to pay the stipulated penalty or suffer the forfeiture, and restrain the enforcement of such penalties and forfeitures, upon payment of the real debt and lawful interest.⁵ Not only would a court of equity restrain the enforcement of a penalty or forfeiture in a court of law, where

¹ As to which, see Tiedeman's Limitations of Police Power, § 90, and Tiedeman's Commercial Paper, § 375.

² Willard v. Tayloe, 8 Wall. 557; McGoon v. Shirk, 54 Ill. 408; Wales v. Coffin, 105 Mass. 328.

³ See *post*, Ch. VIII; Grelton v. Howard, 1 Sw. 433; Streatfield v. Streatfield, Cas. Temp. Talbot, 176; 1 Eq. Lead. Cas. 503, 510, 541; Noys v. Mordaunt, 2 Vern. 581.

⁴ See *post*, §§ 453, 532; Lanoy v. Duke of Athol, 2 Atk. 446; Tidd v. Lister, 10 Hare, 157; 3 De G. M. & G. 857; Evertson v. Booth, 19 Johns. 486;

Kendall v. New Eng. Co., 13 Conn. 384; House v. Thompson, 3 Head, 512; Dorr v. Shaw, 4 Johns. Ch. 17; Heyman v. Dubois, L. R. 13 Eq. 158; Hughes v. Williams, 3 Macn. & G. 690.

⁵ Peachy v. Duke of Somerset, 1 Stra. 477; Elliott v. Turner, 13 Sim. 477; Griggs v. Landis, 21 N. J. Eq. 494; Hagar v. Buck, 44 Vt. 285; Hill v. Barclay, 16 Ves. 402; 18 Ves. 56, 62; White v. Warner, 2 Meriv. 459; Green v. Bridges, 4 Sim. 96; Gregory v. Wilson, 9 Hare, 683; Palmer v. Ford, 70 Ill. 369; Warner v. Bennett, 31 Conn. 468; Ragan v. Walker, 1 Wis. 527; Orr

the contract called for the payment of a liquidated sum of money; but it would refuse in any case to aid in the enforcement of any penalty or forfeiture whatsoever. The enforcement of the unobjectionable penalties and forfeitures, *i. e.*, the case of unliquidated obligations, is left entirely to courts of law, wherever the two courts are still separate tribunals.¹ This doctrine is now of universal application, *i. e.*, as to penalties and forfeiture, and is enforced alike by all courts; and yet in some parts of this country, the ancient bond is still used, which provides for the payment of double the amount of the loan, and to become void upon payment of the real indebtedness when it falls due. Formalism is not yet quite extinct.

Another ancient formalism of the common law, which has been done away with by the application of this maxim, is the effect of a sealed instrument. The seal was said to import a consideration, and to estop all inquiry into the existence and presence of the same. Except in one solitary case, *viz.*: that of deeds of conveyance of lands where one is estopped, by the acknowledgment of a consideration under seal, from invalidating the deed as a conveyance, by showing the actual want of consideration;² this whole doctrine has been repudiated by all courts alike, and the fact of consideration must be affirmatively established, if denied; and the presumption of consideration, if such presumption exists, may be disproved.³ So, also, the court of equity refused to be bound by the common law rule that a sealed instrument could only be discharged by a writing under seal, and that if not so discharged it could be enforced, although it has already been fully performed. This technical rule was ignored by the courts of equity, and the obligee was obliged by an injunction to deliver up the instrument, whenever there had been a full performance of the obligation.⁴

v Zimmerman, 63 Mo. 72; Robinson *v.* Loomis, 51 Pa. St. 78; Smith *v.* Jewett, 40 N. H. 530; Croft *v.* Goldsmid, 24 Beav. 312; Elliott *v.* Turner, 13 Sim. 477; *Ex parte* Vaughan, Turn. & R. 434; Reynolds *v.* Pitt, 19 Ves. 134; Giles *v.* Austin, 38 N. Y. Super. Ct. 215; Sloman *v.* Walter, 1 Bro. Ch. 418; 2 Eq. Lead. Cas. 2014, 2023, 2044. See *post*, Ch. III.

¹ Livingston *v.* Tompkins, 4 Johns. Ch. 415, 431; *houp v. Cook*, 1 Carter, 135; Lefforge *v.* West, 2 Ind. 514, 516; Clark *v.* Drake, 3 Chand. (Wis.) 253, 259; Gordon *v.* Lowell, 21 Me. 251, 257; Beecher *v.* Beecher, 43 Conn. 556; Orr *v.* Zimmerman, 63 Mo. 72; Palmer *v.* Ford, 70 Ill. 369; Fitzhugh *v.* Maxwell, 34 Mich. 138; Evel-eth *v.* Little, 16 Me. 374, 377; Smith *v.* Jewett, 40 N. H. 530, 534; Warner *v.* Bennett, 31 Conn. 468, 478; McKim *v.* Whitehall, 2 Md. Ch. 510. See *post*, § 36.

² See Tiedeman on Real Prop., § 801. But even in this case, the estoppel does not preclude an inquiry into the fact of payment of the consideration.

³ Ord *v.* Johnston, 1 Jur. N. S. 1063, 1065;

Houghton *v.* Lees, 1 Jur. N. S. 862, 863; Coch-rane *v.* Willis, 34 Beav. 359; Hervey *v.* Rudland, 14 Sim. 531; Vasser *v.* Vasser, 23 Miss. 378; Burling *v.* King, 66 Barb. 633; Stone *v.* Hackett, 12 Gray, 227; Webb's Estate, 49 Cal. 541, 545; Min-turn *v.* Seymour, 4 Johns. Ch. 497; Shepherd *v.* Shepherd, 1 Md. Ch. 244; Meek *v.* Kettlewell, 1 Phil. 342; 1 Hare, 464; Jefferys *v.* Jefferys, Cr. & Ph. 138, 141; Wycherley *v.* Wycherley, 2 Eden, 177; Wasson *v.* Colburn, 99 Nass. 342; Jones *v.* Lock, L. R. 1 Ch. 25; Kekewich *v.* Manning, 1 De G. M. & G. 176; overruling some earlier cases in which voluntary agreements were held to be enforceable because they were under seal. See Beard *v.* Nuthall, 1 Vern. 427; Tyr-rell *v.* Hope, 2 Atk. 562; Edwards *v.* Countess of Warwick, 2 P. Wms. 176; Wiseman *v.* Roper, 1 Ch. Cas. 84.

⁴ Cross *v.* Sprigg, 6 Hare, 552; Yeomans *v.* Wil-liams, L. R. 1 Eq. 184; Hurlbut *v.* Phelps, 30 Conn. 42; Kidder *v.* Kidder, 33 Pa. St. 268; Tay-lor *v.* Manners, L. R. 1 Ch. 48; Rees *v.* Berring-ton, 2 Ves. 540; 2 Eq. Lead. Cas. 1867, 1870, 1896. See *post*, § 508.

The most modern application of the principle is to the character and characteristics of a mortgage. At common law, the mortgage was held to be the conveyance of an immediate estate upon condition subsequent, and the rights of the parties thereto were materially determined by this doctrine. The mortgagee was held to be the tenant of the freehold. But equity, looking to the intent rather than to the form, declared the mortgage to be merely a lien on the property mortgaged, to be enforced when the debt fell due and remained unpaid, and not a present conveyance of an estate in such property. Acting upon this principle, the court of equity recognized the mortgagor as being still the owner and entitled to the possession, and refused to recognize in the mortgagee any rights which are the ordinary incidents of present ownership. This subject is more fully treated of in a subsequent connection.¹

§ 19. **Equity imputes an intention to fulfill an obligation.**—This principle applies to all cases, where a duty to do something rests upon someone, usually to buy or sell property for another, and to hold or transfer such property to someone; and the duty has been partially performed, redounding to the benefit of the obligor, rather than to that of the person for whom it was to have been done. In such cases, the court of equity, imputing to the obligor an intention to perform rather than to violate his duty, will hold that such obligor acquired such benefits in trust for the person, who was originally intended to be the beneficiary. This principle constitutes the main foundation for a large part of the law of resulting and constructive trusts; and is applied wherever persons, in the performance of fiduciary duties, buy property with the funds of another and take the title in their own names.² The principle is also applied to one who covenants in his marriage articles to purchase lands and to settle them upon his wife, and who purchases the lands in question but fails to make the settlement;³ and the one who covenants to sell lands who does not then possess them, but who afterwards does purchase them and fails to make the transfer in accordance with his covenant.⁴

¹ See *post*, 411-414, and in Tiedeman Real Prop., §§ 299-301.

² *As applied to trustees*, see *Deg v. Deg*, 2 P. Wms. 414; *Perry v. Philips*, 4 Ves. 107; 17 Ves. 173; *Ferris v. Van Vechten*, 73 N. Y. 113; *Hancock v. Titus*, 33 Miss. 224; *McLaren v. Brewer*, 51 Me. 402; *Schlarfer v. Corson*, 32 Barb. 510; *Lane v. Dighton*, Ambl. 409; *to partners*, see *Smith v. Burnham*, 3 Sum. 435; *Homer v. Homer*, 107 Mass. 85; *Jenkins v. Frink*, 30 Cal. 586; *Settembre v. Putnam*, 30 Cal. 490; *Oliver v. Piatt*, 3 How. (U. S.) 401. *To executors and administrators*, *Barker v. Barker*, 14 Wls. 131; *Stow v. Kimball*, 28 Ill. 93; *White v. Drew*, 42 Me. 551. *To directors and other officers of corporations*, *Church v. Sterling*, 16 Conn. 388. *To committees of lunatics*, *Reed v. Fitch*, 11

Barb. 399. *To guardians*, *Bancroft v. Cousen*, 13 Allen, 50; *Johnson v. Dougherty*, 3 Green's Ch. 406. *To agents in general*, *Robb's Appeal*, 41 Pa. St. 45; *Bridenbacker v. Lowell*, 32 Barb. 10. See *post*, § 312.

³ *Wilcocks v. Wilcocks*, 2 Vern. 558; 2 Eq. Lead. Cas. 833. See *post*, § 174.

⁴ *Deacon v. Smith*, 3 Atk. 323; *Wellesly v. Wellesly*, 4 M. G. & Cr. 581. See *post*, § 147. If the lands purchased are of less value than those bargained for, such purchase shall be considered as part performance of the covenant. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Snowden v. Snowden*, 1 Bro. Ch. 582; 3 P. Wms. 228n; *Lechmere v. Lechmere*, Cas. Temp. Talb. 80.

§ 20. **Equity looks upon that as done which ought to have been done.**¹—Not only will equity impute an intention to fulfill an obligation, where there has been a part or irregular performance of the same; but, if and whenever it is necessary for the attainment of the ends of justice, a court of equity, in applying the maxim, **EQUITY LOOKS UPON THAT AS DONE WHICH OUGHT TO HAVE BEEN DONE**, will treat both the subject-matter of, and the parties to, the obligation, as if the obligation had been fully performed; and determine the rights of the parties, and of all others in privity with them who are not *bona fide* purchasers, in accordance with such presumption of a performance of the obligation. Although some of the authorities are apparently inclined to give the maxim only the limited application to the cases of equitable conversion,² the better opinion is that the maxim finds an effective application, whenever, in consequence of the non-performance of an obligation, someone's rights will be materially and injuriously affected. For the protection of these interests, the court will consider and determine the rights of all parties, as they would have been, if the obligation had been fully performed, and render its decree accordingly.³ The maxim is not only applied to the doctrine of equitable conversion,⁴ which is fully treated in a subsequent connec-

¹ Story's Eq. Jur. § 64g. "What ought to be done is considered in equity as done," Adam's Eq. 135. "Equity regards that as done which ought to be done," Pomeroy Eq. Jur., § 363.

² Story Eq. Jur., § 64g; Snell's Eq. 37.

³ "What ought to be done, is considered in equity as done"; and its meaning is that whenever the holder of property is subject to an equity in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out and was impressed with the character which it would then have borne. The simplest operation of this maxim is found in the rule that trusts and equities of redemption are treated as estates; but its effect is most obvious in the constructive change of property from real to personal property and *vice versa*, so as to introduce new laws of devolution and transfer; Adam's Equity, *135 [295 6th Am. Ed.]. "It (the maxim) is in fact the source of a large part of that division of equity jurisprudence which is concerned with equitable property; the doctrine and rules which create and define equitable estates or interests are in great measure derived from its operation. So far from the maxim being confined to express executory contracts, and to those dispositions of property which give rise to an equitable conversion, it has been employed by the most eminent courts to all classes of equities; to every instance where an equitable *ought* with respect to the subject-matter rests upon one person towards another; to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held

by another party." 1 Pom. Eq. Jur., § 365. See Burgess v. Wheate, 1 W. Bl. 123, 129; 1 Eden 177; Brewer v. Herbert, 30 Md. 301; Jordan v. Cooper, 3 Serg. & R. 585; Peter v. Beverly, 10 Pet. 534, 563; Commonwealth v. Martin, 5 Munf. 117, 122; Coventry v. Barclay, 3 De G. J. & S. 320, 323; Pratt v. Taliaferro, 3 Leigh, 428; Taylor v. Benham, 5 How. (U. S.) 234, 269; Gardiner v. Gerrish, 23 Me. 46; McCaa v. Woolf, 42 Ala. 389; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Craig v. Leslie, 3 Wheat. 563, 577; Douglass Co. v. Union Pac. R. R., 5 Kans. 615; Dagget v. Rankin, 31 Cal. 321, 326. In Frederick v. Frederick, 1 P. Wms. 710, it was held that a widow of one who had contracted to become a citizen of London, but who had died without having performed this agreement by taking up his civic freedom, may claim the share in her husband's personal estate, which, according to the customs of London, is allotted to the widow.

⁴ Fletcher v. Ashburner, 1 Bro. Ch. 497; 1 Eq. Lead. Cas. 1118, 1123, 1157; Crabtree v. Bramble, 3 Atk. 680; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Wheldale v. Partridge, 5 Ves. 386; 8 Ves. 227; Elliott v. Fisher, 12 Sim. 505; Pedder, *in re*, 5 De G. M. & G. 890; Craig v. Leslie, 3 Wheat. 563, 577; Lorillard v. Coster, 5 Paige, 173, 218; Kand v. Gott, 24 Wend. 641, 660; Morrow v. Brenizir, 2 Rawle, 185, 189; Leadenbam v. Nicholson, 1 Har. & Gill 267, 277; Pratt v. Taliaferro, 3 Leigh, 419, 421; Commonwealth v. Martin's Ex'r, 5 Munf. 117, 121; Peter v. Beverly, 10 Pet. 534, 563; Taylor v. Benham, 5 How. (U. S.) 234, 269; Smith v. McCrary, Ired. Eq. 204, 207; Tazewell v. Smith's Adm'rs, 1 Rand. 213, 320; Siter v. McClanachan, 2 Gratt. 280; Hurt v. Fisher, 1

tion;¹ but it is likewise the foundation of all kinds of equitable property; not only trusts, which are implied from an executory contract of sale, whereby, before the completion of the sale, the vendor is treated as trustee of the subject-matter of the sale for the vendee, and the vendee the trustee for the vendor of the purchase-money;² as well as all other trusts arising by operation of law, such as constructive trusts;³ but likewise the whole law of express trusts may be said to be based upon this maxim, that equity looks upon that as done which ought to have been done, whenever provision is made that one shall have the beneficial interest in property, under circumstances which would debar his recognition in a court of law as the possessor of the legal title. Equity, looking upon that as done, which ought to have been done, will treat such beneficiary as the real owner of the property. Hence the law of uses and trusts. An equitable estate is nothing more than the right of the beneficiary to an enjoyment of the land, whose legal title is in another, developed by the rules of equity into a vested protected right in and to the property.⁴

The principle also applies to all cases of equitable assignments of property, which could not be assigned at common law, such as possibilities, *choses in action*, of property not yet acquired, etc.⁵ The mortgagor's equity of redemption, as well as equitable liens of all sorts, are the outgrowth of the application of this very fruitful maxim.⁶

Har. & Gill 88, 96; Allison v. Wilson's Ex'r, 13 Serg. & R. 330, 332; Gott v. Cook, 7 Paige, 523, 534; Dunscomb v. Dunscomb, 1 Johns. Ch. 508; Ashby v. Palmer, 1 Meriv. 296; Harcourt v. Seymour, 2 Sim. N. S. 45; Stead v. Newdigate, 2 Meriv. 521; Sweetapple v. Bindon, 2 Vern. 536; Guidot v. Guidot, 3 Atk. 254; Babington v. Greenwood, 1 P. Wms. 532; Ketterby v. Atwood, 1 Vern. 298.

¹ See *post*, Ch. IX.

² Haughwont v. Murphy, 22 N. J. Eq. 531; King v. Ruckman, 21 N. J. Eq. 599; Huffman v. Hummer, 17 N. J. Eq. 264; Hoagland v. Latourrette, 1 Green's Ch. 254; Crawford v. Bertholf, Saxton, 460; Downing v. Risley, 2 McCarter, 94; Story v. Lord Windsor, 2 Atk. 631; Murray v. Ballou 1 Johns. Ch. 566, 581; Yates v. Compton, 2 P. Wms. 308; Trelawney v. Booth, 2 Atk. 307; Mackreth v. Symmons, 15 Ves. 329, 336; Kirkman v. Miles, 14 Ves. 338; Taylor v. Benham, 5 How. (U. S.) 234; Wood v. Cone, 7 Paige, 472; Worrall v. Munn, 38 N. Y. 139; Seaman v. Van Rensselaer, 10 Barb. 86; Robb v. Mann, 1 Jones, 300; Brewer v. Herbert, 30 Md. 301; Phillips v. Sylvester, L. R. 8 Ch. 173, 176; Lindsay v. Pleasants, 4 Ired. Eq. 321; Richter v. Selin, 8 Serg. & R. 425, 440; Kerr v. Day, 2 Harr. 112; Thompson v. Smith, 63 N. Y. 301, 303; Wood v. Keyes, 8 Paige, 365; Champion v. Brown, 6 Johns. Ch. 403; Peters v. Beverly, 10 Pet. 532, 533; Rose v. Cunyngname, 11 Ves. 554; Pollexfen v. Moore, 3 Atk. 273; Green v. Smith, 1 Atk. 672, 573; Fletcher v. Ashburner, 1 Bro. Ch. 497; Schroppel v. Hopper, 40 Barb. 425;

Moore v. Burrows, 34 Barb. 173; Adams v. Green, 34 Barb. 176; Lewis v. Smith, 9 N. Y. 502, 510; Jackson v. Small, 34 Ind. 241; Siter's Appeal, 26 Pa. St. 180; Revell v. Hussey, 2 Ball. & B. 287; Rawlins v. Burgis, 2 V. & B. 387; Paine v. Meller, 6 Ves. 349; Harford v. Purrier, 1 Madd. Ch. 52; Burgess v. Wheate, 1 W. Bl. 123, 129; 1 Eden 177. See *post*, §§ 147, 309.

³ Stump v. Gaby, 2 De G. M. & G. 623; Gresley v. Mousley, 4 De G. & J. 73; Uppington v. Bullen, 2 Dr. & War. 184. In *Stump v. Gaby*, a conveyance was fraudulent against the grantor. He died, leaving a will, in which he made a devise of this property. In determining the effect of this attempted devise, Lord St. Leonards said: "What then is the interest of a party in an estate which he has conveyed under circumstances which would give a right in this court to have the deed set aside? In the view of this court he remains the owner, and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate. The testator, therefore, had a devisable interest." See *post*, § 312.

⁴ 1 Pomeroy Eq. Jur., § 374. See *post*, Ch. XV, XVI, XVII.

⁵ 1 Pomeroy Eq. Jur., § 373. See *post*, Ch. XXI.

⁶ 1 Pomeroy Eq. Jur., §§ 373, 376. In *Daggett v. Rankin*, Ch. J. Curry, in explaining equitable liens, said: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a

§ 21. **Equality is equity.**—This maxim, as its words import, breathes the very spirit of equity, for the word *equity* really means equality; and whenever a court of equity acquires jurisdiction over a cause of action, which involves the enforcement of a joint-right or a joint-obligation, or the distribution of property among several claimants, it seeks always to apply this principle of equality. The maxim does not furnish in any particular case sufficient ground for the assumption of jurisdiction; nor will a court of equity, in the application of the maxim, ever enjoin one from enforcing his legal rights in a court of law: but in many such cases, if the court of equity acquires jurisdiction on some other ground, it will ignore the rules of law more or less, and give judgment in accordance with the principle, equality is equity. Perhaps one reason, why the court of equity never attempted to force the recognition of this principle on the law courts, is that the latter courts were of their own accord disposed to accept and apply the maxim, or were forced to do so by the mandate of the legislature. For in most of the instances, which will be referred to as illustrative of the application of the maxim, the legal rule has been altogether superseded by the more just rule of equity.

The most striking instances of the application of the principle are in the case of the insolvency of a debtor, and the death of one of two or more joint-debtors or joint-creditors. In the first case, the ordinary legal rule is, that the creditor who first secures judgment and execution against the insolvent debtor can claim full satisfaction of his debt, to the exclusion of other creditors, although there be not enough to give full satisfaction to all the creditors. And this is still the legal rule in English-speaking countries, wherever it has not been changed by the enactment of so-called insolvent and bankruptcy laws. But if a creditor had to resort to equity for aid in the enforcement of his claim against the debtor, the court would at the same time inquire into the entire financial condition of the embarrassed debtor; and if it was found that he had not sufficient assets to settle in full all his liabilities, the court of equity would arrange for the proof of all the claims held against the debtor defendant, and decree a ratable distribution of all his assets among all his creditors, who proved their claims.¹ This is but the application of the principle, *equality is equity*, and the bankruptcy laws of modern times are built upon it.

The other important instance is that of the death of one of two or more joint-debtors or joint-creditors. According to the early common law, which distinguished between joint, and joint and several, obligations, on the death of one of the joint-debtors or joint-creditors, the

mortgage, or to appropriate specific property to the discharge of a particular debt will create a specific (equitable) lien on the property intended to be mortgaged. The maxim of equity, upon which this doctrine rests, is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is,

that equity will treat the subject-matter, as to collateral circumstances and incidents, in the same manner as if the final acts, contemplated by the parties, had been executed exactly as they ought to have been." See *post*, Ch. XXII.

¹ See *post*, § 529.

liability and right of action would attach, respectively, to the surviving joint-debtors and joint-creditors. The estate of the deceased joint-debtor would not be liable for the debt; neither would the estate of the deceased joint-creditor have any claim to a participation in the proceeds of the enforcement of the joint-obligor.¹ But a court of equity could not enforce such a rule, for it is in violation of the principle, *equality is equity*. The early equity rule, however, so far recognized the legal rule as to require the creditor to first exhaust his remedy at law against the survivors, before he could seek aid in equity against the estate of the deceased joint-debtor. But if he had exhausted his remedy at law, without avail, the court of equity would give him the aid he asks for.² But the later rule in England and in some of the American states permits the court of equity to grant the relief against the estate of the deceased joint-debtor without first resorting to the legal remedies against the survivor or survivors.³ There is, however, one exception to the operation of this equity rule, viz.: in respect to the joint-sureties. Some of the courts hold that, if the deceased joint-obligor is a surety instead of the primary debtor, a court of equity will not hold his estate liable, on the ground that he has a superior equity, because his legal liability does not rest upon any personal benefit.⁴ In many of the United States statutory provisions are now found, making all joint-obligations joint and several. In those states, the equity rule has ceased to have any peculiar value, as these statutes have converted it into an uni-

¹ See *ex parte* Kendall, 17 Ves. 535; Weaver v. Shryock, 6 Serg. & R. 262, 264; Jones v. Keep, 23 Wis. 45; Morehouse v. Ballou, 16 Barb. 289; Cairnes v. O'Brien, 40 Wis. 469; Gray v. Chiswell, 9 Ves. 118.

² Voorhis v. Child's Ex'r, 17 N. Y. 354; Pope v. Cole, 55 N. Y. 124; Bentz v. Thurber, 1 T. & C. 645; Masten v. Blackwell, 8 Hun, 313; Maples v. Geller, 1 Nev. 233, 237, 239; Barlow v. Scott's Adm'r, 12 Iowa, 63; Marsh v. Goodrell, 11 Iowa, 474; People v. Jenkins, 17 Cal. 500; May v. Hanson, 6 Cal. 642; qualified by Bank of Stockton v. Howland, 42 Cal. 129; Hunt v. Rousmaniere, 8 Wheat. 212, 213; 1 Pet. 16; Kendall, *ex parte*, 17 Ves. 514, 526, 527; Gray v. Chiswell, 9 Ves. 118; Cowell v. Sikes, 2 Russ. 191; Simpson v. Vaughan, 2 Atk. 31; Towers v. Moor, 2 Vern. 98; Campbell v. Mullett, 2 Sw. 574, 575; Ruffin, *ex parte*, 6 Ves. 125, 126; Devaynes v. Noble, 1 Meriv. 538, 539; Hamersley v. Lambert, 2 Johns. Ch. 509, 510; Williams v. Scott's Adm'r, 11 Iowa, 475; Pecker v. Cannon, 11 Iowa, 20; Fowler v. Houston, 1 Nev. 469, 472; Bradley v. Burwell, 3 Denio, 61; Yates v. Hoffman, 5 Hun, 113; Lane v. Doty, 4 Barb. 534; Richter v. Poppenhausen, 42 N. Y. 373.

³ Wilkinson v. Henderson, 1 My. & K. 582; Brown v. Weatherby, 12 Sim. 6, 11; Thorpe v. Jackson, 2 Y. & C. 553, 561, 562; Freeman v. Stewart, 41 Miss. 138; Devaynes v. Noble, 2 Russ. & My. 495; Braithwaite v. Britain, 1 Keen, 219. The same rule is enforced in some of the states, on the strength of a provision of the

code of procedure, which abolishes all distinctions between actions at law and suits in equity. This is notably the case in Indiana and California. See Braxton v. State, 25 Ind. 82; Owen v. State, 25 Ind. 371; Klusmann v. Copeland, 18 Ind. 306; Eaton v. Burns, 31 Ind. 390; Myers v. State *ex rel.* McCray, 47 Ind. 293, 297; Voris v. State *ex rel.* Davis, 47 Ind. 345, 349, 350; Bostwick v. McEvoy, 55 Cal.

⁴ "If the joint-obligor so dying be a surety, not liable for the debt irrespective of the joint-obligation, his estate is absolutely discharged both at law and in equity, the survivor only being liable. In such a case, where the surety owed no debt outside and irrespective of the obligation, he signs a joint-contract and incurs a joint-liability, and no other. Dying prior to his co-maker, the liability all attaches to the survivor." Getty v. Binsse, 49 N. Y. 385, 388, 389; Pickersgill v. Lahens, 15 Wall. 140; Harrison v. Field, 2 Wash. (Va.) 136; Mo. v. Faulk, 51 Mo. 98; Simpson v. Field, 2 Cas. in Ch. 22; Other v. Iveson, 3 Drew. 177; Jones v. Beach, 2 De G. M. & G. 886; Wilmer v. Currey, 2 De G. & Sm. 347; Richardson v. Horton, 6 Beav. 185; Sumner v. Powell, 2 Meriv. 30; S. C. 1 T. & Russ. 423; Weaver v. Shryock, 6 Serg. & R. 262, 264, 265; United States v. Price, 9 How. (U. S.) 92; Wood v. Fisk, 63 N. Y. 245. Long v. Stafford, 103 N. Y. 274; Richardson v. Draper, 87 N. Y. 337. But see *contra*, Myers v. State, 47 Ind. 293, 297; Voris v. State, 47 Ind. 349, 350.

versal rule, and provide generally that the estate of the deceased obligor remains bound.¹ In other states, the statute merely provides, as a special exception to the character of a joint-obligation which otherwise still obtains, that the estate of the deceased obligor shall be liable to the creditor.²

Similar results are reached by the application of this equitable maxim, where a court of equity undertook to deal with a joint-ownership of property. The common law rule recognized the joint-ownership, as a joint-tenancy, which passes in its entirety, on the death of one of the co-owners, to the survivor or survivors. And the court of equity likewise submitted to this doctrine, except that this court took advantage of any reasonable evidence of an intention of the parties to the contrary, to hold that the joint-estate was a tenancy in common, in which each co-owner's share upon his death, went to his heir or personal representative, according as the property in question was real or personal.³ And in accordance with this greater inclination of equity to find in attending circumstances an intention of the parties to make a tenancy in common, instead of a joint-tenancy, we find courts of equity holding that where the shares of the co-tenants are unequal in value the property is a tenancy in common.⁴ The same equitable principle is applied to mortgages held by two or more jointly. The joint-mortgagees are presumed to be tenants in common, the share of each co-owner passing on his death to his personal representative.⁵ This application of the equitable maxim has, however, lost its special value, through the enactment of statutes which declare that all joint-ownerships are tenancies in common, unless the parties have expressly declared them to be joint-tenancies.⁶

The most modern examples of the application of the maxim, *equality is equity*, are the *pro rata* distribution of property among general legatees of a will, where the testator did not leave enough property to satisfy all the legacies,⁷ and the contribution between joint-obligors,

¹ Such statutes are to be found in New Jersey, Illinois, Kansas, Delaware, Tennessee, Missouri, Arkansas, Colorado, Montana, Alabama, New Mexico. In California and Dakota, joint-obligations are by statute made joint and several only when all the obligors are primary debtors. Stimson Am. Stat. Law, § 4113.

² As in Maine, Vermont, Pennsylvania, Indiana, Minnesota, Nebraska, Maryland, Virginia, West Virginia, Kentucky, Mississippi. In Rhode Island, only after the remedies against the surviving debtors have been exhausted. Stimson Am. Stat. Law, § 4113. See to same effect, *Richardson v. Draper*, 87 N. Y. 337; *Long v. Stafford*, 103 N. Y. 274, where it is held that in New York the death of one of two joint primary obligors does not release his estate from liability. See N. Y. Cod. Civ. Proc. § 758.

³ *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, Pl. 3; *Rigden v. Vallier*, 3 Atk. 735; 2 Ves. Sr. 258;

Harris v. Ferguson, 16 Sim. 308; *Aveling v. Knipe*, 19 Ves. 441; *Davis v. Symonds*, 1 Cox, 402.

⁴ *Mayburry v. Brien*, 15 Pet. 21, 36; *Cuyler v. Bradt*, 2 Caine's Cas. 326; *Overton v. Lacy*, 6 Mon. 13, 15; *Currie v. Tibb's Heirs*, 5 Monroe, 440, 443; *Caines v. Lessee of Grant*, 5 Binn. 119, 120; *Duncan v. Forrer*, 6 Binn. 193, 196; *Rigden v. Vallier*, 3 Atk. 735; 2 Ves. Sr. 258; *Lake v. Gibson*, 1 Eq. Cas. Abr. 294; 1 Eq. Lead. Cas. 264, 268.

⁵ *Petty v. Styward*, 1 Ch. Rep. 3; *Morley v. Bird*, 3 Ves. 631; *Randall v. Phillips*, 3 Mason, 378, 384; *Goodwin v. Richardson*, 11 Mass. 469; *Lingsley v. Abbott*, 19 Me. 430, 434; *Appleton v. Boyd*, 7 Mass. 131, 134; *Robinson v. Preston*, 4 K. & J. 505, 511; *Rigden v. Vallier*, 2 Ves. Sr. 258.

⁶ Such statutes are to be found in almost all of the states. See *Tiedeman Real Prop.*, §§ 237-240.

⁷ See *post*, § 353.

where one of them has been compelled to pay the whole claim.¹ But both of these rules have long since become part of the general law. Indeed, as was stated in the beginning of this section, the maxim has almost ceased to be purely equitable, the only case of purely equitable application being in the case of *pro rata* distribution of insolvent's estates among creditors, in the absence of bankruptcy laws.

§ 22. **Where the equities are in all other respects equal, the first in order of time shall prevail.**—This maxim is not strictly accurate, as it is ordinarily given, viz.: *Where there are equal equities, the first in order of time shall prevail*; or as it is given in Latin, *qui prior est tempore, potior est jure*. If priority of time is recognized, then the equities are not equal. The rule, when correctly stated, declares that when two or more people have equitable interests in property, which are *in all other respects* equal, then whichever is prior in point of time shall prevail.² But priority of time is the last consideration, in determining which is the better equity. The prior equity is only permitted to prevail, when the two or more adverse equities are in fact, in every other respect, equal. If inequality is established between them by other considerations, there is no opportunity for the application of this maxim, and the relative superiority of the equities is determined without any consideration of the priority of time.³ This maxim constitutes the fundamental principle of the

¹ See *post*, § 530.

² "If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal, *i. e.*, in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: As between persons having only equitable interests, if their interests are *in all other respects* equal, priority in time gives the better equity." *Rice v. Rice*, 2 Drew, 73.

³ "In a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to, *i. e.*, that a court of equity will not prefer the one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them, or in other words, that their equities are in all [other] respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial. In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with

respect thereto. And in examining into these points it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights." *Rice v. Rice*, 2 Drew, 73. In this case, a grantor claimed vendor's lien for purchase-money, on land in the conveyance of which there was an acknowledgment of the receipt by him of the consideration, against the subsequent equitable mortgagee by deposit of title deeds, who loaned money to the grantee on this equitable security. The grantor claimed priority in point of time; but the court held that the equitable mortgagee's equity was in other respects superior, especially on account of his being misled by the acknowledgment in the deed of the receipt of the consideration, and hence this rule, as to priority in point of time, could not apply. See, also, to the same effect, *Philips v. Philips*, 4 De G. F. & J. 208, 215; *Newton v. Newton*, L. R. 6 Eq. 135, 140, 141; *Becket v. Cordley*, 1 Bro. Ch. 353, 358; *Loveridge v. Cooper*, 3 Russ. 30; *Cory v. Eyre*, 1 De G. J. & S. 149; *Berry v. Mut. Ins. Co.*, 2 Johns. Ch. 603; *Cherry v. Monro*, 2 Barb. Ch. 618; *Rexford v. Rexford*, 7 Laus. 6; *Rooney v. Soule*, 45 Vt. 303; *Tharpe v. Dunlap*, 4 Helsk. 674; *Rowan v. State Bank*, 45 Vt. 160; *Van Meter v. McFaddin*, 8 B. Mon. 435; *Muir v. Schenck*, 3 Hill, 228; *Fitzsimmons v. Ogden*, 7 Cranch, 2; *Case v. James*, 2 De G. F. & J. 256; *Peto v. Hammond*, 30 Beav. 495; *Mackreth v. Symmons*, 15 Ves. 354; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

equitable rules in respect to priorities and notice, which are fully discussed in a subsequent connection.¹

§ 23. **Where there is equal equity, the law must prevail.**—The meaning of this maxim is that, wherever two or more persons have in the same property adverse equitable interests, which are in every respect equal; and a court of equity cannot, by application of any of the principles or maxims of equity discover any ground of superiority in the equity of any one of them: if in such a case one of these parties should acquire the legal title to the property, he will be held to have thereby acquired superiority in equity as well as in law; and in both courts the other interests would have to give way to his equity, which has become superior, in consequence of becoming united with the legal title.² This principle is applied to all cases of otherwise, equal equitable interests in property where they have been received without notice of adverse interests. The acquisition of the legal title by one of the equitable owners destroys the equality of equities, which otherwise would have enabled the prior equity in point of time to prevail.³

¹ See Ch. IV.

² *Thorndike v. Hunt*, 3 De G. & J. 563, 570, 571; *Fitzsimmons v. Ogden*, 7 Cranch, 2, 18; *Bassett v. Nosworthy*, Rep. Temp. Finch, 102; 2 Eq. Lead Cas. 1; *Philips v. Philips*, 4 De G. F. & J. 208; *Jerrard v. Saunders*, 2 Ves. 454; *Payne v. Compton*, 2 Y. & C. 457; *McNeill v. Magee*, 5

Mason, 289; *Boone v. Chiles*, 10 Pet. 177; *Rowan v. State Bank*, 45 Vt. 160; *Rexford v. Rexford*, 7 Laus. 6; *Vattier v. Hinde*, 7 Pet. 252; *Wood v. Mann*, 1 Sumn. 507; *Wallwyn v. Lee*, 9 Ves. 24; *Pilcher v. Rawlins*, L. R. 7 Ch. 259; *Le Neve v. Le Neve*, Ambl. 436; 2 Eq. Lead. Cas. 109.

³ See *post*, Chapt. IV

CHAPTER III.

EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES.

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§ 25. **Penalties and forfeitures defined.**—A penalty is a sum of money, imposed upon an obligor for the non-performance of his obligation. Forfeiture is a deprivation or destruction of some right of property or other right, in consequence of the non-performance of some obligation or condition. It will be seen from these two definitions that the two words have the same general meaning, the only difference being in respect to the things affected by their imposition. Both are in the nature of a punishment, inflicted upon one for the non-performance of some duty or obligation. Because of this penal character, a court of equity has always opposed the enforcement of both penalties and forfeitures; in fact, a court of equity never will lend its aid to the enforcement of a forfeiture or a penalty, the parties will be left to their action at law.¹ The enforcement of the penalty and forfeiture, in many cases, worked a hardship upon the obligor, greatly disproportionate to the damage suffered by the obligee, in consequence of the non-performance of the obligation in question. Wherever this disproportion existed and could be proven beyond a reasonable doubt, an opportunity, as well as a justification, was furnished to the court of equity for interference with the enforcement of such penalties or forfeitures in the common law courts; in order that the obligee might not be compelled to pay more than the amount of the damages, which followed from his wrongful act. A court of equity, however, does not propose to deny the enforcement of all penalties and forfeitures. The purpose of the interference is simply to prevent the enforcement of such penalties and forfeitures, which involve the recovery of more than what can be established to be the damage following from the wrongful act of the obligee. The fundamental principle, therefore, upon which a court of equity will alone interfere in behalf of the obligee, is that the obligee must show affirmatively that the penalty, or forfeit-

¹ *Marshal v Vixburg*, 15 Wall. 149, *McCor-
mick v. Rossi*, 70 Cal. 474, *Manhattan Life Ins.*

Co. v. Smith, 44 Ohio St. 167. See, also, *Tiede-
man Real Prop.*, § 279 and *post* § 37.

ure, does not exact of him more than what the obligor has suffered from the breach of the obligation. Whenever this fact is not established, or cannot be established from the nature of the transaction and of the obligation, a court of equity will refuse to grant relief. In pursuance of this general proposition therefore, it will be found to be the general rule, that a court of equity will grant relief against the enforcement of penalties and forfeitures,* whenever the obligation consists of the payment of a sum of money or the doing of some act of such a character, as that complete compensation can be made to such obligee for the breach of the undertaking. If the act is of such a nature, that the damage following from the breach of the undertaking cannot be estimated in money, then the court will refuse relief against the penalty or forfeiture.¹

When the two courts of common law and of equity were separate tribunals, the form of the remedy, in which the court of equity provided relief against a penalty or forfeiture, was that of a suit brought by the debtor to secure a cancellation and surrender of the agreement, or a release from the forfeiture upon payment of the debt or damages suffered by the obligor. Accompanying this decree for such surrender or release, the court would also enjoin any action at law for the enforcement of the penalty or forfeiture. Inasmuch as these two courts have now become united in one in most of our states, the form of the remedy is changed; and the common method of relieving against forfeiture is to set up as defense, in the action for the enforcement of the penalty or forfeiture, the equitable right of relief, upon the payment of the actual debt or damage due to the obligor. The principles, however, underlying the right to such relief, have not been materially affected by this change in procedure.

§ 26. **Penalties defined and distinguished from liquidated damages.**—In consequence of the interference of the court of equity in behalf of the obligee, to prevent the enforcement of the penalty, where the amount of such penalty could be proven to be in excess of the damage suffered by the obligee from the non-performance of the obligation; a distinction has arisen in the law between the penalties from which equitable relief will be given, and those from which such equitable relief will be refused. The term “penalty” is now confined in meaning to those penalties against which equity will relieve, while another name is given to those penalties against which no relief can be had.

¹ 2 Eq. Lead. Cas. and notes pp. 2014, 2023, 2044 (4th Am. ed.); Reynolds v. Pitt, 19 Ves. 140; Bowser v. Colby, 1 Hare, 128; Gregory v. Wilson, 9 Id. 683; Bracebridge v. Buckley, 2 Price, 200; Gibbon, 3 Drew. 681; Bargent v. Thomson, 4 Giff. 473; Hagar v. Buck, 44 Vt. 285; Hancock v. Carlton, 6 Gray, 39; Thompson v. Whipple, 5 R. I. 144; Walker v. Wheeler, 2 Conn. 299; Michigan St. Bank v. Hammond, 1 Doug. (Mich.) 527; Giles v. Austin, 38 N. Y.

Super. Ct. 215; Hardy v. Martin, 1 Bro. Ch. 419, n; S. C., 1 Cox, 26; Benson v. Gibson, 3 Atk. 395; Errington v. Arnesly, 2 Bro. Ch. 341, 343; Skinner v. Dayton, 2 Johns. Ch. 534, 535; Bowen v. Bowen, 20 Conn. 127; Gould v. Bugbee, 6 Gray, 371, 375; Hagar v. Buck, 44 Vt. 285; Pittsburg R. R. v. Mt. Pleasant R. R., 26 P. F. Smith (76 Pa. St.), 481, 490; Hackett v. Alcock, 1 Call, 463.

Inasmuch as the ground for refusing the equitable relief to this latter class of penalties is that the sum of the penalty cannot be clearly proven to be in excess of the damage suffered, on account of the inability to prove the amount of such damage in money, the name of *liquidated damages* is given to this class of penalties; in other words, the rule is recognized and laid down by equity, that the parties to a contract can also agree upon the payment of a fixed sum of money in the settlement of the claim for damages from the non-performance of the contract, whenever the character of the contract is such that a jury or the court could not correctly measure the damages of the breach. It becomes, therefore, necessary to a thorough understanding of this subject, and the scope of the equitable rule for relief against penalties, to note in detail when a stipulation for the payment of the sum of money is held to be a penalty, or an agreement for liquidated damages.

§ 27 **To secure payment of money or loan.**—In the first place, where the contract calls for the payment of a sum of money with interest and provides, that upon the failure to pay such a sum of money and accrued interest the obligor shall pay a sum larger than the debt and accrued interest; then this stipulation for the payment of such a large sum will be held to be a penalty against which a court of equity will grant relief.¹ There are, however, some exceptions to the rule which must be referred to: in the first place, it is not a penalty, where a creditor after maturity of the debt agrees to accept an obligation in the place of the old debt, to pay a smaller sum of money, the payment of which is properly secured, subject to the condition, that if the non-performance of the agreement to pay such a smaller sum is broken, that the original debt for the larger sum may be enforced. In such a case the right to enforce the larger sum, as a consequence of the failure to perform the new substituted obligation, is not held to be a penalty, against which equity will relieve, because the effect of the failure of the security, which constituted the consideration for the reduction in the amount of the original debt, cannot be estimated accurately in dollars and cents.² It has also been held, where a contract for the payment of money contains a stipulation for the acceleration of the payment of an entire debt, upon the failure

¹ *Skinner v. Dayton*, 2 Johns. Ch. 535; 17 Johns. 357; *Deforest v. Bates*, 1 Edw. Ch. 394; *Giles v. Austin*, 38 N. Y. Supr. Ct. 215; *Brown v. Brown*, 20 Conn. 126; *Carpenter v. Wescott*, 4 R. I. 225; *Walling v. Aiken*, 1 McMullen Eq. 1; *Moore v. Platte*, 8 Mo. 467; *Bright v. Rowland*, 3 How. (Miss.) 398.

² *Thompson v. Hudson*, L. R. 4 H. L. 1, reversing S. C., L. R. 2 Eq. 612; L. R. 2 Ch. 255. Lord Westbury in the same case said (p. 27): "It is right and rational for a creditor to say to his debtor, 'Provided you pay me half of the debt or two-thirds of the debt on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the

whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it;' and this is the view which a court of equity will adopt. If you were to put that proposition to any plain man walking the streets of London, there would be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it was requisite to go to those tribunals before you could get that plain principle and conclusion of common sense accepted as law, he would undoubtedly hold up his hands with astonishment at the state of the law."

to pay an instalment of the interest or principal of the debt, that such declaration is not a penalty against which equity will afford relief. This is generally supported by the authorities.¹ This rule must, however, be taken subject to the qualification, that the amount of interest which might be collected on the debt itself would be proportionately reduced, where the creditor decided to accelerate the payment of the debt; in other words, if with the acceleration of the time of payment of the whole debt, the debtor was nevertheless required to pay the entire amount of interest directly, or indirectly, which he would have been called upon to pay in the absence of such acceleration of the time of payment; it is clear that in such a case the creditor will have gained from the transaction, a sum of money in excess of the actual loss; and upon the general grounds heretofore presented, the court would be justified in declaring such a stipulation to be a penalty, and afford relief against it. The cases cited in the preceding note did not clearly make this distinction; but in the cases cited below, the point is sustained and affirmatively asserted.² A further exception is recognized by an English case where the obligation is in the alternative; namely, that under certain circumstances a larger sum of money is to be paid than what is called for under the general terms of the contract. In this case, the court of arbitrators awarded that defendant should pay to plaintiff for her life an annuity of £1,200 a year; and in order to secure this annuity, the defendant was directed within two months to purchase for the plaintiff a government annuity of £1,200, and if the defendant should fail to make such a purchase within the two months stipulated, he should be liable to pay £100 for every month thereafter in which he should fail to purchase the annuity, in addition to the regular income occurring from the annuity.³ Vice-Chancellor Bacon, held that this additional £100 was liquidated damages, and could be recovered in addition to the regular income from the annuity. In rendering the decision of the court, he says: "Whenever the defendant saw fit he might have relieved himself from the obligation of that payment [the £100 a month] by performing the other branch of the contract, namely, the purchase of a government annuity. Nothing can be clearer and plainer. 'Penalty' it is, but penalty in order to secure the performance of the other branch of the contract, with perfect power and liberty for the person upon whom the burden is cast to relieve himself from that penalty or

¹ *Stanhope v. Manners*, 2 Eden, 197; *People v. Superior Court of N. Y.*, 19 Wend. 104; *Noyes v. Clark*, 7 Paige, 179; *Ferris v. Ferris*, 28 Barb. 29; *Baldwin v. Van Vost*, 2 Stockt. Ch. 577; *Martin v. Melville*, 3 Id. 222; *Robinson v. Loomis*, 1 P. F. Smith (51 Pa. St.), 78; *Schooley v. Romain*, 31 Md. 574. 579; *Ottawa Plank R. Co. v. Murray*, 15 Ill. 337; *Basse v. Galleger*, 7 Wis. 442; *Maine Bank v. International Bank*, 9 Id. 57, 68; *Berrinkott v. Traphagen*, 39 Id. 219; *Bennett v. Stevenson*, 53 N. Y. 508; *Malcolm v. Allen*, 49

Id. 448; *Mallory v. West Shore, &c. R. R.*, 35 N. Y. Supr. Ct. 175; *Willis v. O'Brien*, 35 Id. 536; *Gulden v. O'Byrne*, 7 Phila. 93; *Mobray v. Leekie*, 42 Md. 474; *Wilcox v. Allen*, 36 Mich. 160; *Harper v. Ely*, 56 Ill. 179; *Meyer v. Graeber*, 19 Kans. 165; *Pope v. Hooper*, 6 Neb. 178; *Howell v. Western R. R.*, 4 Otto, 463; *contra Mayo v. Jubah*, 5 Munf. 495.

² See *Tiernan v. Hariman*, 16 Ill. 400; *Sterne v. Becks*, 1 Deg. J. & S. 595, 600 & 601.

³ See *Parfitt v. Chambre*, L. R. 15 Eq. 336,

additional payment whenever he shall think fit. That is not a penalty which courts of common law or courts of equity can allow to be relinquished or satisfied, except upon the terms of performing that very thing which the introduction of the penalty imposes in order to effectuate it." It is doubtful whether the position of the English court in this case can be sustained on the principles heretofore set forth; and by which the distinction between penalties and liquidated damages is determined.

§ 28. **Liquidated damage.**—**General description.**—As has already been stated, whenever the obligation to pay a sum of money is attached as a penalty for the non-performance of some act of such a character, that the damage following from the non-performance of it cannot be accurately ascertained or measured in money; in such a case the penalty is held to be liquidated damages, and as such can be enforced by the courts, and against which equity will not afford a relief. The term "liquidated damages" means, that the parties have substituted for the judicial ascertainment of the damage, resulting from the non-performance of the contract, an agreement as to the amount which can be recovered for the breach of such a contract, and this substituted agreement is enforced as and under the name of liquidated damages.¹ It is, however, very difficult sometimes to determine whether the agreement for the recovery of the fixed sum as damages should be considered as a penalty against which equity will relieve, or as liquidated damages which the courts can enforce. The answer to this question does not depend upon the words employed in the composition of the contract, but rather upon the construction of the whole instrument, and the circumstances surrounding the parties and the transaction. Hence the construction placed upon the transaction will in nowise depend upon the employment in the contract of the words, penalties, or liquidated damages; in other words, the parties cannot make the obligation one for liquidated damages by calling it such. The courts will pronounce it to be a penalty, if under the circumstances of the case and upon the application of principles heretofore presented, the obligation must be considered to be a penalty. Where, however, the intent of the parties and the character of the transaction is doubtful, the tendency of the court is in favor of considering the same as a penalty.² Nor is the mere largeness of the sum of money agreed to be paid on

¹ *Bagley v. Peddie*, 16 N. Y. 469; *Mott v. Mott*, 11 Barb. 127; *Dakin v. Williams*, 17 Wend. 447; 22 *Id.* 201; *Smith v. Coe*, 33 N. Y. Supr. Ct. 480; *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. S.) 59; *Shute v. Hamilton*, 3 Daly, 462; *Wolfe Creek, &c. Co. v. Shultz*, 71 Pa. St. 180; *Streeper v. Williams*, 12 Wright, 450; *Pierce v. Fuller*, 8 Mass. 223; *Cushing v. Drew*, 97 *Id.* 445; *Tingley v. Cutler*, 7 Conn. 291; *Gammon v. Howe*, 14 Me. 250; *Peine v. Weber*, 47 Ill. 41; *Low v. Nolte*, 16 *Id.* 478; *Brown v. Maulesby*, 17 Ind. 10; *Hamilton v. Overton*, 6 Blackf. 206; *Yenner v. Hammond*, 36 Wis. 977.

² *Cushing v. Drew*, 97 Mass. 445; *Shute v. Taylor*, 5 Metc. 61; *Wallis v. Carpenter*, 13 Allen, 19; *Lynde v. Thompson*, 2 *Id.* 456; *Streeper v. Williams*, 48 Pa. St. 450; *Hatch v. Fogarty*, 33 N. Y. Supr. Ct. 166; *Hahn v. Horstman*, 12 Bush, 249; *Yenner v. Hammond*, 36 Wis. 277 (the word "penalty" used, but construed to be liquidated damages); *White v. Arlith*, 1 Bond, 319; *Hamaker v. Schroers*, 49 Mo. 406; *Shute v. Hamilton*, 3 Daly, 462; *Gillis v. Hall*, 7 Phila. 422; *S. C.*, 2 Brews. 342. In *White v. Arlith*, 1 Bond, 319, it was held that if a sum agreed upon to be paid on the breach of a contract is

the breach of the contract necessarily a circumstance which would force the courts to pronounce the obligation to be a penalty.¹ But while this is true, that the disproportion of the sum agreed to be paid to the damage resulting from the breach of the contract, will not of itself be a sufficient reason for pronouncing the agreement to be a penalty; yet it is a circumstance which tends to weaken the claim, that the agreement is one for liquidated damages; and where this construction of the character of the agreement has the support of other attending circumstances, this conjunction of circumstances will change the presumption to that in favor of the obligation being a penalty.²

§ 29. Rule for determining liquidated damages and penalties.

—The general rule for determining when an agreement is one for liquidated damages is the following: Where the agreement is for the performance of one act, and the damages flowing from the non-performance of that agreement cannot be adequately estimated in money; the parties may by a separate clause of the contract stipulate, that upon failure to perform the contract, the parties so failing shall pay to the other a definite sum of money, which shall be taken by him in the place of and as satisfaction of his claim for damages. The examples that might be cited in illustration of the application of this rule are numerous and varied in character. One very common illustration is in the case of the sale of the good-will of a business, in which the party selling stipulates that he will not carry on that trade in the same place, and if he violates that agreement he will pay the vendee a stipulated sum of money as damages.³ Another common illustration is that of a stipulation in a building contract, that the contractor will pay a fixed sum of money as damages for each day transpiring subsequent to the time agreed upon for the completion of the building, in which he fails to so complete it.⁴ It is also held to be liquidated damages, when a lessee agrees to pay a fixed additional sum for any unusual use of the land.⁵ It is also the rule, that a contract to pay a sum of money for the breach of a contract of sale of land will be considered and treated as liquidated damages;⁶ and so, likewise, if the contract was for the sale of goods or wares of such a special character, as that the ven-

called in the contract by the name of penalty, the court will treat it as a penalty whatever may be its real character; while if the name liquidated damages is given to the sum agreed to be paid in the contract, the courts will inquire into the real facts of the case, in order to ascertain the character of the obligation apart from the declaration of the parties. This case, however, is otherwise unsupported by authority and is directly opposed to the cases above cited.

¹ *Clement v. Cash*, 21 N. Y. 253; *Sheill v. McNitt*, 9 Paige, 101; *Dwinel v. Brown*, 54 Me. 468; *Morse v. Rathburn*, 42 Mo. 606; *Gower v. Saltmarsh*, 11 *Id.* 27; *Peine v. Weber*, 47 Ill. 41; *Gamble v. Linder*, 66 *Id.* 137; *Williams v. Green*, 14 Ark. 313; *Hodges v. King*, 7 Met. 583.

² *Barry v. Wisdom*, 5 Ohio St. 241; *Perkins v. Lyman*, 11 Mass. 76; *Lynde v. Thompson*, 2 Allen, 456, 459; *Hodgson v. King*, 7 Met. 583; *Streeter v. Williams*, 12 Wright, 450; *Curry v. Larer*, 7 Barr. 410; *Colwell v. Lawrence*, 38 Barb. 643; 38 N. Y.

³ *Green v. Price*, 13 M. & W. 695; *Streeter v. Rush*, 25 Cal. 67; *Cushing v. Drew*, 97 Mass. 445.

⁴ *O'Donnell v. Rosenberg*, 14 Abb. Pr. N. S. 59.

⁵ *Rolfe v. Peterson*, 2 Bro. P. C. 436 (Toml. ed.); *Woodward v. Gyles*, 2 Vern. 119; *Jones v. Green*, 3 Y. & J. 298; *Hardy v. Martin*, 1 Cox, 27; *French v. Macale*, 2 Dr. & War. 274.

⁶ *Jemmisson v. Gray*, 29 Iowa, 537; *Lee v. Overstreet*, 44 Ga. 507; *Shreve v. Brereton*, 51 Pa. St. (1 P. F. Smith) 175, 185; *Burr v. Todd*, 5 Wright, 206; *Taylor v. The Marcella*, 1 Woods, 302.

dee could not readily find in the market substitutes therefor, as where some rare or unusual painting or statue was the subject-matter of the sale; in such a case, the damages flowing from the breach of the contract could not be readily estimated in dollars and cents, and hence the court would pronounce a stipulation for the payment of a fixed sum of money to be an agreement for liquidated damages.¹ If, however, in this case the stipulated sum of money is very greatly in excess of a reasonable valuation of the goods sold, the stipulation would very likely be considered as a penalty, notwithstanding the uncertainty as to the amount of the damage suffered.² Whether the stipulation for liquidated damages in a contract for the sale of personal property will be treated as liquidated damages, depends, upon the character of the contract. In the case of the contract for the sale of real property, the uncertain personal valuation placed by persons upon the ownership of a particular piece of land, is the justification for treating as liquidated damages, a stipulation for the payment of a fixed sum of money for the breach of a contract of sale. But in ordinary contracts for the sale of personal property, the damages suffered by the breach of the contract, is the difference between the contracted price and what would have to be paid in the market for goods of the same character; hence the damages flowing from the breach of such a contract can be readily computed in this case, and therefore the courts would declare a stipulation for the payment of a fixed sum of money on the breach of the contract of sale to be a penalty.

These cases in application of the rule of the text may be continued indefinitely and in the note below additional cases are added.³ It must be added, that the rule referred to applies only to those cases in which the agreement to pay a stipulated sum is attached to the contract for the performance of one single act; for where the contract provides for the performance, or non-performance of more than one act, of several distinct and separate acts, and the sum of money stipulated for as liquidated damages will, under the terms of the contract, be payable to the obligee, not only upon the non-performance of all of the acts agreed upon, but likewise for the non-performance

¹ *Lynde v. Thompson*, 2 Allen, 460; *per Bigelow*, C. J.; *Gammon v. Howe*, 14 Me. 250; *Chamberlain v. Bagley*, 11 N. H. 234; *Mead v. Wheeler*, 13 *Id.* 351; *Tingley v. Cutler*, 7 Conn. 291; *Shiell v. McNitt*, 9 Paige, 101, 103; *Clement v. Cash*, 21 N. Y. 253; *Knapp v. Maltby*, 13 Wend. 587; *Streep v. Williams*, 12 Wright, 450; *Hise v. Foster*, 17 Iowa, 23; *Morse v. Ruthburn*, 42 Mo. 594; *Williams v. Green*, 14 Ark. 315, 327.

² See *Spencer v. Tilden*, 5 Cow. 144; *Halde-man v. Jennings*, 14 Ark. 329; *Williams v. Green*, 14 *Id.* 315, 326; *Burr v. Todd*, 5 Wright, 206.

³ *Wolf Creek & Co. v. Shultz*, 71 Pa. St. (21 P. F. Smith) 180; *Powell v. Burroughs*, 54 Pa. St.

329; *Pearson v. Williams*, 24 Wend. 246; 24 *Id.* 630; *Brewster v. Edgerly*, 13 N. H. 275; *Curtis v. Brewer*, 17 Pick. 513; *Faunce v. Burke*, 4 Harris, 469; *Berrikott v. Traphagen*, 39 Wis. 220; *Leggett v. Mut. Life Ins. Co.*, 50 Barb. 616; *Goble v. Linder*, 76 Ind. 157; *Ryan v. Martin*, 16 Wis. 57; *Hise v. Foster*, 17 Iowa, 23; *Morse v. Rathbun*, 42 Mo. 594; *Streeter v. Rush*, 25 Cal. 67; *Lightner v. Menzel*, 35 Cal. 452. In the following cases, the sum was held to be a penalty: *Colwell v. Lawrence*, 38 N. Y. 71; *Green v. Tweed*, 13 Abb. Pr. (N. S.) 427; *Staples v. Parker*, 41 Barb. 648; *Wallis v. Carpenter*, 13 Allen, 19; *Long v. Towl*, 42 Mo. 545; *Ranger v. Great Western Ry. Co.*, 5 Ill. L. Cas. 72.

of any one of the acts; the obligee would, at least, in the case of a partial breach, recover more than he has lost by the breach of the contract. In that case, the stipulation is declared to be a penalty, notwithstanding the uncertain character of the damage suffered for the breach of the contract.¹ So, also, where the agreement contains provision for the performance, or non-performance of several acts of different values, the damages flowing from one of them can be definitely estimated. In that case, the agreement for a sum of money to be paid, is to be treated as a penalty and not as liquidated damages.

But often where the agreement does contain provision for the performance of more than one act, if the stipulation for the payment of a sum of money for the breach of the contract applies only to the breach of one of these provisions of the contract, then this stipulation will be treated as liquidated damages, instead of as a penalty.³ So, also, will the stipulation be treated as an agreement for liquidated damages, where it is only to be paid for a general breach of the contract, in respect to all of its provisions.⁴ So, likewise, the contract will not be considered as separate agreements for the performance of several distinct acts, merely because it calls for the performance of several acts. These acts may in fact constitute only parts of one transaction; and in such a case, the contract is in legal contemplation a contract for one transaction and not for many.⁵ Finally, it must be stated, that wherever the payment of a larger sum of money is provided for, in settlement of the breach of a contract for the payment of a smaller sum, it will be treated as a penalty, however disguised the real char-

¹ *Jemison v. Gray*, 29 Iowa, 537; *Lee v. Overstreet*, 44 Ga. 507; *Hamaker v. Schroers*, 49 Mo. 406; *Taylor v. The Marcella*, 1 Woods, 302; *Lyman v. Babcock*, 40 Wisc. 503; *Dallaghan v. Fitch*, 42 *Id.* 679; *Ex parte Pollard*, 17 Bank. Reg. 223; *Savannah R. R. v. Callaghan*, 56 Ga. 331; *Shreve v. Brereton*, 51 Pa. St. (1 P. F. Smith) 175; *Curry v. Larer*, 7 Barr, 470; *Perkins v. Lyman*, 11 Mass. 76; *Lampman v. Cochran*, 16 N. Y. 269, 277. In the leading case of *Jemison v. Gray*, *supra*, the contract was to deliver 60,000 railroad ties to be paid for when delivered, with the exception of ten per cent. which was to be retained by the buyer as a security for the final completion. This ten per cent. was considered to be a penalty and not liquidated damages.

² *Trower v. Elder*, 27 Ill. 452, and cases cited; *First Orthodox Ch. v. Walruth*, 27 Mich. 232; *Cook v. Finch*, 19 Minn. 407; *Morris v. McCoy*, 7 Nev. 399; *Dullaghan v. Fitch*, 42 Wisc. 679; *Lyman v. Babcock*, 40 *Id.* 503; *Savannah R. R. v. Callahan*, 56 Ga. 331; *Shreve v. Brereton*, 51 Pa. St. (1 P. F. Smith) 175, 180; *Niver v. Rossman*, 18 Barb. 50; *Jackson v. Baker*, 2 Edw. Ch. 471; *Cheddick v. Marsh*, 1 Zab. 363; *Whitfield v. Levy*, 6 Vroom, 149; *Berry v. Wisdom*, 3 Ohio St. 244; *Bayse v. Androse*, 28 Mo. 39; *Long v. Towle*, 42 *Id.* 548. In New York the rule, as stated in the above text, is modified so that

the exception to the general rule is recognized only when one of the provisions of the contract is for the payment of a sum of money: *Cothel v. Talmadge*, 9 N. Y. 551; *Ruggles, J., Clement v. Cash*, 21 N. Y. 253, 259; *Bagley v. Peddie*, 16 *Id.* 470.

³ *Shute v. Hamilton*, 3 Daly, 462; *Mott v. Mott*, 11 Barb. 134; *Dakin v. Williams*, 17 Wend. 447; 22 *Id.* 201; *Pearson v. Williams*, 24 *Id.* 244; 26 *Id.* 630; *Mead v. Wheeler*, 13 N. H. 301; *Hodges v. King*, 7 Met. 583; *Lange v. Week*, 2 Ohio St. 519; *Watts v. Sheppard*, 2 Ala. 425, 445.

⁴ *Hall v. Crowley*, 5 Allen, 304; *Chase v. Allen*, 13 Gray, 42; *Young v. White*, 5 Watts, 460; *Powell v. Burroughs*, 54 Pa. St. (4 P. F. Smith) 329, 336; *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. S.) 59; *Leary v. Laffin*, 101 Mass. 334; *Dwtinel v. Brown*, 54 Mo. 458; *Clement v. Cash*, 21 N. Y. 253; *Cothel v. Talmadge*, 9 *Id.* 551; *Bagley v. Peddie*, 16 *Id.* 470.

⁵ *Clement v. Cash*, 21 N. Y. 253; *Bagley v. Peddie*, 16 *Id.* 470; *Cothel v. Talmadge*, 9 *Id.* 551; *Leary v. Laffin*, 101 Mass. 334. In *Clement v. Cash*, *supra*, *Wright, J.*, applied the rule as follows: "The contract in question, in legal effect, provided but for the performance of a single act on each side, and at the same period of time, viz., the execution and delivery of a deed of the land of the defendant, and payment therefor by the plaintiff.

acter of the transaction may be.¹ The court will look below the surface of the transaction for the ascertainment of its true character.

§ 30. **Election to pay penalties or liquidated damages.**—As a consequence of the opposition, both of the courts of law and of equity, to the enforcement of the penalty for the non-performance of a contract, the obligor is never permitted to elect to pay a penalty and thus escape the obligation to specifically perform the contract; his election to do so is never treated as an obstacle to the enforcement of the specific performance of the contract.² Where, however, the agreement for the payment of a sum of money for the breach of a contract is held by the courts, under the circumstances of the case, to be an agreement for liquidated damages, and the obligor elects to pay the liquidated damages, equity will refuse to decree specific performance in behalf of the obligee, and leave the injured party to his remedy at law.³

§ 31. **General principles governing the relief against forfeitures.**—It has often been stated and accepted without question, that relief would be granted against forfeiture in identically the same cases where relief is afforded against the enforcement of a penalty; in other words, that wherever the obligation is the payment of a sum of money, or where the damages flowing from a non-performance of the agreement can be estimated in money, in all such cases relief will be afforded against the forfeiture provided for; and that equity will not relieve against forfeiture wherever the damages from the non-performance of the agreement cannot be estimated in money. It is certainly true, that where the stipulation of a forfeiture is intended to secure the performance of an act in which the damages from the non-performance cannot be estimated, the relief will be denied unless

That the defendant agreed to receive in payment for his deed, and the plaintiff to pay simultaneously with its delivery, the consideration in money and other property, cannot divest what was to be done of the character of a single transaction. If the defendant failed to convey, or the plaintiff to make payment in the way covenanted, there was a total non-performance. The consideration to be paid was nine thousand dollars, of which four thousand was to be in cash, and five thousand in securities, the cash and transfers of the securities to be passed over to the defendant on receipt of the deed."

¹ *Lampman v. Cochran*, 16 N. Y. 275; *Clement v. Cash*, 21 N. Y. 253, 260; *Bagley v. Peddie*, 16 N. Y. 469, 471; *Dakin v. Williams*, 17 Wend. 447; 22 *Id.* 401; *Tiernan v. Hamman*, 16 Ill. 400; *Kuhn v. Meyers*, 37 Iowa, 351; *Morris v. McCoy*, 7 Nev. 399; *Spear v. Smith*, 1 Denio, 465; *Hoag v. McGinnis*, 22 Wend. 163; *Niver v. Rossman*, 18 Barb. 50; *Gregg v. Crosby*, 18 Johns. 219, 226; *Curry v. Larer*, 7 Barr. 400; *Whitfield v. Levy*, 6 Vroom, 149; *Shiell v. McNitt*, 9 Paige, 101, 106; *Niver v. Rossman*, 18

Barb. 50; *Davis v. Hendrie*, 1 Mont. Ter. 499; *Hardee v. Howard*, 33 Ga. 533; *Sutton v. Howard*, *Id.* 536; *Goldsworthy v. Strutt*, 1 Exch. 659, 665; *Lynde v. Thompson*, 2 Allen, 456, 459.

² *Jones v. Heavens*, L. R. 4 Ch. D. 636; *In re Dagenham Dock Co.*, L. R. 8 Ch. 1022; *Ewing v. Gordon*, 49 N. H. 444; *Gillis v. Hall*, 7 Phila. 422; 2 Brews. 342; *Dooley v. Watson*, 1 Gray, 414; *Hooker v. Pyncheon*, 8 *Id.* 550; *Fisher v. Shaw*, 42 Me. 32; *Hull v. Sturdivant*, 46 *Id.* 34; *Dailey v. Lichfield*, 10 Mich. 29; *Whitney v. Stone*, 23 Cal. 275; *Dike v. Green*, 4 R. I. 288, 295. It must, however, be observed, that where the election is made by the creditor or obligee, to take, or recover the sum of money, and he has been permitted to recover a judgment for damages, he cannot then ask for a specific performance of the contract, his resort to the legal remedy precludes his employment of the equitable remedy. *Fox v. Scard*, 33 Beav. 327, *per* Sir J. Romilly, M. R.

³ *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 73; *Shiell v. McNitt*, 9 Paige, 101; *St. Mary's Church v. Stockton*, 4 Halst. Ch. 520; *Bodine v. Gladding*, 9 Harris, 50; *Holdman v. Jennings*,

special circumstances justify the grant of such relief:¹ and it is also true, that wherever the agreement secured is a debt, and the forfeiture is intended as a security for the payment of the debt, equity will afford relief against forfeiture.² But there are many cases in which equity will not relieve against forfeitures, even though compensation can be made:³ and also, where the compensation cannot be made or estimated, equity will afford relief from the forfeiture, on account of the special circumstances of the cases which make the enforcement of the forfeiture peculiarly inequitable. Thus, for example, where the forfeiture has been occasioned by accident, fraud, surprise or mistake of the obligor, the court will ordinarily grant the relief against the forfeiture, although the obligation is not one which would permit of the accurate estimation of the damages of the breach.⁴ The courts of equity will also relieve or prevent the enforcement of a forfeiture where, subsequent to the breach of the agreement, the obligee waives the right of forfeiture or acquiesces in the breach, by receiving benefits from the obligor in the further performance of the agreement, or stands by and permits the obligor to continue the performance of the agreement.⁵ On the other hand, if the obligor is guilty of negligence or willfulness in the non-performance of the agreement, and, therefore, the agreement is not due to misfortune; the court of equity will refuse to grant relief against the forfeiture in any such case, whatever may be its peculiar circumstances.⁶ The general principles here set forth will now be to special cases of more or less common occurrence.

§ 32. **Relief against forfeiture in mortgages.**—In application of the proposition set forth in the preceding paragraph, it is a well-known fact that a court of equity will relieve a mortgagor from the forfeiture of his estate as a consequence of the condition, namely, the non-pay-

14 Ark. 329; *Skinner v. Dayton*, 2 Johns. Ch. 526; *City Bank of Baltimore v. Smith*, 3 Gill. & J. 265; *Jaquith v. Hudson*, 5 Mich. 123; *Hahn v. Concordia Soc.*, 42 Md. 460.

¹ *Gregory v. Wilson*, 9 Hare, 683; *Skinner v. Dayton*, 2 Johns. Ch. 526, 535; *Baxter v. Lansing*, 7 Paige, 350; *Drenkler v. Adams*, 20 Vt. 415; *Clarke v. Drake*, 2 Chand. (Wis.) 253; *Gregg v. Landis*, 4 C. E. Green, 850, 6 *Id.* 494, 511; *Ottawa Pl. Rd. Co. v. Murray*, 15 Ill. 336.

² *Bracebridge v. Buckley*, 2 Price, 200; *Skinner v. Dayton*, 2 Johns. Ch. 535; 17 Johns. 339; *Hagar v. Buck*, 44 Vt. 285; *Hancock v. Carlton*, 6 Gray, 39; *Carpenter v. Westcott*, 4 R. I. 225; *Thompson v. Whipple*, 5 *Id.* 144; *Walker v. Wheeler*, 2 Conn. 229; *Hart v. Homlier*, 8 Harris, 248; *Bright v. Rowland*, 3. How. (Miss.) 398; *Moore v. Platte*, 8 Mo. 467; *Walling v. Aiken*, 3 McMullin Eq. 1; *Royand v. Walker*, 1 Wis. 527; *Giles v. Austin*, 38 N. Y. Super. Ct. 215; *Orr v. Zimmerman*, 63 Mo. 72; *Palmer v. Ford*, 70 Ill. 369.

³ *Eaton v. Lyon*, 3 Ves. 692, 693; *Germantown &c. R. R. v. Fidler*, 60 Pa. St. (10 P. F. Smith) 131; *Dunklee v. Adams*, 20 Vt. 415 See also *post* § 33.

⁴ *Eaton v. Lyon*, 3 Ves. 693, *per* Lord Alvanley; *Hill v. Barclay*, 18 Ves. 58, 62, *per* Lord Eldon; *Harman v. South London Water Co.*, 2 Meriv. 61; *Bamford v. Creasey*, 3 Giff. 675; *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248; *Meek v. Carter*, 6 W. R. 852.

⁵ *Lilly v. The Fifty Associates*, 101 Mass. 432; *Helme v. Philadelphia Ins. Co.* 61 Pa. St. (11 P. F. Smith) 107; *Gregg v. Landis*, 4 C. E. Green, 356; 6 *Id.* 494, 507; 2 Washb. on Real Prop. 19; *Co. Lit.* 211b; *Andrews v. Senter*, 32 Me. 397; *Gray v. Blanchard*, 8 Pick. 284; *Hubbard v. Hubbard*, 97 Mass. 192; *Doe v. Glandwin*, 6 Q. B. (51 Eng. C. L.) 953; *Gild v. Richards*, 16 Gray, 326; *Chalker v. Chalker*, 1 Conn. 79; *Jackson v. Crysler*, 1 Johns. 126; *Gluck v. Elkan*, 36 Minn. 80; *Hubbard v. Hubbard*, 97 Mass. 192; *Coon v. Brecket*, 2 N. H. 153; *Chalker v. Chalker*, 1 Conn. 79; *Jackson v. Crysler*, 1 Johns. 126; *Crouch v. Wabash, &c. R. R. Co.*, 22 Mo. App. 315.

⁶ *Hancock v. Carlton*, 6 Gray, 39; *Clarke v. Drake*, 3 Chand. (Wis.) 223; *Horsburg v. Baker*, 1 Peters, 236.

ment of the debt.¹ Not only will the court refuse to enforce the forfeiture and prevent the enforcement of the forfeiture, where the conveyance is a mortgage; but it will not permit the parties themselves by any contemporaneous agreement to waive the right to its relief. The mortgagor cannot by any agreement contemporaneous with the execution of the mortgage, deny to himself upon the breach of the condition his right of redemption.² Not only is this the case; but wherever the relation of debtor and creditor exists, however informal or obscure may be the character of the transfer, the agreement would be held to create a mortgage although the parties did not intend that that should be the effect of the transaction.³

§ 33. **Agreements to repurchase.**—If in connection with the transfer of property an agreement is made between the vendor and vendee, that if the vendor should tender the payment of a certain sum of money, in the time stipulated, he shall have the right to regain the estate, the transaction may be either a mortgage to secure the payment of a debt or an agreement simply to permit the vendor to repurchase the estate. The difference in the legal effect of the two transactions is very great. If the agreement be merely to repurchase upon certain specified terms, or at the time stipulated, a failure to comply with the terms of the agreement destroys the right to repurchase, and the grantor has no equity of redemption, of which he can afterwards avail himself in a court of equity. If it is a defeasance, he has that right, the conveyance being a mortgage. Wherever a doubt exists whether the agreement is one to repurchase or a defeasance, the courts are inclined to the latter construction. And where the relation between the parties is that of debtor and creditor, and the intention of the parties, as shown on the face of the deed, is that the agreement should operate as a security for the debt, the presumption becomes conclusive that the agreement is a defeasance. And generally, under such circumstances, parol evidence will not be admissible to rebut this

¹ See *post* §§ 411-414.

² *Wing v. Cooper*, 37 Vt. 181; *Clark v. Henry*, 2 Cow. 324; *Henry v. Davis*, 7 Johns. Ch. 40; *Waters v. Randall*, 6 Metc. 479; *Bailey v. Bailey*, 5 Gray, 505; *Vanderhaize v. Haques*, 13 N. J. 244; *Oldenbaugh v. Bradford*, 67 Pa. St. 104; *Rankin v. Mortimore*, 7 Watts, 372; *Baxter v. Child*, 39 Me. 110; *Johnston v. Gray*, 16 Serg. & R. 361; *Murphy v. Calley*, 1 Allen, 107; *Clark v. Condit*, 18 N. J. Eq. 358; *Batty v. Snook*, 5 Mich. 231; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Eaton v. Whiting*, 3 Pick. 484; *Davis v. Stonestreet*, 4 Ind. 101; *Wynkoop v. Cowing*, 21 Ill. 570; *Robinson v. Farrelly*, 16 Ala. 472; *Cherry v. Browen*, 4 Sneed, 415; *Lee v. Evans*, 8 Cal. 424; *Pierce v. Robinson*, 13 Cal. 125; *Rogan v. Walker*, 1 Wis. 527; *Plato v. Roe*, 14 Wis. 453; *Willets v. Burgess*, 34 Ill. 494; *Miami Ex. Co. v. U. S. Bank*, *Wright* (Ohio), 253; *Youle v. Richards*, 1 N. J. Eq. 534; *McClurkan*

v. Thompson, 69 Pa. St. 305. See *Tiedeman*, *Real Prop.*, § 308.

³ *Nugent v. Riley*, 1 Metc. 117; *Hebron v. Centre Harbor*, 11 N. H. 571; *Holmes v. Grant*, 8 Paige Ch. 243; *Lanfair v. Lanfair*, 18 Pick. 299; *Austin v. Dower*, 25 Vt. 558; *Stewart v. Hutchings*, 13 Wend. 485; *Carey v. Rawson*, 8 Mass. 159; *Gilson v. Gilson*, 2 Allen, 115; *Hicks v. Hicks*, 5 Gill. & J. 75; *Breckenridge v. Auld*, 1 Robt. 148; *Read v. Gaillard*, 2 Desau. 552; *Harrison v. Lemon*, 3 Blackf. 51; *Carr v. Holbrook*, 1 Mo. 240; *Belton v. Avery*, 2 Root, 279; *Marshall v. Stewart*, 17 Ohio, 356; *Pugh v. Holt*, 27 Miss. 461; *Batty v. Snook*, 5 Mich. 231; *Gillis v. Martin*, 2 Dev. Eq. 470; *Ogden v. Grant*, 6 Dana, 473; *Coldwell v. Woods*, 3 Watts, 188; *Kenkle v. Wolfersberger*, 6 Watts, 126; *Watkins v. Gregory*, 6 Blackf. 113; *Peterson v. Clark*, 15 Johns. 205; *Rice v. Rice*, 4 Pick. 349; *Pearce v. Wilson*, 111 Pa. St. 14.

presumption, although such evidence is freely admitted to rebut the contrary presumption.¹

§ 34. **Forfeitures arising from the sale of shares of stock.**—It seems to be an invariable rule, that the court will refuse to grant relief against the forfeiture of the shares of stock in a corporation, which has been incurred by the failure of the stockholder, or subscriber, to pay the instalment due thereon, under the charter or the by-laws of the company. The court will refuse relief, except where the failure to comply with these provisions of the charter is due to fraud or unavoidable mistake.²

§ 35. **Forfeitures in conveyances and leases.**—Where a lease contains a condition that the lessor may re-enter for the non-payment of rent, equity will afford relief against forfeiture; not only before the lessor has regained the possession, or before he brings his action of ejectment for the recovery of possession, but even afterward; that is, even after the action of ejectment has resulted in a judgment for the recovery of the possession, or the lessor has in any way acquired the possession. In such a case, the forfeiture is held to be nothing more than a provision for compelling the payment of a debt.³ But if the forfeiture of the lessee's estate is enforced for the breach of the covenants, other than the covenant to pay rent, then relief will be granted or denied according to the character of these covenants; denying the relief, where the other covenants are of such a character, that the damages flowing therefrom cannot be estimated in money.⁴ It is the general rule, that unless the case is attended with peculiar circumstances which call for the extraordinary use of the powers of equity, relief will be granted against a forfeiture which arises from the breach of the other ordinary covenants of a lease; on the ground, that exact compensation in money can be made for the breach of them. This rule is applied to all covenants to repair the premises:⁵ the

¹ *Kelly v. Thompson*, 7 Watts, 401; *Wing v. Cooper*, 37 Vt. 179; *Tucks v. Lindsay*, 18 Iowa, 505; *Trull v. Skinner*, 17 Pick. 216; *Page v. Foster*, 7 N. H. 392; *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. 483; *Weathersly v. Weathersly*, 40 Miss. 469; *Pearson v. Seay*, 35 Ala. 612; *Rich v. Doane*, 35 Vt. 125; *De France v. De France*, 34 Pa. St. 385; *Watkins v. Gregory*, 6 Blackf. 113; *Rice v. Rice*, 4 Pick. 349; *Haines v. Thompson*, 70 Pa. St. 438; *Woodson v. Wallace*, 22 Pa. St. 171; *Peterson v. Clark*, 15 Johns. 205; *Robinson v. Cropsey*, 2 Edw. Ch. 138; s. c. 6 Paige, 480; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Hughes v. Sheaff*, 19 Iowa, 335; *Sears v. Dixon*, 33 Cal. 326; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Davis v. Stonestreet*, 4 Ind. 151; *Heath v. Williams*, 30 Ind. 495; *Cornell v. Hall*, 22 Mich. 377; *Pennington v. Hanby*, 4 Munf. 140; *Henly v. Hotaling*, 41 Cal. 22; *Snyder v. Griswold*, 37 Ill. 216; *McCarron v. Cassidy*, 18 Ark. 34; *Montgomery v. Chadwick*, 7 Iowa, 114; *Kearney v. McComb*, 16 N. J. Eq. 189; *Glover v.*

Payne, 19 Wend. 518. See *Tiedeman, Real Prop.*, §§ 305-304.

² *Sparks v. Company, &c. of Liverpool Waterworks*, 13 Ves. 428, 433, 434, *per* Sir Wm. Grant, M. R. 32; *Sudlow v. Dutch, &c. Ry. Co.*, 21 Beav. 43; *Germantown, &c. R. R. v. Fittler*, 60 Pa. St. (10 P. F. Smith) 124, 131; *Small v. Herkimer Man. Co.*, 2 N. Y. 335.

³ *Bowser v. Colby*, 1 Hare, 109, 128, 130-132; *Atkins v. Chilson*, 11 Met. 112; *Sanborn v. Woodman*, 5 Cush. 360; *Stone v. Ellis*, 9 Id. 55; *Palmer v. Ford*, 70 Ill. 369.

⁴ *Bowser v. Colby*, 1 Hare, 109; *Horne v. Thompson*, 1 Sausse & Scully, 615; *Wadman v. Calcraft*, 10 Ves. 67; *Davis v. West*, 12 Id. 475; *Nokes v. Gibbon*, 3 Drew. 693.

⁵ *Hill v. Barclay*, 16 Ves. 403, 406; 18 Ves. 58, 61, *per* Lord Eldon; the earlier cases of *Hack v. Leonard*, 9 Mod. 90, *per* Lord Macclesfield; and *Sanders v. Pope*, 12 Ves. 282, 290, *per* Lord Erskine.

covenant against assignment and subletting:¹ the covenant to insure² and all covenants regulating or limiting the use of the land.³

§ 36. **Forfeiture in contract for the sale of land.**—The question, when a vendee shall lose his rights under an executory contract for the sale of land for the breach of his own obligation therein, will depend upon the relation of the obligation to the contract of the vendor. That is, where the matter of time in the performance of his contract to pay the consideration is deemed to be essential to the full performance of his agreement, then equity will not afford relief; but where the time is not essential, and the substantial rights of the vendor can be obtained by the performance of the contract at a later day, the relief will be afforded. The question, when time is of the essence of the contract, cannot be fully presented here. It must suffice in this connection to say, that when the payment of a consideration by the vendee is a condition precedent to the performance of the contract by the vendor, equity will, as a general rule, refuse relief against forfeiture. But where the stipulation for the payment of the consideration is a condition subsequent, then the provision for forfeiture of the rights of the vendee under the contract is treated as a security for the payment of the debt, and equity will in such cases grant relief to the vendee against forfeiture:⁴ where the court refused to interfere for the relief of the vendee.

§ 37. **Equity will not enforce forfeitures.**—While equity will in many cases refuse to interfere for the relief of an obligor against forfeiture for the breach of the obligation, it is a well-settled rule to which there are no real, if apparent exceptions, that the court of equity will refuse to interfere on behalf of the party entitled to the forfeiture: he must look solely to the courts of law for aid. In the enforcement of such a forfeiture, a court of equity never lends its aid.⁵

¹ *Hill v. Barclay*, 18 Ves. 36, *per* Lord Eldon; *Baxter v. Lansing*, 7 Paige, 350; *Gregg v. Landis*, 6 C. E. Green, 494, 514.

² *Gregory v. Wilson*, 9 Hare, 683; *Havens v. Middleton*, 10 Hare, 641.

³ *Hills v. Rowland*, 4 De G. M. & G. 430; *Maicher v. Foundling Hospital*, 1 V. & B. 187; *Descarlett v. Dennett*, 9 Mod. 22.

⁴ *Wells v. Smith*, 2 Edw. Ch. 78; 7 Paige, 22, 24; *Edgerton v. Peckham*, 11 *Id.* 352, 359; *Sanborn v. Woodman*, 5 Cush. 36; *De Camp v. Flay*, 5 S. & R. 323, 326; *Remington v. Irwin*, 2 Harris, 143, 145; *Jones v. Robbins*, 29 Me. 351; *Clark v. Lyons*, 25 Ill. 105; *Snyder v. Spaulding*, 57 *Id.* 480, 484; *McClartey v. Gokey*, 31 Iowa, 505; *Steele v. Branch*, 40 Cal. 3; *Farley v. Vaughn*, 11 *Id.*

227; *Royan v. Walker*, 1 Wis. 527; *Benedict v. Lynch*, 1 Johns. Ch. 370.

⁵ *Livingston v. Tompkins*, 4 Johns. Ch. 415, 431; *Baxter v. Lansing*, 7 Paige, 350, 353; *Gordon v. Lowell*, 21 Me. 251; *Smith v. Jewett*, 40 N. H. 530, 534; *Atlas Bank v. Nahant Bank*, 3 Met. 581; *Warner v. Bennett*, 31 Conn. 461, 468; *Oil Creek R. R. v. Atlantic & G. W. R. R.*, 57 Pa. (7 P. F. Smith) 65; *Meig's Appeal*, 62 Pa. St. (12 P. F. Smith) 23, 35; *McKim v. White Hall Co.*, 2 Md. Ch 510; *White v. Port Huron, &c. R. R.*, 13 Mich. 356; *Michigan Bank v. Hammond*, 1 Dougl. (Mich.) 527; *Lawl v. Hyde*, 39 Wis. 353; *Eveleth v. Little*, 16 Me. 374, 377; *Clarke v. Drake*, 3 Chand. (Wis.) 253, 259; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Beecher v. Beecher*, 43 Conn. 556.

CHAPTER IV.

EQUITABLE DOCTRINE OF PRIORITY, AND HEREIN OF THE RIGHTS OF BONA FIDE PURCHASERS.

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§ 40. **Fundamental principles of the doctrine of priority.**—The question, which of two conflicting interests or claims upon the property of another shall have priority, is one involving the application of two equitable maxims, which have been discussed in a previous chapter, and are as follows: *First*, where there are equal equities, the first in order of time shall prevail; and *Secondly*, where there is equal equity, the legal title must prevail.¹ The meaning of these maxims is, that whenever equities are equal and one of them becomes attached to the legal title, the person so owning both the equity and the legal title shall have the priority of claim over the one who only owns the equity.² When, however, the legal title is owned by some third person, to whom the question of priority of equitable rights is foreign; in other words, whenever the question of priority between equitable claims is not affected by the possession by one of the claimants of the legal title, then the equality, or the inequality of the character of the equities determines their relative priority. Under these cir-

¹ In this connection, the term "equity" is used in the sense of an equitable claim of some sort.

² *Thorndike v. Hunt*, 3 De G. & J. 563, 570, 571; *Fitzsimmons v. Ogden*, 7 Cranch, 2, 18; *Newton v. McLean*, 41 Barb. 285.

cumstances, if the equities are equal in their claims for consideration by the court of equity, then the first in order of time will prevail.¹ Finally, as a corollary of the preceding rules, if the equities are unequal in character and value, the equity which is superior in point of fact will prevail over the inferior equity, although the superior equity may be inferior in order of time.² In the subsequent paragraphs these general principles will be successively applied to particular cases.

§ 41. **To what estates and interests the doctrine applies.—Not to legal estates.**—At the outset of the discussion of this doctrine, it must be borne in mind that this is an equitable doctrine; and that the equitable doctrine of priority does not apply to legal estates in the absence of any statutory modifications. The priority between legal estates, or legal claims upon property, is completely controlled by the order of time. The invariable legal rule is, that when a valid legal conveyance of property is made, the grantor has nothing left in him which he can transfer to another, and hence the first conveyance must have the precedence, even though the second vendee takes his deed without any notice of the prior conveyance, and pays full value for it.³ The equitable doctrine of priority, therefore, can only apply to equitable estates and interests, in claims of priority over other equitable or legal estates; that is, these rules can be resorted to for advancing the interest of an equitable estate over a legal estate, but it cannot apply where the conflicting estates are both legal.⁴ This exclusion of conflicting legal estates from the government of their relative priority by the equitable doctrine under discussion has, however, been seriously modified by statutes which provide for the recognition of some other rule than that of time, in the determination of the priority between two successive legal conveyances. The first is that of the statute of 13 Eliz., c. 5, by which conveyances of lands or titles which are made for purposes of delaying or defrauding creditors, are declared to be void as against such creditors and their representatives. So also, by the statute of 27 Eliz., c. 4, the same provision is applied to grants of land, made for the purpose of defrauding subsequent purchasers. In such cases, what would otherwise be a valid

¹ *Phillips v. Phillips*, 4 De G. F. & J. 208, 215 *per* Lord Westbury; *Shirras v. Craig*, 7 Cranch, 34, 48; *Boone v. Chiles*, 10 Pet. 177; *Watson v. Le Row*, 6 Barb. 481, 485; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 603, 608; *Lynch v. Utica Ins. Co.*, 18 Wend. 236, 253; *Grosvenor v. Allen*, 9 Paige, 74, 76; *Downer v. The Bank*, 39 Vt. 25; *Bellas v. McCarty*, 10 Watts, 13; *Kramer v. Arthurs*, 7 Barr. 165; *Sumner v. Waugh*, 56 Ill. 531; *Pensonneau v. Bleakley*, 14 Ill. 15; *Cherry v. Monro*, 2 Barb. Ch. 618, 76; *Thorp v. Durbon*, 45 Iowa, 192; *Hoadley v. Hadley*, 48 Ind. 452; *Stevens v. Watson*, 4 Abb. App. Dec. 303; *Littlefield v. Nichols*, 42 Cal. 372; *Walker v. Matthews*, 58 Ill. 196.

² *Basset v. Nosworthy*, 2 Eq. Lead. Cas. 1; *Le Neve*, 2 Eq. Lead. Cas. 109, 117, 144.

³ *Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 716, *per* Davis, J.; *Ruckman v. Decker*, 23 N. J. Eq. (8 C. E. Green) 283; *Van Amringe v. Morton*, 4 Whart. 382; *Wade v. Withington*, 1 Allen, 561; *Waring v. Smyth*, 2 Barb. Ch. 119, 133; *Arrison v. Harmstead*, 2 Barr. 191, 197; *Jones v. Jones*, 3 Sim. 633.

⁴ *Basset v. Nosworthy*, Rep. temp. Finch, 102; 2 Eq. Lead. Cas. 1, 31, 46; *Le Neve v. Le Neve*, Ambl. 436; 2 Eq. Lead. Cas. 109, 117; *Newton v. Newton*, L. R. 6 Eq. 135.

legal conveyance is postponed to the satisfaction of the claims of creditors or of a subsequent purchaser, and in both cases the claim which is given priority is the one which is acquired subsequently. Similar statutes are in force in the American states, and in the bankrupt and insolvent laws are found additional provisions of the same kind. The more important and more general modification of this rule is to be found in the recording laws of the various states, which provide that every conveyance which is not recorded shall be considered void as against a subsequent purchaser for a valuable consideration.¹

§ 42. **Subsequent equity protected by the legal title.**—As has already been stated, if a second or other subsequent equitable title or interest, which would otherwise be postponed to the earlier equity on the ground that the equities are equal, is attached to the legal estate or title, this conjunction of the legal title and the later equity in the one person gives the owner of that equity a priority over the earlier equity which he could not otherwise claim; but in order that this priority might be claimed, it is held by some authorities to be essential that the owner of the later equity acquires the legal title without notice of the prior equitable interest.² Whenever a subsequently acquired equity is acquired with notice of the existence of a prior equitable claim, the later equity cannot claim precedence over the prior equity, whether the legal title or equity is first acquired. The notice of the prior equity destroys whatever claim to priority might otherwise exist.³ But whether the acquisition of the legal estate, after notice of a prior equity, will prevent the claim of priority by one who acquires the later equity without notice of the prior equity, is a question upon which the authorities differ. The later English cases adopt the rule, that in order that priority may be acquired by the later of two equal equitable interests, in consequence of the possession of the legal estate, that not only must the later equitable estate be acquired without notice of the prior equity, but that the legal estate must also be so acquired; so that the claim for priority will be lost where the legal estate is acquired after notice of the prior equity, although the later equity was acquired by the same person without such notice, and he secured the legal title for the express purpose of acquiring this priority.⁴ But, on the other hand, the proposition is maintained by a number of cases that, whenever the later of two equal equities is acquired without notice of the prior equity,

¹ See *post*, § 47 for a consideration of the recording acts.

² *Cave v. Cave*, L. R. 15 Ch. D. 639; *Hunter v. Walters*, L. R. 7 Ch. 75; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; *Hewitt v. Loosemore*, 9 Hare, 449; *Fitzsimmons v. Ogden*, 7 Cranch, 2; *Newton v. McLean*, 41 Barb. 285; *Beall v. Butler*, 54 Ga. 43; *Jones v. Lapham*, 15 Kans. 540; *Fox v. Palmer*, 25 N. J. Eq. (10 C. E. Green) 416; *Straus v. Kerngood*, 31 Gratt. 584.

³ *Montefiore v. Browne*, 7 H. L. Cas. 241, 259;

Meckreth v. Symmons, 15 Ves. 329, 350; *Tourville v. Naish*, 3 P. Wms. 307; *Mundrell v. Mundrell*, 10 Ves. 246, 271; *Merry v. Abney*, 1 Chan. Cas. 38; *Earl Brook v. Bulkeley*, 2 Ves. Sen. 498; *Van Meter v. McFaddin*, 8 B. & O. 435; *School Dist. v. Taylor*, 19 Kans. 287. *In re Sands Brewing Co.* 3 Biss. 175.

⁴ *Mumford v. Stohwasser*, L. R. 18 Eq. 556, 562, 563; *Allen v. Knight*, 5 Hare, 272; *Sharples v. Adams*, 32 Beav. 213; *Carter v. Carter*, 3 K. & J. 617.

such later equity may be given priority by the acquisition of the legal estate, even though the legal estate is taken with notice of the prior equity.¹

§ 43. **Priority of time among equal equities.**—It has already been explained that where equities are equal, and neither of the claimants to priority has the legal estate, the general rule is that the first in point of time shall have priority. This doctrine is fully recognized and generally applied by the American courts.² This priority of time is, however, very often modified by the controlling influence of the recording laws; that is, although as between the original parties who acquire these successive equal equities, the rule governs the question of priority, yet where the later equity is transferred to a *bona fide* purchaser who takes the property for value without notice of the prior equity, such *bona fide* purchaser of the later equity acquires under the recording laws a priority which his assignor could not claim.³

§ 44. **Superior and inferior equities.**—The deduction from the two maxims which constitute the foundation of equitable priority is, that where one of two equities is superior in fact, that is which has a greater claim on the courts of equity for a recognition of priority in consideration, the original claim of priority in order of time must give way, so that the equity which is superior in fact shall have precedence over that which is inferior. This is a negative consequence of the maxim, that the priority in the order of time can only apply where the equities are equal. Now an equity may be superior to another intrinsically, or the superiority may be due to some collateral circumstance. In the first case, the nature of the equity appeals more strongly for protection to the court of equity, and gives to the claim for precedence of the other equity a more or less unconscionable character. For example, where two mortgages are given simultaneously over the same land, and one of them is to secure the purchase-money, it would be but reasonable for the court of equity to hold that the purchase-money mortgage shall, in case of conflict of interest, have precedence over the mortgage given to secure some independent debt; and such is the ruling of the courts, sometimes in conformity with a statutory provision, but equally so in the absence of statute.⁴ The

¹ Leach v. Ansbacher, 55 Pa. St. (5 P. F. Sm.) 85; Baggerly v. Gaither, 2 Jones, Eq. 80; Carroll v. Johnston, 2 Id. 120, 123; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Siter v. McClannachan, 2 Gratt. 280, 283; Zollman v. Moore, 21 Id. 313; Osborn v. Carr, 12 Conn. 195, 208; Gibler v. Trimble, 14 Ohio, 323; Campbell v. Brackenridge, 8 Blackf. 471; Grimstone v. Carter, 3 Paige, 421, 437; Fash v. Reevesies, 32 Ala. 451.

² Berry v. Mut. Ins. Co., 2 Johns. Ch. 603; Cherry v. Monro, 2 Barb. Ch. 618; Grosvenor v. Allen, 9 Paige, 74, 76; Thorpe v. Durbon, 45 Iowa, 192; Hoadley v. Hadley, 48 Ind. 452; Stevens v. Watson, 4 Abb. App. Dec. 302; Littlefield v. Nich-

ols, 42 Cal. 372; Walker v. Matthews, 58 Ill. 196.

³ Morse v. Brockett, 67 Barb. 234; Van Aken v. Gleason, 34 Mich. 477; Gausen v. Tomlinson, 23 N. J. Eq. (8 C. E. Green) 405; Gausen v. Tomlinson, *supra*; Howard v. Chase, 104 Mass. 249; Green v. Warnick, 64 N. Y. 220; Rodes v. Canfield, 8 Paige, 545; Jones v. Phelps, 2 Barb. Ch. 440; Pomeroy v. Latting, 15 Gray, 435; Sparks v. State B'k, 7 Blackf. 469; Corning v. Murray, 3 Barb. 652; Clark v. Brown, 3 Allen, 509; Dusenbury v. Hulbert, 2 T. & C. 177.

⁴ Heusler v. Nickum, 38 Md. 270; Alderson v. Ames, 6 Id. 52, 56; Clabaugh v. Byerly, 7 Gill. 354; Stansel v. Roberts, 13 Ohio, 148; Ahern v.

purchase-money mortgage also is given precedence over the liens and interests which attach thereto immediately upon the acquisition of the estate, such as mechanic's liens and judgment liens, where the judgment or lien has been procured prior to the acquisition of the property.¹ It is also a familiar rule, that a wife's dower attaches to the husband's estate subject to a purchase-money mortgage.² The same priority is conceded to the vendor's lien, wherever such lien is recognized as existing.³

§ 45. **Inequality of equity determined by collateral circumstances.**—The inequality of equity may also be determined by collateral circumstances. For example, if the owner of a prior equity should fraudulently mislead a would-be subsequent purchaser of an equitable claim, or legal title to the same property, by denying the existence of his own claim, then the priority which he could claim in favor of his earlier equity as against the equity or legal interest subsequently acquired, will be lost because of his misrepresentation in response to the inquiry of such subsequent purchaser. The owner of the prior equity will under these circumstances be estopped from asserting his claim for priority against one, who acquires the subsequent interest in reliance upon the former's denial of all claim of the land. This doctrine of estoppel will destroy the priority of the earlier equity, not only as against a subsequent equity, but also against the legal title which one might acquire subsequently.* Not only will the otherwise superior equity in point of time lose such priority, where

White, 39 Md. 409; Heuissler v. Nickum, 38 *Id.* 270; Cake's Appeal, 23 Pa. St. 186; Foster's Appeal, 3 *Id.* 78; Banning v. Edes, 6 Minn. 402; Stephenson v. Haines, 16 Ohio St. 478; Maybury v. Brien, 15 Pet. 21; Curtis v. Root, 20 Ill. 53; Fitts v. Davis, 42 *Id.* 391; Grant v. Dodge, 43 Me. 489; Banning v. Edes, 6 Minn. 402; Bolles v. Carli, 12 *Id.* 113; Beebe v. Austin, 15 Johns. 477; Haywood v. Nooney, 3 Barb. 643; Adams v. Hill, 9 Fost. 202; Curtis v. Root, 20 Ill. 53.

¹ Curtis v. Root, 20 Ill. 53; Fitts v. Davis, 42 *Id.* 391; Grant v. Dodge, 43 Me. 489; Banning v. Edes, 6 Minn. 402; Bolles v. Carli, 12 *Id.* 113; Virgin v. Brubaker, 4 Nev. 31; Guy v. Carriere, 5 Cal. 511; Strong v. Van Deusen, 23 N. J. Eq. (8 C. E. Green) 369; Lamb v. Cannon, 38 N. J. Law, 362; Macintosh v. Thurston, 25 N. J. Eq. (10 C. E. Green) 242; Bolles v. Carli, 12 Minn. 113; Morris v. Pate, 31 Mo. 315; Hopper v. Parkinson, 5 Nev. 233; Nichols v. Overacker, 16 Kans. 54; Pratt v. Topeka B'k, 12 *Id.* 570; Carr v. Caldwell, 10 Cal. 380; Magee v. Magee, 51 Ill. 500; Allen v. Hawley, 66 *Id.* 164, 168; Austin v. Underwood, 37 *Id.* 438; Amphlett v. Hibbard, 29 Mich. 298; New England, &c. Co. v. Merriam, 2 Allen, 391; Lane v. Collier, 46 Ga. 580; Clarke v. Brown, 3 Allen, 509; Deussenbury v. Hulbert, 2 T. & C. 177.

² Mills v. Van Vorhies, 20 N. Y. 412; McGowan v. Smith, 44 Barb. 232; Kittle v. Van

Dyck, 1 Sanf. Ch. 76; Clark v. Munroe, 14 Mass. 351; Young v. Tarbell, 37 Me. 509; Birnie v. Main, 29 Ark. 591; Bullard v. Bowers, 10 N. H. 500; Moore v. Rollins, 45 Me. 493; Young v. Tarbell, 37 Me. 509; Strong v. Converse, 8 Allen, 559; Holbrook v. Finney, 4 Mass. 566; Hinds v. Ballou, 44 N. H. 620; Stow v. Tift, 15 Johns. 458; Mills v. Van Vorhies, 25 Barb. 125; Reed v. Morrison, 12 Serg. & R. 18; Bogie v. Rutledge, 1 Bay, 312; Henagan v. Harlee, 10 Rich. Eq. 285; Chase's Case, 1 Bland. 206; McClure v. Harris, 12 B. Mon. 261; Klinck v. Keckelely, 2 Hill, Ch. 250; Shelden v. Hofnagle, 51 Hun. 478; Stewart v. Smith, 36 Minn. 82; Hugunin v. Cochrane, 51 Ill. 302; 2 Am. Rep. 303; Warner v. Van Alstyne, 3 Paige, 513; Ellicott v. Welch, 2 Bland. 242; Miller v. Stump, 3 Gill. 304; Barnes v. Gay, 7 Iowa, 26; McClure v. Harris, 12 B. Mon. 261; Crane v. Palmer, 8 Blackf. 120; Thompson v. Cochrane, 7 Humph. 72.

³ Hugunin v. Cochrane, 51 Ill. 302; 2 Am. Rep. 303; Warner v. Van Alstyne, 3 Paige, 513; Ellicott v. Welch, 2 Bland. 242; Miller v. Stump, 3 Gill. 304; Barnes v. Gray, 7 Iowa, 26; McClure v. Harris, 12 B. Mon. 261; Crane v. Palmer, 8 Blackf. 120; Thompson v. Cochrane, 7 Humph. 72.

⁴ Lee v. Munroe, 7 Cranch, 366; Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354; Storrs v. Barker, 6 *Id.* 166, 168; Otis v. Sill, 8 Barb. 102; Lesley v. Johnson, 41 *Id.* 359; Crocker v. Van

there is a fraudulent concealment or denial of the existence of such equity; but there will also be a loss of such priority, whenever the owner of the earlier equity negligently permits another to acquire a subsequent interest in the same property in reliance upon the apparently unincumbered condition of the title, under circumstances which make it the duty of the owner of the prior equity to warn such would-be subsequent purchaser of the existence of his own claim.¹ But it is not every failure to notify a purchaser of the existence of the equity, which would destroy the priority which he might claim in point of time; the circumstances of the case must create an obligation to notify others of the existence of such equity.² The general doctrine underlying this question is that which relates to the equitable doctrine of estoppel, which constitutes the subject of a subsequent chapter, to which the reader is referred for a fuller discussion of the question.³

§ 46. **Superior equity of a bona fide purchaser.**—**General doctrine.**—In undertaking to unfold the principles of law underlying the rights of a *bona fide* purchaser in respect to the question of priority, the general principles heretofore set forth must be clearly held in view, and more especially the meaning of the two equitable maxims which have been declared to be the foundation of the whole doctrine of priority. That is, in order to appreciate the principles which determine when, and under what circumstances, the equity of a *bona fide* purchaser is recognized as superior, one must apply to each case the two maxims, “that where the equities are equal the earliest in point of time shall prevail,” and “where the equities are equal the legal title shall prevail,” under limitations which will be explained in detail. A *bona fide* purchaser is one who acquires his interest for value and without notice of a prior equity. While, as between equal equities, a want of notice of a prior equity does not give to the latter equity any superiority,⁴ yet the subsequent taking of what would be an intrinsically superior equity, with notice of the prior equity, would destroy such superiority, and restore to the prior equity the priority

Crocker, 31 N. Y. 500; Lee v. Kirkpatrick, 1 Mo. Cart. Eq. 264; McKelvey v. Truby, 4 Watts & Serg. 323; Folk v. Beidelman, 6 Watts, 339; Schmitthelmer v. Elseman, 7 Bush. 298; Chapman v. Hamilton, 19 Ala. 121; Kelly v. Lenihan, 56 Ind. 448; Eggeman v. Eggeman, 37 Mich. 436; Brinkerhoff v. Lansing, 4 Johns. Ch. 65; Storrs v. Barker, 6 Johns. Ch. 166, 168; Bright v. Boyd, 1 Story, 478; see Eldridge v. Walker, 80 Ill. 270; see, also, Platt v. Squire, 12 Metc. 494; Fay v. Valentine, 12 Pick. 40; Marston v. Brackett, 9 N. H. 336; Miller v. Blugham, 29 Vt. 82; Stafford v. Bailou, 17 Id. 329; Broome v. Beers, 6 Conn. 198; Rice v. Dewey, 54 Barb. 455; L'Amoureux v. Vandenberg, 7 Paige, 316; Paine v. French, 4 Ohio, 318; Chester v. Greer, 5 Humph. 26.

¹ Worthington v. Morgan, 16 Sim. 547; Briggs v. Jones. L. R. 10 Eq. 92; Fisher v. Knox, 1 Har-

ris, 622; Hendrickson's Appeal, 12 Id. 363; Rider v. Johnson, 8 Id. 190, 193; Campbell's Appeal, 5 Casey, 401; Garland v. Harrison, 17 Mo. 282.

² Perry Herrick v. Attwood, 2 De G. & J. 21; Waldron v. Sloper, 1 Drew. 193; Carter v. Carter, 3 K. & J. 617.

³ Post, Chap VI.

⁴ Beckett v. Cordley, Bro. Ch. 353 (which Lord Eldon notices in Martinez v. Cooper, 2 Russ. 214); opinion of Lord Westbury in Phillips v. Phillips, 4 De G. F. & J. 208, 215; Pensonneau v. Bleaklev, 14 Ill. 15; Sumner v. Waugh, 56 Ill. 531; see Boone v. Chiles, 10 Pet. 177; Shirras v. Caig, 7 Cranch, 34, 48; Kramer v. Arthurs, 7 Barr, 185; Watson v. Le Row, 6 Barb. 481, 485; Bellas v. McCarty, 10 Watts, 13; Newton v. Newton, L. R. 6 Eq. 135, 140, 141, per Lord Romilly, M. R.

which it would enjoy in consequence of being first in order of time, where the equities are equal; in other words, the taking of the subsequent equity, with notice of the prior equity, destroys whatever superiority of equity might otherwise exist in favor of the interest subsequently acquired.¹

If one were to take literally the statements of some judges as to the scope of the doctrine of *bona fide* purchase, one would suppose that the superior equity of a *bona fide* purchase would be conceded to anyone, who subsequently acquired an interest in property for value and without notice of a prior interest in the same property held by another, whatever may be the character of these successive interests or rights in the property.² This, however, is not the case. The doctrine is subject to very important limitations, in respect to the interests which are controlled in matter of priority by this doctrine. These limitations will be explained in succeeding paragraphs; but to an intelligent appreciation of this limitation a knowledge of the fundamental thought, at the base of the doctrine of *bona fide* purchase, is necessary. In the first place it must be borne in mind, in recognizing in the subsequent purchaser a superior right or priority of claim over the person who acquires the prior interest, that the court does not undertake to determine, generally, any settlement of the intrinsic merits of the claims of the two parties. The rule of a *bona fide* purchase is concerned only with a determination on the part of the court of equity, whether to refrain from interfering in behalf of the holder of the prior interest; in other words, the doctrine of a *bona fide* purchase is merely the determination of inaction on the part of the court of equity, which results indirectly as a defense of the holder of the subsequent interest. This is unquestionably an invariable rule, where ever the altercation between the parties is occasioned by the possession by them of conflicting interests or estates in the same property,³ The only cases in which the court will grant affirmative relief to the *bona fide* purchaser are those in which the foundation for application of the doctrine is itself a claim to equitable protection, and not due to the possession by the parties of conflicting interest or estates in the property.⁴

§ 47. **The doctrine of bona fide purchase as modified by the recording acts.**—The equitable doctrine of *bona fide* purchase must not be confounded with the legal doctrine, which rests upon the recording acts. It is unquestionably true, that the principle applied in the recording acts was borrowed from the equitable doctrine of *bona fide* purchase; but the recording acts adopted the principle, as a legal rule, and applied them to cases to which the equitable doctrine was never

¹ *Le Neve v. Le Neve*, Ambl. 436; *Mackreth v. Symmons*, 15 Ves. 329, 350; *Pindall v. Trevor*, 30 Ark. 249.

² *Stanhope v. Earl Verney*, 2 Eden, 81, 85; *Jerrard v. Saunders*, 2 Ves. 454, 458.

³ *Jerrard v. Saunders*, 2 Ves. 454, 457; *Boona v. Childs*, 10 Pet. 177, 210.

⁴ See *post*, § 50.

applied. The declaration of the recording acts is, that in order that the priority in point of time which prevails independently of those acts may be claimed and enjoyed by the owner of the earlier estate or interest in the land, his deed must be recorded in the books of public record provided for the purpose; and that where such a purchaser of the property fails to comply with the recording law, and leaves his instrument of conveyance unrecorded, any subsequent purchaser for value and without notice of the same property may claim the superior equity of a *bona fide* purchaser, and take such property free from the conflicting claim of the prior purchaser. The provisions of the recording acts vary to a very considerable extent; not only as to the instruments of the conveyance which shall come under the provisions of the act, but likewise as to the effects of the failure to record the instrument. But so far as these recording acts have controlled or modified the equitable doctrine of a *bona fide* purchase, the doctrine has been taken out of the realm of equity jurisprudence and is made a principle of law. Hence in this connection it is not proper nor incumbent upon the writer to enter into an explanation of its details. The doctrine of *bona fide* purchase, so far as it continues to be a branch of equity jurisprudence, applies only to those transactions which are not brought within the operation of the recording law.¹

§ 48. Cases to which the doctrine of bona fide purchase applies.

—Bearing in mind that where equities are equal, priority is given to the one which is first in point of time; the first conclusion reached is that, where the interests acquired by two parties in the same property are both equitable interests, and they are acquired for value and without notice; in other words, where both of the purchasers of equitable interests are *bona fide* purchasers, the subsequent purchaser cannot claim any superior equity. The want of notice by the later or subsequent purchaser is under such circumstances no ground for claiming a superior equity.² Where, however, the owner of the first equitable interest takes it as a gift; that is, he is not a purchaser for value, and the holder of the second equitable interest in the same property is a purchaser for value; then his character as a *bona fide* purchaser does make his equity superior to the prior grantee or donee, and overcomes the superiority which the holder of the prior interest would ordinarily claim for his equity, in consequence of being first in point of time.³ The most common case for the application of the doctrine of *bona fide* purchase is, where the holder of a prior equitable estate or interest attempts to enforce his claim to the property against one who subsequently, for value and without notice of the prior equity, claims not only the equitable estate but also the legal

¹ See Tiedeman, Real Prop., §§ 816-818.

² *Pensonneau v. Bleakley*, 14 Ill. 15; *Sumner v. Waygh*, 56 Ill. 531; see *Boone v. Chiles*, 10 Ct. 177; *Shirras v. Craig*, 7 Cranch, 34, 48; *Wat-*

son v. Le Row, 6 Barb. 481, 485; *Bellas v. McCarty*, 10 Watts, 13.

³ *Green v. Givan*, 33 N. Y. 343; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Hulett v. Whipple*, 58 Barb. 224.

title to the property. The application of the doctrine to this class of cases rests upon the equitable maxim, that, where two successive equities are equal the legal title shall prevail; that is, the union of the legal title with the subsequent equity in the hands of the holder of such later equity gives to him a superiority over the holder of the prior equity.¹ This is conceded to be the proper application of the doctrine, not only when the legal title is acquired by such subsequent purchaser at the same time when he purchases the subsequent equity, but in many cases where he acquires the legal title after his acquisition of the equitable estate.²

So far no particular difficulty is experienced in determining the class of interests to which the doctrine of *bona fide* purchase can be applied. The difficulty arises when the claim is made, in favor of an equitable estate or interest acquired subsequently by a *bona fide* purchaser, of priority over the legal estate, which had been previously acquired by a purchaser for value. Wherever the recording law does not control the determination of this question, considerable difficulty is experienced in reconciling the authorities. According to some of them, in no case can the subsequent purchaser of the equitable interest claim priority over the prior purchaser of a legal estate, where the prior purchaser has not been estopped from enforcing his legal estate to the land by his fraud or negligence toward the subsequent purchaser of the equitable estate;³ and it is certain that the authorities are agreed in respect to the inapplication of the doctrine of *bona fide* purchase in favor of the subsequent purchaser of the equitable estate, where the action is for the enforcement of prior legal claims, such as the assignment of dower or the enforcement of a prior mortgage.⁴ On the other hand, there are many cases both English and American, in which it is held that a court of equity will refuse to grant relief to the holder of a prior legal estate in the land against the subsequent purchaser of an equitable estate, even though the legal owner may be in possession of the property.⁵ So far as these cases may be reconciled at all, and a reliable rule laid down for the government of the courts in the future, the distinctions presented by Lord Westbury, in a leading case must be accepted as controlling.⁶ According to Lord Westbury—whose opinion is now generally conceded to be a correct presentation of the limitation of the application of the doctrine of *bona fide* purchase—the

¹ Wells v. Morrow, 38 Ala. 125; Sumner v. Waugh, 56 Ill. 531; Demarest v. Wyncoop, 3 Johns. Ch. 129, 147; Varick v. Briggs, 6 Paige, 323; Dickerson v. Tillinghast, 4 Paige, 215; Woodruff v. Cook, 2 Edw. Ch. 259; Boyd v. Beck, 29 Ala. 703; Carter v. Allan, 21 Gratt. 241; Mundine v. Pitts, 14 Ala. 84; Zollman v. Moore, 21 Gratt. 313.

² See *post*, 65.

³ Blake v. Heyward, 1 Bail. Eq. 208; Brown v. Wood, 6 Rich. Eq. 155; Jenkins v. Bodley, 1 Sm. & Mar. Eq. 338; Wailes v. Cooper, 24 Miss. 208;

Larrowe v. Beam, 10 Ohio, 498; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274.

⁴ Finch v. Shaw, 19 Beav. 500; Colyer v. Finch, 5 H. L. Cas. 905.

⁵ Finch v. Shaw, 19 Beav. 500, *per* Lord Romilly; Colyer v. Finch, 5 H. L. Cas. 905, *per* Lord Cranworth; Flagg v. Mann, 2 Sumn. 486, *per* Story, J.; Union Canal Co. v. Young, 1 Whart. 410, 431, *per* Rogers, J.

⁶ Phillips v. Phillips, 4 De G. F. & J., pp. 208, 215, 216.

cases in which the doctrine is applicable are limited to three cases: *First*, the case already referred to in respect to which there is no doubt; namely, where the holder of a prior equitable interest asks its enforcement against the subsequent purchaser of the legal estate; *secondly*, where the plaintiff is seeking to enforce some equitable claim to relief on the ground of mistake or fraud.¹ In respect to the point of contention, it was held that where the holder of a prior legal estate enters a court of equity, for the purpose of obtaining in that court the same remedy which he can obtain in a court of law; in other words, where the question of priority and of the application of the doctrine of *bona fide* purchase arises in cases in which the court of equity has concurrent jurisdiction with the court of law in the enforcement of the legal title to the property, the court will refuse to apply to such case the doctrine of a *bona fide* purchase in favor of the defendant, who is the subsequent purchaser of an equitable interest. But where the holder of a prior legal title enters a court of equity for the purpose of resorting to the auxiliary jurisdiction of the court, and the employment of strictly equitable remedies in protection of his legal title, then the court will recognize in favor of the defendant his superior claim to the consideration of the court of equity in consequence of his character as a *bona fide* purchaser.² *Thirdly*;

§ 49. **Suit by holder of an equity.**—Not only does the doctrine of *bona fide* purchase apply where the prior interest in the property is an equitable estate, but also when the claim takes the form merely of a right to equitable remedies whereby to regain one's title or inter-

¹ See *supra*.

² "The defense of a purchaser for valuable consideration is a creature of a court of equity, and it can never be used in any manner in variance with the elementary rules which have already been stated. There appears to be three cases in which the use of this defense is most familiar: *First*, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir-of-law for discovery (which was the case in *Bassett v. Nosworthy*, Cas. t. Finch, 102), or by a tenant for life for the delivery of title deeds (which was the case of *Wallwyn v. Lee*, 9 Ves. 24), and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defense is good, and the reason given is that as against a purchaser for valuable consideration without notice the court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the court exercises a legal jurisdiction concurrently with the courts of law. Thus it was decided by Lord Thurlow in *Williams v. Lambe*, 3 Bro. Ch. 284, that the defense could not be pleaded to a bill for dower; and by Sir John Leach in *Collins v. Archer*, 1 Russ. & My. 284, that it was no answer to a bill of tithes. In those cases the court of equity was not

asked to give the plaintiff any equitable as distinguished from legal relief. *Secondly*, the second class of cases is the ordinary one of several purchasers or incumbancers each claiming in equity, and one who is later and last in time succeeded in obtaining an outstanding legal estate not held upon existing trusts, or a judgment, or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrance, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. *Thirdly*, where there are circumstances which give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of a purchaser for valuable consideration without notice, the court will not interfere." Lord Westbury in *Phillips v. Phillips*, 4 De G. F. & J. 208.

est in property. The acquisition of the title to the property by a subsequent purchaser, from one against whom the remedy could have been maintained, will constitute the bar to the institution of the action. In illustration of this application of the doctrine, reference may be made to suits for relief against accident and mistake in the transfer of property. Such relief will be given to the grantor as against the grantee of a deed which had been executed by mistake or ignorance of the facts. But as soon as this property has been transferred by this grantee to a *bona fide* purchaser for value and without notice, the party suffering from such accident or mistake loses his right of recovery of the property.¹ The same effect is produced by a *bona fide* purchase of property from a vendee to whom the property has been transferred through a fraud on the vendor, or on the creditor of such vendor, and whether the property transferred is real or personal. In all such cases, the sale of such property by the fraudulent vendee to the *bona fide* purchaser puts an end to the right to avoid such sale at the instance of the party defrauded.²

§50. **Affirmative relief to a bona fide purchaser.**—As has already been stated, the ordinary effect of the doctrine of *bona fide* purchase is that of inaction; that is, a court of equity will refuse to interfere in behalf of the plaintiff who seeks to enforce some remedy against a *bona fide* purchaser of property. The court will ordinarily not grant to the defendant in such an action, or in any other subsequent action where he assumes the role of plaintiff, any affirmative relief against the outstanding prior interest in the property, on the strength of his character as a *bona fide* purchaser. But there are cases, exceptional in character, in which such affirmative relief will be granted to the *bona fide* purchaser. The ordinary cases are those in which the

¹ *St. John v. Spalding*, 1 T. & C. 483; *Phillips v. Phillips*, 4 De G. F. & J, 208, 218, *per Lord Westbury*; *Ligon v. Rogers*, 12 Ga. 281, 292; *Whitman v. Weston*, 30 Me. 285.

² *Manning v. Keenan*, 73 N. Y. 45; *Stevens v. Brennan*, 79 N. Y. 254; *Robinson v. Dauchy*, 3 Barb. 20; *Pearse v. Pettis*, 47 Barb. 276; *Decan v. Shipper*, 11 Casey, 239; *Jackson v. Summer-ville*, 1 Harris, 359; *Dean v. Yates*, 22 Ohio St. 388; *Sargent v. Sturm*, 23 Cal. 359; *Rison v. Knapp*, 1 Dillon, 186, 201; *Spaulding v. Brewster*, 50 Barb. 142; *Barnard v. Campbell*, 65 Barb. 286; *Joslin v. Cowee*, 60 Barb. 48; *Roberts v. Dillon*, 3 Daly, 50; *Field v. Stearns*, 42 Vt. 106; *Poor v. Woodburn*, 25 Vt. 234; *Hodgeden v. Hubbard*, 18 Vt. 504; *Root v. French*, 13 Wend. 570; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, 3 Duer, 373; *Brower v. Peabody*, 13 N. Y. 121; *Fassett v. Smith*, 23 N. Y. 252; *Hathorne v. Hodges*, 28 N. Y. 436; *Spraghtons v. Hawley*, 39 N. Y. 441; *Paddon v. Taylor*, 44 N. Y. 371; *Kinney v. Kiernan*, 49 N. Y. 164; *Weaver v. Barden*, 49 N. Y. 286; *Devoe v. Brant*, 53 N. Y. 462; *Bean v. Smith*, 2 Mason, 252, 272-282; *Wood v. Mann*, 1 Sumn. 506; *Fletcher v. Peck*,

6 Cranch, 87, 133, 134; *Ersine v. Decker*, 39 Me. 467; *Hart v. The Bank*, 33 Vt. 252; *Poor v. Woodburn*, 25 Vt. 234, 236; *Hubbell v. Currier*, 10 Allen, 333; *Sleeper v. Chapman*, 121 Mass. 404; *Coleman v. Cocke*, 6 Rand. 618; *Collins v. Heath*, 34 Ga. 443; *Reed v. Smith*, 14 Ala. 380; *Sydnor v. Roberts*, 13 Tex. 598; *Gavagan v. Bryant*, 83 Ill. 376; *Rowley v. Bigelow*, 12 Pick. 307; *Williamson v. Russell*, 39 Conn. 406; *Root v. French*, 13 Wend. 570; *Mears v. Waples*, *Houst.* 581; *Rowley v. Bigelow*, 12 Pick. 307; *Frazer v. Western*, 1 Barb. Ch. 230; *Ledyard v. Butler*, 9 Paige, 132; *Anderson v. Roberts*, 18 Johns. 515; reversing the *Johns. Ch.* 371, 377; *Phelps v. Morrison*, 24 N. J. Eq. (9 C. E. Green) 195; *Hood v. Fahnestock*, 8 Watts, 489; *Price v. Punkin*, 4 Watts, 85; *Boyce v. Waller*, 2 B. Mon. 91; *Spicer v. Robinson*, 73 Ill. 519; *Henderson v. Henderson*, 55 Mo. 534; *McNab v. Young*, 81 Ill. 11; *Dickerson v. Evans*, 84 Ill. 451; *Chicago, &c. Co. v. Foster*, 48 Ill. 507; *Fulton v. Woodman*, 54 Miss. 158; *Farmer's Nat. Bank v. Fletcher*, 44 Iowa, 252; *Hurley v. Osler*, 44 Iowa, 642; *Henderson v. Henderson*, 55 Mo. 534.

holder of the prior interest in the property is estopped from setting up his own title against the subsequent purchaser, on the ground that such prior claimant has fraudulently or negligently permitted the *bona fide* purchaser to acquire such interest in the property under the impression that the title of the vendor was free from any equitable claim by himself, under circumstances when the law require him to give the information or to notify such would-be subsequent purchaser.¹ In all these cases the remedy consists of a cancellation or surrender of the deeds of conveyance upon which the prior interest rests, or some sort of release of such prior interest to the subsequent purchaser. And it may be stated in addition as a general proposition, that the court of equity will grant affirmative relief to a subsequent purchaser in all cases where, from the character of the case and under the rules of equity, the *bona fide* purchaser can resort to the equitable remedy for removing a cloud from the title.²

§ 51. **What constitutes a bona fide purchase.**—In order that one may claim the protection in equity of a *bona fide* purchase, he must show the existence of three elements in the character of the transaction, that is, his purchase must have been made, *first*, for a valuable consideration; *secondly*, without notice of the prior equity; *thirdly*, in good faith. The absence of any one of these three elements from the transaction will destroy the superior equity of a *bona fide* purchase.³

§ 52. **What is a valuable consideration.**—A consideration is defined by writers upon contracts in general to be the inducement to the assumption of an obligation, and it may consist either of a detriment to the promisee or a benefit to the promisor. But in this connection the term “valuable consideration” is not so broad in its meaning, as when it is discussed in the connection with contracts in general. In order that one may claim to be a *bona fide* purchaser, he must show that he has parted with something of pecuniary value, in consideration of his acquisition of the title to the property purchased; in other words, he must show that he has suffered a detriment or loss of a pecuniary character. It is not necessary that the consideration shall be pecuniary; it is only required to be something of pecuniary value.⁴

¹ Strong v. Ellsworth, 26 Vt. 366; Clabough v. Byerly, 7 Gill, 354; Richardson v. Chickering, 41 N. H. 380; Wells v. Pierce, 27 N. H. 503; Parker v. Barker, 2 Metc. 423; Laurence v. Brown, 5 N. Y. 304; Buchanan v. Moore, 13 Serg. & R. 304; McKelvey v. Truby, 4 W. & S. 323; Willis v. Swartz, 4 Casey, 413; Beaupland v. McKeen, 4 Casey, 124; McKelway v. Armour, 2 Stockt. Ch. 115; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Nivens v. Belknap, 2 Johns. 573; Cheeney v. Arnold, 18 Barb. 434; Wells v. Pierce, 7 Post. 503; Carr v. Wallace, 7 Watts, 394; Vanhorn v. Frick, 3 Serg. & R. 278; Saunderson v. Ballance, 2 Jones Eq. 322; Higgins v. Ferguson, 14 Ill. 269; Godeffroy v. Caldwell, 2 Cal. 489. For a fuller explanation of the doctrine of estoppel see *post*, Ch VI.

² Wallace v. Lord Donegal, 1 Dr. & Wal. 461; Martin v. Hewitt, 44 Ala. 418; Sharp v. Hunte, 7 Coldw. 389; Filley v. Duncan, 1 Neb. 134. See, for a fuller discussion of the bill for removing the cloud from title, *post* § 545.

³ Kinney v. Consolidated, &c. Min. Co., 4 Sawy. 382; Hardin v. Harrington, 11 Bush. 367; Briscoe v. Ashby, 24 Gratt. 454; Hamman v. Kelgwin, 29 Tex. 34; Willoughby v. Willoughby, 1 T. R. 763, 767, *per* Lord Hardwicke.

⁴ Brown v. Welch, 18 Ill. 343; Keys v. Test, 33 Ill. 316; McLeod v. Nat. B'k, 42 Miss. 99; Haughwout v. Murphy, 31 N. J. Eq. (6 C. E. Green) 118; Aubuchon v. Bender, 44 Mo. 530; Spurlock v. Sullivan, 36 Tex. 511; Webster v. Van Steenberg, 46 Barb. 211; Pickett v. Barron, 29 Barb. 505; Dickerson v. Tillinghast, 4 Paige, 215;

A mere donee of property, that is, one who takes as a gift, cannot claim to be a *bona fide* purchaser. Not only may the loan of money, or exchange or transfer of property, or the rendition of some service be a sufficient valuable consideration,¹ but so also will there be a sufficient consideration where the purchaser surrenders or releases some existing legal right, and assumes some new legal obligation from which he will not be relieved by a court of equity.² If the transaction is otherwise conducted in good faith, mere inadequacy of the consideration will not affect the equity of the *bona fide* purchaser;³ but where the inadequacy is so gross as to make the consideration nominal and unsubstantial, the consideration is not sufficient to support the claim of a *bona fide* purchaser.⁴

§ 53. **Antecedent debts as consideration.**—Inasmuch as the rationale of the doctrine of a *bona fide* purchase is, that the purchaser has parted with some value or suffered a loss in reliance upon the validity of the title which has been acquired to the property transferred to him; and that the acquisition of this property was the inducement to his surrender or transfer of the value or to his assumption of the loss sustained; it has been a much-mooted question, how far and to what extent the securing the payment of an antecedent debt makes the holder of such lien a *bona fide* purchaser. The familiar example of the question here raised is, that of a mortgage of property or a judgment lien acquired on such property in securing the payment of an antecedent debt. Where the debt is contracted at the time when the mortgage is given and the money is loaned in direct reliance upon procuring the mortgage, there is no question as to the mortgagee in question being a *bona fide* purchaser. But where the mortgage is given to secure the payment of a debt already contracted, or of money loaned on some prior occasion, the consideration is executed; and for that reason it becomes doubtful whether a mortgagee, in a mortgage subsequently given to secure such debt, is a subsequent purchaser for value. It should be borne in mind in this connection, that the question does not depend upon the same principles which determine the validity of such a mortgage, as between the mortgagee and the mortgagor; and hence the cases, in which the sufficiency of

Penfield v. Dunbar, 64 Barb. 239; Weaver v. Barden, 49 N. Y. 286; Delancey v. Stearns, 66 N. Y. 157; Union Canal Co. v. Young, 1 Whart. 410, 432; Roxborough v. Messick, 6 Ohio St. 448; Palmer v. Williams, 24 Mich. 328; Westbrook v. Gleason, 79 N. Y. 23, 28; Williams v. Shelly, 37 N. Y. 375; Lawrence v. Clark, 36 N. Y. 128; Reed v. Gannon, 3 Daly, 414; Munn v. McDonald, 10 Watts, 270.

¹ Curtis v. Leavitt, 15 N. Y. 11, 179; Glidden v. Hunt, 24 Pick. 221; Baggally v. Gaither, 2 Jones Eq. 80; Gerson v. Pool, 31 Ark. 85; Bowen v. Prout, 52 Ill. 354; Munn v. McDonald, 10 Watts, 270; Martin v. Jackson, 3 Casey, 504, 509; Roxborough v. Messick, 6 Ohio St. 448; Keir-

sted v. Avery, 4 Paige, 9; Conrad v. Atlantic Ins. Co., 1 Pet. 386.

² See Williams v. Shelly, 37 N. Y. 375; Reed v. Cannon, 3 Daly, 414; McLeod v. Nat. Bank, 42 Miss. 99; Westbrook v. Gleason, 79 N. Y. 23, 36; Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 N. Y. 143; Padgett v. Lawrence, 10 Paige, 170; Struthers v. Kendall, 5 Wright, 214, 218; Goodman v. Simonds, 20 How. (U. S.) 343, 371.

³ Westbrook v. Gleason, 79 N. Y. 23, 36, *per* Rapallo, J.; Seward v. Jackson, 8 Cow. 406, 430; Pickett v. Barron, 29 Barb. 505; Cary v. White, 52 N. Y. 138, 142; Wood v. Chapin, 13 N. Y. 509.

⁴ Worthy v. Caddell, 76 N. C. 82.

the consideration is sustained for the purpose of making the mortgage valid as between the parties to it, cannot be referred to as authority in the present connection. Relying upon the statement, that in the case proposed the mortgagee has not parted with anything of value, in reliance upon the title which he acquires by the execution of the mortgage, it has been held by the majority of the courts, that such a mortgagee cannot claim the superior title of a *bona fide* purchaser.¹ But in a few of the states it is held that the security for a pre-existing debt does rest upon a valuable consideration sufficient to give to the creditor, in respect to such security, the character of a *bona fide* purchaser.² Under the general principles here set forth, it is universally held that an assignment of property for the benefit of creditors does not rest upon a valuable consideration; and it is not a *bona fide* purchase, either as to the assignee or as to the creditors, for whose benefit the assignment is made.³ But the giving of the security may rest upon some fresh and independent consideration, and whenever such independent consideration is proven to be the inducement to the giving of the security, the creditor as to such security is clearly a *bona fide* purchaser. Thus, for example, where the creditor in consideration of the security agrees to definitely extend the time of payment⁴ or to surrender some other security held by him;⁵ or where with the giving of the security the antecedent debt has been satisfied and discharged in whole or in part, and such satisfaction and discharge of the original debt constitutes the inducement to the giving of the security.⁶ In all such cases a fresh and independent consideration exists for the giving of the security which is sufficient to make the

¹ Bay v. Coddington, 20 Johns. 637; 5 Johns. Ch. 54; Mingus v. Condit, 23 N. J. Eq. (8 C. E. Green) 313; Pancoast v. Duval, 26 N. J. Eq. (11 C. E. Green) 445; Ingram v. Morgan, 4 Hump. 66; Wormley v. Lowry, 1 Hump. 468; Clark v. Flint, 22 Pick. 231; Sargent v. Sturm, 22 Cal. 359; Alexander v. Caldwell, 55 Ala. 517; Short v. Battle, 52 Ala. 456; Clark v. Flint, 22 Pick. 231; Buffington v. Gerrish, 15 Mass. 156; Mingus v. Condit, 24 N. J. Eq. (8 C. E. Green) 313; Wheeler v. Kirtland, 24 N. J. Eq. 552; Ashton's Appeal, 73 Pa. St. (23 P. F. Sm.) 153, 162; Garrard v. Pittsburg, &c. R. R., 5 Casey, 154, 159; Prentice v. Zane, 2 Gratt. 262; Halstead v. B'k of K'y, 4 J. J. Marsh. 554; Manning v. McClure, 36 Ill. 490; Boon v. Barnes, 23 Miss. 136; Pratt v. Coman, 37 N. Y. 440; see also Wood v. Robinson, 22 N. Y. 564; Van Heusen v. Radcliff, 17 N. Y. 580; Lawrence v. Clark, 35 N. Y. 128; Dickerson v. Tillinghast, 4 Paige, 215; Evertson, 5 Paige, 644; Gafford v. Stearns, 51 Ala. 434; Johnson v. Graves, 27 Ark. 557; Cary v. White, 52 N. Y. 138; Hart v. The Bank, 33 Vt. 252; Poor v. Woodburn, 25 Vt. 235; Hodgeden v. Hubbard, 18 Vt. 504.

² Babcock v. Jordan, 24 Ind. 14; Frey v. Clifford, 44 Cal. 335.

³ Mellon's Appeal, 8 Casey, 121; Spackman v. Ott, 65 Pa. St. (15 P. F. Sm.) 131; *In re Fulton's Estate*, 51 Pa. St. (1 P. F. Sm.) 204, 211; Twelves v. Williams, 3 Whart. 485; Ludwig v. Highley, 5 Barr. 132, 140; Willis v. Henderson, 4 Seam. 13; Clark v. Flint, 22 Pick. 231; Holland v. Cruft, 20 Pick. 321; Griffin v. Marquardt, 17 N. Y. 28; Van Heusen v. Radcliff, 17 N. Y. 580; Joslin v. Cowee, 60 Barb. 48; Haggerty v. Palmer, 6 Johns. Ch. 437.

⁴ Lonsdale v. Brown, 4 Wash. C. C. 148, 151; Railroad Co. v. Barker, 5 Casey, 160, 162; Griswold v. Davis, 31 Vt. 390, 394; Atkinson v. Brooks, 26 Vt. 569.

⁵ Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' B'k, 25 N. Y. 143; Padgett v. Lawrence, 10 Paige, 170; Struthers v. Kendall, 5 Wright, 214, 218; Goodman v. Simonds, 20 How. (U. S.) 343, 371; see Thompson v. Blanchard, 4 N. Y. 303; Penfield v. Dunbar, 64 Barb. 239.

⁶ Ohio Life Ins., &c. Co. v. Ledyard, 8 Ala. 866; The Bank of Godfrey, 23 Ill. 579, 606; Donaldson v. B'k of Cape Fear, 1 Dev. Eq. 103; Soule v. Shotwell, 52 Miss. 236; Ruth v. Ford, 9 Kans. 17; Love v. Taylor, 26 Miss. 567; Saffold v. Wade's Ex'r, 51 Ala. 214. For a full discussion of the doctrine of payment see *post* § 55.

holder of the security a *bona fide* purchaser as against the owner of some prior interest therein.

§ 54. **Priority of unrecorded mortgages over judgment creditors.**—It is also claimed by many of the authorities, that an unrecorded mortgage or conveyance will have priority over the subsequently docketed judgment, although the judgment is obtained and docketed without notice of the prior conveyance or mortgage; on the ground that the lien of judgment on the property is acquired without consideration by the judgment creditor, and that the assertion of the prior unrecorded mortgage or conveyance against such subsequent docketed judgment would not give to the judgment creditor any claim of being injured, for he has parted with nothing in securing the judgment lien in reliance upon the apparently valid title of the judgment debtor. The equitable doctrine then is, that a judgment lien will attach only to the actual interest of the judgment debtor, and subject to all the prior equitable claims against such interest.¹ This rule, however, has been repudiated by the courts of many of the states, which hold, that the judgment creditor is entitled to priority over other earlier equitable interests, on the ground that he does suffer a damage of a legal character in consequence of the recognition of priority in the earlier equity, whenever he goes to the trouble and expense of procuring the judgment lien, and is induced by the apparently unincumbered condition of the debtor's title to rely upon such judgment lien. In accordance with this principle, it is held in these states that the judgment lien, docketed subsequently to an unrecorded mortgage or to the acquisition of some equitable interest or lien, shall have precedence over such prior equity or interest;² but, when-

¹ Bartley, J., in *White v. Denman*, 1 Ohio St. 110, 112; *Everett v. Stone*, 3 Story, 446, 455; *Briggs v. French*, 2 Sumn. 251; *Ells v. Tousley*, 1 Paige, 280; *In re Howe*, 1 *Id.* 125; *White v. Carpenter*, 2 *Id.* 217, 266; *Gouverneur v. Titus*, 6 *Id.* 347; *Kiersted v. Avery*, 4 *Id.* 9; *Arnold v. Patrick*, 6 *Id.* 310; *Morris v. Mowatt*, 2 *Id.* 586, 590; *Buchan v. Sumner*, 2 Barb. Ch. 165, 207; *Hoagland v. Latourette*, 1 Green's Ch. 254; *Dunlap v. Burnett*, 5 Sm. & Mar. 702; *Money v. Dorsey*, 7 *Id.* 15; *Bank v. Campbell*, 2 Rich. Eq. 179; *Watkins v. Wassell*, 15 Ark. 73, 94, 95; *Cover v. Black*, 1 Barr. 493; *Shryock v. Waggoner*, 4 Casey, 430; *Hampson v. Edelen*, 2 Har. & Johns. 64; *Hackett v. Callender*, 32 Vt. 97, 108, 109; *Hart v. Farm. & Mech. Bank*, 33 *Id.* 252; *Brown v. Pierce*, 7 Wall. 205; *Baker v. Morton*, 12 *Id.* 150; *Richeson v. Richeson*, 2 Gratt. 497; *Bayley v. Greenleaf*, 7 Wheat. 46, 51; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Wheeler v. Kirtland*, 24 N. J. Eq. (9 C. E. Green) 552; *Knell v. Build'g Ass'n*, 34 Md. 67; *Galway v. Malchow*, 7 Neb. 285; *Jackson v. Dubois*, 4 Johns. 216; *Schmidt v. Hoyt*, 1 Edw. Ch. 652; *Thomas v. Kelsey*, 30 Barb. 268; *Wilder v. Butterfield*, 50 How. Pr. 385; *In re Howe*, 1 Paige, 125; *Schroeder v. Gurney*, 73 N. Y. 430;

Moyer v. Hinman, 13 N. Y. 180; 17 Barb. 137; *Wilcoxson v. Miller*, 49 Cal. 193; *Pixley v. Huggins*, 15 *Id.* 127; *Plant v. Smythe*, 45 *Id.* 161; *Hunt v. Watson*, 12 *Id.* 363; *Rose v. Maune*, 4 *Id.* 173; *First Nat. B'k v. Haylett*, 40 Iowa, 659; *Hoy v. Allen*, 27 *Id.* 208; *Churchill v. Morse*, 23 *Id.* 229; *Evans v. McGlesson*, 18 *Id.* 150; *Welton v. Tizzard*, 15 *Id.* 495; *Patterson v. Linder*, 14 *Id.* 414; *Bell v. Evans*, 10 *Id.* 353; *Norton v. Williams*, 9 *Id.* 528; *Sappington v. Oeschli*, 49 Mo. 244; *Potter v. McDowell*, 43 *Id.* 93; *Stillwell v. McDonald*, 39 *Id.* 282; *Valentine v. Havener*, 20 *Id.* 133; *Apperson v. Burgett*, 33 Ark. 328; *Kelly v. Mills*, 41 Miss. 267; *Righter v. Forrester*, 1 Bush. (Ky.) 278; *Morton v. Robards*, 4 Dana, 258; *Orth v. Jennings*, 8 Blackf. 420; *Hempton v. Levy*, 1 McCord Ch. 107, 111; *Galway v. Mulchow*, 7 Neb. 285; *Van Thorniley v. Peters*, 36 Ohio St. 471.

² *Corpman v. Baccastow*, 84 Pa. St. 363; *King v. Portis*, 77 N. C. 25; *Van Thorniley v. Peters*, 26 Ohio St. 471; *White v. Denman*, 1 Ohio St. 110, 112, 114; *Mayham v. Coombs*, 14 Ohio, 428; *Jackson v. Luce*, *Id.* 514; *Holliday v. Franklin B'k*, 16 *Id.* 533; *Guiteau v. Wisely*, 47 Ill. 433; *McFadden v. Worthington*, 45 *Id.* 362; *Massey v. Westcott*, 40 *Id.* 160; *Reichert v.*

ever the judgment lien is given priority over the earlier equity, the claim for priority depends upon the want of notice of the prior equity when the lien was acquired; that is, if when the judgment lien was acquired and the judgment docketed, the judgment creditor knew of the existence of the earlier equitable claim against the property, he cannot claim for his judgment lien any precedence over the prior equity.¹ Where, however, the recording laws expressly declare that a judgment lien shall have precedence over the unrecorded mortgage or prior conveyance, the statutory provision must prevail; and is held to prevail, giving to the judgment lien priority over the unrecorded mortgage, even though the judgment creditor knew when the judgment was docketed that such unrecorded mortgage existed.² But whether in any particular state the judgment lien is held to have priority over the prior equity or interest or not; if the judgment lien should be enforced by execution, and the property sold under such execution to a *bona fide* purchaser, the legal title in such a purchaser would be taken by him free from the priority of the earlier equity; and such equities could not be enforced against the land in the hands of such a purchaser.³ Where, however, the purchaser under execution of the judgment takes the land with notice of the prior equity, and the judgment creditor also loses his precedence because of his knowledge of the existence of the prior equity; or the question arises in a state in which the judgment creditor is denied all claim of priority over the earlier equity; the purchaser cannot, under such circumstances, claim to take the legal

McClure, 23 *Id.* 516; Barker v. Bell, 37 Ala. 354; Mainwaring v. Templeman, 51 Tex. 205; Firebaugh v. Ward, 51 *Id.* 409; Cavanaugh v. Peterson, 47 *Id.* 197; Grace v. Wade, 45 *Id.* 522; Andrews v. Mathews, 59 Ga. 466; Young v. Devries, 31 Gratt. 304; Eidson v. Huff, 29 *Id.* 338; McClure v. Thistle's Ex'rs, 2 *Id.* 182; Anderson v. Nagle, 12 W. Va. 98; Uhler v. Hutchinson, 23 Pa. St. 110; Jaques v. Weeks, 7 Watts, 261; Hulings v. Guthrie, 4 Burr. 123; Hibberd v. Bovier, 1 Grant's Cas. (Pa.) 266; Mallory v. Stodder, 6 Ala. 801; Ohio Life Ins. & T. Co. v. Ledyard, 8 *Id.* 886; Pollard v. Cocke, 19 *Id.* 188.

¹Priest v. Rice, 1 Pick. 164; Hart v. Farm & Mech B'k, 33 Vt. 252; Hackett v. Callender, 32 *Id.* 97, 108, 109; Cover v. Black, 1 Barr. 493; O'Rourke v. O'Connor, 39 Cal. 442; Britton's Appeal, 9 Wright, 172; Mellon's Appeal, 8 Casey, 121; Lawrence v. Stratton, 6 Cush. 163, 167; Goddard v. Prentice, 17 Conn. 546; Cox v. Milner, 23 Ill. 476; Ogden v. Haven, 24 *Id.* 57; Dixon v. Doe, 1 Sm & Mar. 70; Ayres v. Duprey, 27 Tex. 593; Wyatt v. Stewart, 34 Ala. 716, 721; Burt v. Cassey, 12 Ala. 734; Wallis v. Rhea, 10 *Id.* 451; 12 *Id.* 616; Garwood v. Garwood, 4 Halst. 193.

²Guerrant v. Anderson, 4 Rand. 208; Davidson v. Cowan, 1 Dev. Eq. 471; Davcy v. Littlejohn, 2 Ired. Eq. 495; Mayham v. Cooms, 14

Ohio, 428; Butler v. Maury, 10 Humph. 420; Lillard v. Ruckers, 9 Yerg. 64.

³Orth v. Jennings, 8 Blackf. 420; Rodgers v. Gibson, 4 Yeates, 111; Heister v. Fortner, 2 Binney, 40; Sieman v. Schurck, 29 N. Y. 598; Jackson v. Chamberlain, 8 Wend. 620, 625; Jackson v. Post, 15 *Id.* 588; 9 Cow. 120; Jackson v. Town, 4 Cow. 599; Gouverneur v. Titus, 6 Paige, 347; Den v. Richman, 1 Green, 43; Morrison v. Funk, 23 Pa. St. 421; Stewart v. Freeman, 10 Harris, 120, 123; Kellam v. Janson, 5 *Id.* 467; Mann's Appeal, 1 Barr. 24; Wilson v. Shoneberger, 10 Casey, 121; Scribner v. Lockwood, 9 Ohio, 184; Paine v. Mooreland, 15 *Id.* 435; Runyan v. McClellan, 24 Ind. 165; Ehle v. Brown, 31 Wis. 405, 414; Rogers v. Hussey, 36 Iowa, 664; Draper v. Bryson, 26 Mo. 108; Harrison v. Cachelin, 23 *Id.* 117, 126; Waldo v. Russell, 5 *Id.* 387; Ohio Life Ins. & T. Co. v. Ledyard, 8 Ala. 866; Ayres v. Duprey, 27 Tex. 593, 605; Cooper v. Blakey, 10 Ga. 263; Miles v. King, 5 S. C. 146; Gower v. Doheney, 33 Iowa, 36, 39; Halloway v. Planter, 20 *Id.* 121; Wood v. Chapin, 13 N. Y. 509; Arnold v. Patrick, 6 Paige, 310, 316; Dickerson v. Tillinghast, 4 *Id.* 215; Wright v. Douglas, 10 Barb. 97; Sargent v. Sturm, 23 Cal. 359; Orme v. Roberts, 33 Tex. 798; Ayres v. Duprey, 27 *Id.* 593.

title free from the earlier equitable claim.¹ But if the question arose in a state in which the judgment creditor can claim for his lien priority over the earlier equitable interest, because he does not know of its existence when the judgment lien was secured, then this priority, which is recognized by the law in the judgment creditor in favor of his lien, passes to the purchaser; so that the purchaser under the execution of the judgment can claim priority in his character as assignee of the judgment creditor, although when he takes the deed to the property he knows of the existence of the prior equitable interest or claim.²

§ 55 **Payment of a consideration.**—Not only must there be a valuable consideration in fact, but it must be actually paid out before one receives notice of the prior claim. Notice of a prior interest before the consideration has been actually paid, but after the contract has been made and the title of the property been conveyed, would take away from the subsequent grantee the character and the superior equity of a *bona fide* purchaser.³ Where, however, a part of the consideration has been paid before receiving such notice, and a part paid subsequently, the courts have been induced in many of the states, as well as in England, to hold that such a person is a *bona fide* purchaser *pro tanto*, as to the part of the consideration which was paid out before receiving notice of the prior equity.⁴ As a corollary to the rule that actual payment of the consideration is required before receipt of the notice of the prior equity; if the consideration constitutes an executory contract, the contract must be executed or performed before the notice is received. Thus, for example, the vendee's bond, or covenant, or bond and mortgage, or any other non-negotiable instrument of indebtedness, given for the price of the property pur-

¹ *Ells v. Tousley*, 1 Paige, 280; *Gouverneur v. Titus*, 6 *Id.* 347; *Morris v. Mowatt*, 2 *Id.* 586, 590; *Parks v. Jackson*, 11 *Wend.* 442; *Sieman v. Schurck*, 29 *N. Y.* 598; *Moyer v. Hinman*, 13 *Id.* 180, and cases cited *per* Denio, J.; *Bank v. Campbell*, 2 *Rich. Eq.* 179; *Churchill v. Morse*, 23 *Iowa*, 229; *Hoy v. Allen*, 27 *Id.* 208; *Chapman v. Coats*, 26 *Id.* 288; *O'Rourke v. O'Connor*, 39 *Cal.* 442; *Davis v. Ownsby*, 14 *Mo.* 170; *Valentine v. Havener*, 20 *Id.* 133; *Sappington v. Oeschli*, 49 *Id.* 244, 246; *Byers v. Engles*, 16 *Ark.* 543; *Prescott v. Heard*, 10 *Mass.* 60; *Ogden v. Haven*, 24 *Ill.* 57; *Ayres v. Duprey*, 27 *Tex.* 593.

² *Jacques v. Weeks*, 7 *Watts*, 261, 270; *Uhler v. Hutchinson*, 23 *Pa. St.* (11 *Harris*) 110; *Calder v. Chapman*, 52 *Pa. St.* (2 *P. F. Sm.*) 359, 362; *Massey v. Westcott*, 40 *Ill.* 160; *McFadden v. Worthington*, 45 *Id.* 362; *Guiteau v. Wisely*, 47 *Id.* 433; *Potter v. McDowell*, 43 *Mo.* 93; *Stillwell v. McDonald*, 39 *Ill.* 282; *Davis v. Ownsby*, 14 *Mo.* 170; *Greenleaf v. Edes*, 1 *Minn.* 264; *Henderson v. Downing*, 24 *Miss.* 106; *Kelley v. Mills*, 41 *Id.* 267, 273; *Fash v. Ravesses*, 32 *Ala.* 451; *De Vendell v. Hamilton*, 27 *Id.* 156; *Pol-*

lard v. Cooke, 19 *Id.* 188; *Smith v. Jordan*, 25 *Ga.* 687.

³ *Wood v. Mann*, 1 *Sumn.* 506, 578; *Flagg v. Mann*, 2 *Sumn.* 486; *Penfield v. Dunbar*, 64 *Barb.* 239; *Palmer v. Williams*, 24 *Mich.* 328; *Ketteridge v. Chapman*, 36 *Iowa*, 348; *Baldwin v. Sager*, 70 *Ill.* 503; *Wood v. Mann*, 1 *Sumn.* 506, 578; *Flagg v. Mann*, 2 *Sumn.* 486; *Jewett v. Palmer*, 7 *Johns. Ch.* 65; *Losey v. Simpson*, 3 *Stockt. Ch.* 246.

⁴ *Boggs v. Varner*, 6 *Watts & S.* 469, 472; *Dufphey v. Frenaye*, 5 *Stew. & Port.* 215; *Baldwin v. Sager*, 70 *Ill.* 503; *Ketteridge v. Chapman*, 36 *Iowa*, 348; *Haughwout v. Murphy*, 21 *N. J. Eq.* (6 *C. E. Green*) 118; *Paul v. Fulton*, 25 *Mo.* 156; *Union, &c. Co. v. Young*, 1 *Whart.* 410, 431; *Juvenal v. Jackson*, 2 *Harris*, 519, 524; *Beck v. Urich*, 1 *Harris*, 636, 639; 4 *Harris*, 499; *Kunkle v. Wolfersberger*, 6 *Watts*, 126; *Frain v. Fredrick*, 32 *Tex.* 294; *Frost v. Beekman*, 1 *Johns. Ch.* 288; *Farmers' Loan Co. v. Maltby*, 8 *Paige*, 361; *Doswell v. Buchanan's Ex'rs*, 3 *Leigh*, 365; *Everts v. Agnes*, 5 *Wis.* 343; *Youst v. Martin*, 3 *Serg. & R.* 423; *Bellas v. McCarty*, 10 *Watts*, 13; *Boggs v. Varner*, 6 *Watts & S.* 469, 472.

chased, will not make such vendee a *bona fide* purchaser, as long as such bond, covenant, or other instrument of indebtedness remains unpaid. For, while his obligation to execute such bond or covenant is absolute in a court of law, the court of equity will relieve him from liability on such an instrument of indebtedness, where there was a failure of the consideration for it through the assertion of a superior equity in the property purchased.¹ But it is not necessary that the consideration should be actually satisfied by a payment in cash. Not only would there be a sufficient execution of the consideration where the vendee transfers to the vendor the obligation of some third person, payable to himself in payment of the price;² but, so also, where the price is settled for by the execution of a negotiable note or bill in favor of the vendor. In consequence of the liability on such negotiable instruments of the obligors to the *bona fide* holder, irrespective of the existence or failure of the consideration, the courts have held that the vendee has parted with something of value in the delivery of such a negotiable instrument. According to some of the authorities, it was doubtful whether the claim of a *bona fide* purchaser could in such a case be established, unless there had been an actual transfer of such note or bill to a *bona fide* holder.³ But it has been held that the mere possibility of being liable on such a negotiable instrument to a *bona fide* holder is a sufficient execution of the consideration to make the vendee a *bona fide* purchaser.⁴ Another form of assumption of a positive obligation is where the purchaser, in consideration of such purchase, promises to pay a debt due by the vendor to some third person in such a manner, that a complete novation of the indebtedness has taken place.⁵

§ 56. **Effect of notice.** — The second requirement of a *bona fide* purchase is, that the title was taken without notice of the prior claim to the property. The general proposition does not admit of any special difficulty. It is clear enough to the understanding that notice of a prior equity, when received before the acquisition of the interest in the property and before payment of the consideration, will prevent the assertion of the prior equity of a *bona fide* purchaser; while on the other hand, if the conveyance has been made and the consideration paid, before any notice is received, its reception subsequently

¹ *Weaver v. Barden*, 49 N. Y. 286; *Cary v. White*, 52 N. Y. 138; *Delancy v. Stearns*, 66 N. Y. 157; *Westbrook v. Gleason*, 79 N. Y. 23, 28; *Beck v. Uhrich*, 1 Harris, 636, 639; 4 N. Y. 499; *Kunkle v. Wolfersberger*, 6 Watts, 126; *Roseman v. Miller*, 84 Ill. 297; *Ketteridge v. Chapman*, 36 Iowa, 348; *Hutchins v. Chapman*, 37 Tex. 612; *Dickerson v. Tillinghast*, 4 Paige, 215; *Ellis v. Tousley*, 1 Paige, 280; *Whittick v. Kane*, 1 Paige, 200, 208; *Jewett v. Palmer*, 7 Johns. Ch. 65, 68; *De Mott v. Starkey*, 3 Barb. Ch. 408; *Webster v. Van Steenberg*, 46 Barb. 211; *Spicer v. Waters*, 65 Barb. 227; *Haughwout v. Murphy*, 21 N. J. Eq. (C. E. Green) 118.

² *Harris v. Morton*, 16 Barb. 274; *Patten v. Moore*, 32 N. H. 382; *High v. Batte*, 10 Yerg. 186; *McBee v. Loftis*, 1 Strobb. Eq. 90; *Williams v. Beard*, 1 S. C. 309; *Murray v. Ballou*, 1 Johns. Ch. 566; *Heatley v. Finster*, 2 Johns. Ch. 159; *Jewett v. Palmer*, 7 Johns. Ch. 64; *Christie v. Bishop*, 1 Barb. Ch. 105.

³ *Frost v. Beekman*, 1 Johns. Ch. 288; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Williams v. Beard*, 1 S. C. 309.

⁴ *Baldwin v. Sager*, 70 Ill. 503; *Partridge v. Chapman*, 81 Ill. 137.

⁵ *Jackson v. Winslow*, 9 Cow. 13; *Frost v. Beekman*, 1 Johns. Ch. 288.

can have no effect whatever upon the title of such a *bona fide* purchaser.¹

It has been a point of dispute as to whether the character of the conveyance may not make it impossible for one to claim the protection of a *bona fide* purchaser, and such has been held in a variety of cases to be true.² It has been particularly a matter of doubt, whether the grantee who takes the title under a quit-claim deed can claim to be a *bona fide* purchaser, inasmuch as such quit-claim deed purports on its face to transfer only whatever interest the grantor might own in the property, without any express or implied covenant or assertion that the grantor has any interest at all. A great many cases maintain that such a grantee cannot claim to be a *bona fide* purchaser, because from the character of the deed itself under which he holds, he is charged with notice of the defects of his grantor's title.³ But there are other cases which refuse to recognize in this respect any difference between the quit-claim deed and other modes of conveyance.⁴

§ 57. **Time of giving the notice.**—It has already been explained that in order that one might claim the benefit of the doctrine of *bona fide* purchase, he must pay or execute the consideration before receiving the notice of the prior equity.⁵ And the same requirement is made as a general rule in respect to acquiring the title to such property; in other words, in order that one might claim to be a *bona fide* purchaser, he must not only pay the consideration before receiving notice, but he must likewise receive the transfer of the property to him. The receipt of notice, before both these two joint acts have been done, will destroy the vendee's claim to the protection of a *bona fide* purchaser.⁶ The meaning of this rule, as laid down by the

¹ Kearney v. Vaughan, 50 Mo. 284; Hoyt v. Jones, 31 Wis. 389; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beekman, 1 Johns. Ch. 288; Murray v. Finster, 2 Johns. Ch. 155; Losey v. Simpson, 3 Stockt. Eq. 246; Beck v. Urich, 1 Harris, 636; Jewett v. Palmer, 7 Johns. Ch. 64; Hamman v. Keigwin, 39 Tex. 34; Batts v. Scott, 37 Tex. 59; Virgin v. Wingfield, 54 Ga. 451; Hardin v. Harrington, 11 Bush, 387; Hull v. Swarthout, 29 Mich. 249.

² Edmonds v. Torrence, 48 Ala. 38 (assignee from a vendee under a land contract); Lewis v. Boskins, 27 Ark. 61, and Peay v. Capps, 27 Ark. 160 (vendee in possession under a land contract, buying a better title than his vendors, cannot become thereby a *bona fide* purchaser, as against his vendor). In Conover v. Van Mater, 18 N. J. Eq. (3 C. E. Green) 481, it is held that the assignee of a mortgage, even without notice, takes it subject to all equities, it being only a chose in action and a mere equitable lien. The contrary is held in Massachusetts, where the mortgage creates a true legal estate. Welch v. Priest, 8 Allen, 165; Bertram v. Cook, 32 Mich. 518 (assignee of the vendee in a land contract); Stout v. Hyatt, 13 Kans. 232 (pur-

chaser of a mere equitable title); McNary v. Southworth, 58 Ill. 573 (where a trustee purchased at his own trust sale, a remote purchaser deriving title under him may be a *bona fide* purchaser).

³ Oliver v. Piatt, 3 How. (U. S.) 333; May v. Le Claire, 11 Wall. 217; Bragg v. Paulk, 42 Me. 502; Smith v. Dutton, 42 Iowa, 48; Watson v. Phelps, 40 Iowa, 482; Munn v. Best, 62 Mo. 491; Kearney v. Vaughan, 50 Mo. 284; Ridgeway v. Holliday, 59 Mo. 444.

⁴ Chapman v. Sims, 53 Miss. 154; Corbin v. Sullivan, 47 Ind. 356; and see Hutchinson v. Hartmann, 15 Kans. 133.

⁵ See ante, § 55.

⁶ Wells v. Morrow, 38 Ala. 125; Moore v. Clay, 7 Ala. 742; Duncan v. Johnson, 13 Ark. 190; Simms v. Richardson, 2 Litt. 274; Blair v. Owles, 1 Munf. 38; Doswell v. Buchanan, 3 Leigh, 394; Blight's Heirs v. Banks, 6 Mon. 192; Halstead v. B'k of K'y, 4 J. J. Marsh, 554; Pillow v. Shannon, 3 Yerg. 508; Zollman v. Moore, 21 Gratt. 313; and see Wilson v. Hunter, 30 Ind. 466, 471; Baldwin v. Sager, 70 Ill. 503; Palmer v. Williams, 24 Mich. 328; Penfield v. Dunbar, 64 Barb. 239; Wormley v. Wormley, 8 Wheat.

majority of the cases, is that although the consideration may be paid, if before the conveyance is made of the title the purchaser receives notice of the existence of the prior equity in the property, he cannot claim the benefit of the doctrine of *bona fide* purchase.¹ But there are some American cases which refuse to apply the rule thus laid down; and maintain that the payment of the consideration prior to the receipt of the notice is the main fact in determining the right to the protection of a *bona fide* purchase, whether the conveyance of the property to such purchaser is fully completed before or after the receipt of the notice.²

§ 58. **Effect of notice on purchaser of equitable interest.**—A very difficult matter to settle from the attitude of the authorities in this connection is, whether the *bona fide* purchaser of an equitable estate, who does not at the time acquire the legal estate, but acquires it by transfer subsequently and after he has received notice of the prior equity in the property, can claim to be a *bona fide* purchaser to such property. The difficulty arises out of the equitable propositions heretofore set forth, that where there are two successive *bona fide* purchasers of the equitable interest, in the absence of the modification of the recording laws, the prior equity can claim priority in consequence of being equal with the subsequent equity and superior in point of time. That being the case, the relative priority of these two succeeding equities is determined whenever the second equity is acquired. If therefore the holder of the second equity were permitted under the authorities, after receiving notice of the prior equity, to secure priority by acquiring the legal title to the property, such priority would, therefore, be permitted to be determined by the acquisition of an interest which has been received with notice of the existence of what up to the time that the legal title was acquired, was a superior equity; and hence the majority of the courts have held, in England and in this country, that such a subsequent acquisition of the legal title could not destroy the right of priority of the holder of the earlier equity.³ This is

421, 449, 450; *Frost v. Beekman*, 1 Johns. Ch. 288; *Murray v. Finster*, 2 Johns. Ch. 155; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Losey v. Simpson*, 3 Stockt. Eq. 246; *Beck v. Uhrich*, 1 Harris, 636, 639; *Bennett v. Titherington*, 6 Bush, 192.

¹ *Bennett v. Titherington*, 6 Bush, 192; *Simms v. Richardson*, 2 Litt. 274; *Blair v. Owles*, 1 Munf. 38; *Doswell v. Buchanan* 3 Leigh, 394; *Bligh v. Bank*, 6 Mon. 192; *Halstead v. B'k of K'y*, 4 J. J. Marsh, 654; *Pillow v. Shannon*, 3 Yerg. 508; *Peabody v. Fenton*, 3 Barb. Ch. 451, 464, 465; *Grimstone v. Carter*, 3 Paige, 421, 437; *Fash v. Ravesties*, 32 Ala. 451; *Moore v. Clay*, 7 Ala. 742; *Wells v. Morrow*, 38 Ala. 125; *Duncan v. Johnson*, 13 Ark. 190; *Osborn v. Carr*, 12 Conn. 195, 198.

² *Gibler v. Trimble*, 14 Ohio, 323; *Mut. Ass. Soc. v. Stone*, 3 Leigh, 218; *Wheaton v. Dyer*, 15 Conn. 807, 310; *Phelps v. Morrison*, 21 N. J. Eq. (9 C. E. Green) 196; *Carroll v. Johnston*, 2 Jones

Eq. 120; *Baggarly v. Gaither*, 2 Jones Eq. 80; *Leach v. Ansbacher*, 55 Pa. St. (5 P. F. Sm.) 85.

³ *Phillips v. Phillips*, 4 De. G. F. & G. 208; *Peabody v. Fenton*, 3 Barb. Ch. 451, 464, 465. In *Grimstone v. Carter*, 3 Paige, 421, 437, Chan. Walworth stated the doctrine most clearly and accurately: "This court will not permit the party having the subsequent equity to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity. To protect a party, therefore, and to enable him to defend himself as a *bona fide* purchaser for a valuable consideration, he must aver in his plea or state in his answer not only that there was no equal equity in himself by reason of his having actually paid the purchase-money, but that he had also clothed his equity with the legal title before he had notice of the prior equity."

undoubtedly the ruling of the courts in many of the cases;¹ but the decisions in this country are in respect to this question in a state of hopeless conflict. Almost as many of the cases hold, that with the subsequent acquisition of the legal title by the holder of the later equitable estate, he will acquire priority over the later equitable estate, notwithstanding he has notice of such prior equity at the time when he acquired the legal estate.²

The American authorities are at variance with each other on all points, and it is impossible to present any point of distinction for the purpose of reconciling them. But the English cases may be distinguished from each other as follows: where the equitable interest subsequently acquired is in the nature of a mere equitable right, and is not in the nature of an equitable estate, then the rule is applied that the subsequent acquisition of the legal estate by the holder of such an equity would not give any claim to priority. But where the subsequent purchaser acquires an equitable estate instead of a mere equity, the English courts, as a general rule, maintain that the superior equity is acquired by the acquisition of the legal estate, even though such purchaser has notice of the prior equity when he obtained the legal estate. The most common example in the English cases is that which is known under the name of tacking of mortgages; that is, where three mortgages are given successively over the same land to different parties, A. B. and C. The interests of B. and C. in their respective mortgages are under the rules of the common law, purely equitable. They have neither an equitable estate nor any legal estate in the land. Now where B. and C. take their mortgages with notice of the mortgage secured before, and more especially where C. takes his mortgage without notice of those mortgages and both are purchasers for value; since the interests of both are equitable, the first in point of time, namely, the mortgage of B., should have the priority. But if C., the third mortgagee, should acquire by purchase from A., the first mortgage, inasmuch as A.'s mortgage under the common law rules is the grant of the freehold, the mortgagee's interest is a legal estate; and C., by the purchase of A.'s mortgage would have acquired the legal title which, having thus been brought into conjunction with his equitable third mortgage, would have established that union of the equitable estate of the third mortgage with the legal estate acquired from A.,

¹ Wells v. Morrow, 38 Ala. 125; Duncan v. Johnson, 13 Ark. 190; Osborn v. Carr, 12 Conn. 195, 198; Bennett v. Titherington, 6 Bush, 192; Simms v. Richardson, 2 Litt. 274; Blair v. Owles, 1 Munf. 38; Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465; Grimstone v. Carter, 3 Paige, 421, 437; Fash v. Ravesties, 32 Ala. 451; Moore v. Clay, 7 Ala. 742; Doswell v. Buchanan, 3 Leigh, 394; Blight v. Bank, 6 Mon. 192; Halstead v. B'k of Ky, 4 J. J. Marsh. 554; Pillow v. Shannon, 3 Yerg. 508.

² Weaton v. Dyer, 15 Conn. 307, 310; Phelps v. Morrison, 24 N. J. Eq. (9 C. E. Green) 195; Car-

roll v. Johnston, 2 Jones Eq. 120; Baggaly v. Gaither, 2 Jones Eq. 80; Mut. Ass. Soc. v. Stone, 3 Leigh, 218; Gibler v. Trimble, 14 Ohio, 523; Leach v. Ansbacher, 55 Pa. St. (5 P. F. Sm.) 85. In Carroll v. Johnston, *sup.*, the case was the conflicting claims of two vendees on successive executory contracts of the sale of land. The later vendee obtained a legal conveyance after he had learned of the prior sale of the land to another, and the subsequent vendee was held to have acquired priority by the conveyance to him of the legal estate.

which under the English cases would give to C. the protection of a *bona fide* purchaser over the intermediate mortgage of B.; even though when he acquired the first mortgage by purchase he had learned of the second mortgage of B.¹ The English rule just explained did not apply solely to the case of successive mortgagees, but was applied by the courts to a variety of cases where the *bona fide* purchaser of an equitable estate subsequently acquired the legal title thereto and claimed priority over the holder of a prior equity. The equitable estate when united to the legal estate was declared to be superior to the mere prior equity.² Not only did the English courts recognize this superior equity when a legal estate was already acquired, but also where the *bona fide* purchaser had not yet procured the legal estate but had the best right to such an estate, in consequence of the apparent superiority of the equitable estate held by a *bona fide* purchaser over a mere equity.³

The exception to the operation of this rule of *bona fide* purchase which was found to be generally recognized by all of the authorities is in respect to the purchase of an equitable estate and the subsequent acquisition of a legal estate from the trustee; that is, where the two successive equitable interests are estates in the property and not mere equitable claims, and both have acquired such interests as *bona fide* purchasers. In these cases the equities of the two estates are equal except in point of time, and the first in point of time can claim priority over the other. Where this relation exists between the parties, the last equitable estate cannot be given priority over the earlier estate by the acquisition of the legal estate from the trustee, after the holder of the later equitable estate had received notice of the prior equitable estate.⁴ But it is manifest from the principles which have been set forth in preceding paragraphs, that where one acquires the legal estate by purchase from a trustee for value, and without notice at the time that the purchase was made of the existence of an equitable estate in a third person, such a purchaser could claim the protection of a *bona fide* purchaser.⁵

It has been a question among the American courts, whether one who acquires an equitable title in the first instance from the *cestui que trust* and subsequently purchases the legal title from the trustee without notice of a prior equitable estate, can claim the protection of a *bona fide*

¹ *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Marsh v. Lee*, 2 Ventris, 337; 1 Cas. 1 Chan. 162; *Young v. Young*, L. R. 3 Eq. 801; *Pease v. Jackson*, L. R. 3 Ch. 576; *Prosser v. Rice*, 28 Beav. 68; *Bates v. Johnson*, Johns. 304; see, also, S. C. 1 Eq. Lead. Cas. 837 (4th Am. ed.) Eng. note g.

² *Young v. Young*, L. R. 3 Eq. 801; *Jones v. Bowles*, 3 My. & K. 581; *Prosser v. Rice*, 28 Beav. 68; *Pease v. Jackson*, L. R. 3 Ch. 576; *Flcher v. Rawlins*, L. R. 7 Ch. 259; 11 Eq. 53; *Carter v. Carter*, 3 K. & J. 617.

³ *Ex parte Knott*, 11 Ves. 609; *Tildesley v. Lodge*, 3 Sm. & Giff. 543; *Willoughby v. Willoughby*, 1 T. R. 763, *per* Lord Hardwicke;

Charlton v. Low, 3 P. Wms. 328; *Bowen v. Evans*, 1 Jo. & Lat. 178, 264; *Shine v. Gough*, 1 Ball. & B. 436.

⁴ *Baillie v. McKewan*, 35 Beav. 177; *Sharples v. Adams*, 32 Beav. 213; *Colyer v. Finch*, 19 Beav. 500; 5 H. L. Cas. 905; *Saunders v. Dehew*, 2 Vern. 270; *Willoughby v. Willoughby*, 1 T. R. 763, 771; *Carter v. Carter*, 3 K. & J. 617, 642; *Allen v. Knight*, 5 Hare, 272; see, *ante*, 740, 756; *Sumner v. Waugh*, 56 Ill. 531, 539; *Zollman v. Moore*, 21 Gratt. 313; *Flagg v. Mann*, 2 Sumner, 486, 518; *Bellas v. McCarty*, 10 Watts, 13..

⁵ *Thorndike v. Hunt*, 3 De G. & J. 563; *Dawson v. Prince*, 2 De G. & J. 41.

purchaser against the prior purchaser of the equitable estate. It has been differently decided by the courts of the different states. According to some of these cases, inasmuch as the original purchase was of an equitable estate, the purchaser is said to be charged with notice of the later character of the title of his vendor, and of whatever defects in such title may exist, so that he would be put to his inquiry into the extent and character of such defects; and would for that reason be prevented from claiming any priority over the former purchaser of the equitable estate in consequence of his subsequent acquisition of the legal estate of the trustee.¹ But this conclusion is not sustained by the other authorities; and it is held by them that if the legal estate is acquired subsequently, without actual notice of the prior equitable claim to the estate, that the protection of a *bona fide* purchaser will be secured by such subsequent purchase.²

§ 59. **Effect of purchase without notice from an earlier purchaser.**—Where the land has been transferred from one person to another, as soon as anywhere in the line of transfer a *bona fide* purchaser is found, he not only procures thereby protection for his title while that title is in him; but he may transfer to another the title, together with the superior right acquired by his being a *bona fide* purchaser.³ The grantee of a *bona fide* purchaser is therefore just as much entitled to the superior equity of a *bona fide* purchaser, as if he himself was a purchaser without notice. And the fact, that he takes land with notice of the defective title or without a valuable consideration, does not interfere with his claim to enjoy the benefit of the superior equity acquired by his grantor in the character of a *bona fide* purchaser,⁴ with one exception, viz.: where the original purchaser who took the property with notice of the defective title, has the same property reconveyed to him by one who has the claim of superiority of a *bona fide* purchaser; that is, if A. took a deed with notice of the prior equitable claim, and then sold to B. who is a *bona fide* purchaser for value

¹ *Kramer v. Arthurs*, 7 Barr, 165, *per* Gibson, C. J.; *Sergeant v. Ingersoll* 7 Barr, 340; 3 Harris, 343.

² *Flagg v. Mann*, 2 Sumn. 486, 560; *Vattier v. Hinde*, 7 Pet. 252, 271.

³ *Wood v. Mann*, 1 Sumn. 506; *Galatin v. Erwin*, Hopk. Ch. 48; *Somes v. Brewer*, 2 Pick. 184; *Paris v. Lewis*, 85 Ill. 597; *Hardin v. Harrington*, 11 Bush, 367; *Pringle v. Dunn*, 37 Wis. 449; *Price v. Martin*, 46 Miss. 489; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 147; *Varick v. Briggs*, 6 Paige, 323; *Tompkins v. Powell*, 6 Leigh, 576; *Glidden v. Hunt*, 24 Pick. 221. The same rule applies under the recording acts: *Connecticut v. Bradish*, 14 Mass. 296; *Fallas v. Pierce*, 30 Wis. 443; *Mallory v. Stodder*, 6 Ala. 801; *Truluck v. Peoples*, 3 Kelley, 446; *Jackson v. Valkenburgh*, 8 Cow. 260; *Knox v. Silloway*, 10 Me. 201, 221; see *Varick v. Briggs*, *supra*.

⁴ *Fletcher v. Peck*, 6 Cranch, 87; *Alexander v. Pendleton*, 8 Cranch, 462; *Vattier v. Hinde*, 7

Pet. 252; *Boone v. Chiles*, 10 Pet. 177; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Webster v. Van Steenberg*, 46 Barb. 211; *Dana v. Newhall*, 13 Mass. 498; *Trull v. Bigelow*, 16 Mass. 406; *Boyn-ton v. Rees*, 8 Pick. 229; *Rutgers v. Kingland*, 3 Halst. Ch. 178, 658; *Holmes v. Stout*, 3 Green Ch. 492; *Bracken v. Miller*, 4 Watts & S. 102; *Mott v. Clark*, 9 Barr. 399; *Allison v. Hagan*, 12 Nev. 38; *Pringle v. Dunn*, 37 Wis. 449; *McShirley v. Birt*, 44 Ind. 382; *Moore v. Curry*, 36 Tex. 668; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 147; *Galatin v. Erwin*, Hopk. Ch. 48; *Varick v. Briggs*, 6 Paige, 323, 329; *Griffith v. Griffith*, 9 Paige, 315; *Lindsey v. Rankin*, 4 Bibb, 482; *Halstead v. B'k of K'y*, 4 J. J. Marsh. 554; *Blight's Heirs v. Banks*, 6 Mon. 192, 198; *Church v. Church*, 1 Casey, 278; *Filby v. Miller*, 1 Casey, 264; *Curtis v. Lunn*, 6 Munf. 42; *Lacy v. Wilson*, 4 Munf. 313; *City Council v. Page*, *Speers's* Eq. 159.

and without notice; while B. could transfer this superior equity to any other third person, notwithstanding such third person had notice of the prior equitable claim, A. could not participate in the enjoyment of this superior equity by any reconveyance of the property to him by B.¹

But the original purchaser must not only be a purchaser for value, in order to give to his volunteer grantee the superior equity of a *bona fide* purchaser, but he must also be a purchaser without notice; in other words, the original purchaser must have in the transfer to him all the elements, which go to make up a *bona fide* purchaser.

§ 60. **Good faith necessary.**—Not only must the purchaser be one for a valuable consideration, or without notice of a prior equitable estate, but he must also have acted in good faith. Where, therefore, in his connection with the transaction, he is guilty of any fraud or bad faith, either to the holder of the prior equitable estate or to anyone connected in any character with the transaction, he cannot claim the benefit afforded ordinarily to a *bona fide* purchaser. Such a party is confronted with the equitable maxim that, “he who comes into equity must come with clean hands.”²

§ 61. **The doctrine of bona fide purchase applied to assignments of things in action.**—In order in the first place that it may be understood why the equitable doctrine of *bona fide* purchase may apply to assignments of things in action, it must be known that at common law a thing in action could not be assigned, and in consequence an attempted assignment was void according to law, with one single exception, namely, negotiable paper; that exception was made in favor of the needs of commerce. Where, therefore, the attempt was made to assign an ordinary thing in action, the assignment if valid at all, could only be enforced in a court of equity.³ The commercial needs of the times were met and satisfied by the recognition of such assignments as valid equity, so that while the assignee was not recognized in a court of law at all, in equity he was deemed to be the real owner of the thing in action. Hence the assignment of things in action involves the creation of equitable interests, wherever the common law provision has not been repealed by statute. The character, therefore, of the rights of the assignee in and to the thing in action is a subject for the jurisdiction of the court of equity, and for the application of the principles of equity in respect to the doctrine of *bona fide* purchase. The application of this doctrine to assignments of things in action, may assume one of four forms: *First*, as to the equities which arise in respect to such things in action in favor of the debtor. *Second*, where the equity

Blatchley v. Osborn, 33 Conn. 226; Ashton's appeal, 73 Pa. St. (23 P. F. Sm.) 153; Church v. Island, 64 Pa. St. (14 P. F. Sm.) 153; Church v. Church, 1 Casey, 278; Troy City B'k v. Wilcox, Wis. 671; Kennedy v. Daly, 1 Sch. & Les. 355; Bumpus v. Platner, 1 Johns Ch. 213, 219; Butt v. Large, 6 Barb. 373.

² See Culpepper's Case, cited in Sanders v. Deligne, Freem. Ch. 123; Fagg's Case, cited in 2 Vern. 701; Cram v. Mitchell, 1 Sandf. Ch. 251; Zollman v. Moore, 21. Gratt. 313, 321.

³ See *post*, Ch. XXI. for a full discussion of equitable assignment.

arises between successive assignors and assignees; or in other words, in favor of some prior assignor. *Third*, where the question of title to such thing in action arises between successive assignees from the same assignor. *Fourth*, where the equity arises in favor of some third person not an assignee or original obligee.

§ 62. **Equities in favor of the debtor.**—It is a cardinal rule in the law of assignment of things in action in general, that the assignee of such things in action only acquires the right therein belonging to the assignor, and subject to all the limitations and conditions which attach to the assignor's title. Hence such an assignee, whenever the thing in action is not negotiable, whatever form the obligation may assume, takes it subject to all of the defenses which the debtor might have set up against the assignee.¹ This rule applies to all kinds of contracts of every sort where the element of negotiability is not present, such as the shares of stock, bonds, warehouse receipts, contracts for the sale of goods, and the like.² There is, however, an exception, recognized by some of the authorities, in favor of a mortgage which is given to secure the payment of a negotiable instrument. According to these authorities, the negotiable character of the instrument of indebtedness is imparted to the security itself, so that the assignee of a mortgage and of a note not only takes the note free from all the defenses of an equitable character which could be set up against the assignor, but likewise takes the mortgage itself free from such defenses.³ But, on the other hand, there are authorities which repudiate this rule and hold that the negotiable character of the note is not

¹ *Ingraham v. Disborough*, 47 N. Y. 421; *Wanzer v. Cary*, 76 N. Y. 526; *Andrews v. Gillespie*, 47 N. Y. 487; *Bush v. Lathrop*, 22 N. Y. 535, 538, *per* Denio, J.; *Reeves v. Kimball*, 40 N. Y. 299; *Commer. B'k v. Colt*, 15 Barb. 506; *Western B'k v. Sherwood*, 29 N. Y. 383; *Barney v. Grover*, 28 Vt. 391; *Boardman v. Hayne*, 29 Iowa, 339; *Norton v. Rose*, 2 Wash. (Va.) 233; *Brashear v. West*, 7 Pet. 608; *Wood v. Perry*, 1 Barb. 114, 131; *Ainslie v. Boynton*, 2 Barb. 258, 263; *Frants v. Brown*, 17 S. & R. 287; *Jordan v. Black*, 2 Murph. (N. C.) 30; *McKinnie v. Rutherford*, 1 Dev. and Bat. Eq. 14; *Moody v. Sitton*, 2 Ired. Eq. 382; *Lackay v. Curfiss*, 6 Ired. Eq. 199; *Kamena v. Huelbig*, 23 N. J. Eq. (8 C. E. Green) 78; *Bank v. Fordyce*, 9 Barr. 275; *Ragsdale v. Hagy*, 9 Gratt. 409; *Martin v. Richardson*, 68 N. C. 255; *Andrews v. McCoy*, 8 Ala. 920; *Jeffries v. Evans*, 6 B. Mon. 119; *Kleeman v. Frisbie*, 63 Ill. 482.

² *Parmalee v. Wheeler*, 32 Wis. 429; *Boardman v. Hayne*, 29 Iowa, 339; *Downey v. Tharp*, 63 Pa. St. (13 P. F. Sm.) 322; *Draper v. Saxton*, 118 Mass. 427; *McMasters v. Wilhelm*, 85 Pa. St. 218; *Allen v. Watt*, 79 Ill. 284; *Hall v. Hickman*, 2 Del. Ch. 318; *Kleeman v. Frisbie*, 63 Ill. 482; *Commer. B'k v. Colt*, 15 Barb. 506; *Reeves v. Kimball*, 40 N. Y. 299; *Marine B'k v. Jauncey*, 1 Barb. 486; *Maas v. Goodman*, 2 Hilt. 275; *Western B'k v. Sherwood*, 29 Barb. 383.

³ *Taylor v. Page*, 6 Allen, 86; *Kenicott v. Supervisors*, 16 Wall. 452, 469; *Carpenter v. Longan*, 16 Wall. 271, 273; *Reeves v. Scully*, Walk. Ch. 348; *Pierce v. Faunce*, 47 Me. 507; *Cicotte v. Gagnier*, 2 Mich. 381; *Bloomer v. Henderson*, 8 Mich. 395; *Potts v. Blackwell*, 4 Jones Eq. 58; *Martineau v. McCollum*, 4 Chand. 153; *Fisher v. Otis*, 3 Chand. 83; *Cornell v. Hichens*, 11 Wis. 353; *Croft v. Bunster*, 9 Wis. 503, 509; *Scott v. Magloughlin*, (Ill. '90.) 24 N. E. 1030; *Barnum v. Phenix*, 60 Mich. 388; *Carpenter v. Longan*, 16 Wall. 271; *Sprague v. Graham*, 29 Me. 160; *Kenicott v. Supervisors*, 10 Wall. 452; *Jackson v. Blodgett*, 5 Cow. 203; *Gould v. Marsh*, 1 Hun, 566; *Green v. Hart*, 1 Johns. 580; *Taylor v. Page*, 6 Allen, 86; *Young v. Miller*, 6 Gray, 152; *Dutton v. Ives*, 2 Mich. 515; *Breen v. Seward*, 11 Gray, 118; *Bloomer v. Henderson*, 8 Mich. 395; *Webb v. Haselton*, 4 Neb. 308; 19 Am. Rep. 638. But if a mortgage conveys more than one note, and one of the notes is overdue when all of them are assigned, the assignment is considered as to all of the notes, so far made after maturity, as to destroy the negotiable character of the mortgage as a security for the notes which are not yet due. *Abele v. McGuigan*, (Mich. '90.) 44 N. W. 393; see, to same general effect, *Whitney v. Graynor*, 74 Wis. 289.

imparted to the mortgage, and that the assignee of the mortgage takes the mortgage subject to all the equitable defenses which could have been enforced against the mortgagee, although the note is taken by him free from such defenses.¹ The doctrine that the assignee of things in action takes subject to all the defenses which the debtor may set up against the original creditor, applies to all sorts of defenses and defenses of every character. For example, the principle applies where there has been a failure of the consideration, or the consideration is void for illegality, or the original debt is itself conditional.² So, likewise, the assignee takes the thing in action subject to the right of the debtor to set off any debt, which the original creditor might have owed to him at the time of the assignment.³ So also is the thing in action taken by the assignee subject to the effect of any payment of the debt which might have been made, before the debtor receives notice of the assignment.⁴

§ 63. **Notice to debtor necessary.**—In consequence of this doctrine that the debtor can set up against a subsequent assignee as a defense, that he has paid the debt or has a claim against the original creditor which he desires to set off to his own obligation; it is requisite for the assignee of a thing in action to notify the debtor that he has taken the debt by assignment; for until the debtor has been so notified, he may pay the debt or receive from the creditor some other independent obligation and claim the right to set it off against his own obligation, and the assignee would take the thing in action subject to these defenses.⁵

§ 64. **Equities between successive assignors and assignees.**—Not only does the assignee take the debt subject to all the defenses which the debtor might have set up, but likewise any defenses which some prior assignor might have been able to set up against the assignee's immediate assignor. Cases of this kind can arise whenever the prior assignment has been procured by a fraud, a forgery, or breach of some fiduciary duty; or when it is subject to some condition or reservation, and the subsequent assignment is made without any condition or limitation whatever, the assignment being absolute as to its terms. The general rule is, that in all these cases, although the assignee claims

¹ *Baily v. Smith*, 14 Ohio St. 396; *Kleeman v. Frisbie*, 63 Ill. 482; *Bryant v. Vix*, 83 Ill. 11; *Redin v. Branhan*, 43 Minn. 283; *Boone v. Clark*, 129 Ill. 466; *Olds v. Cummings*, 31 Ill. 188; *Sumner v. Waugh*, 56 Ill. 531; *Johnson v. Carpenter*, 7 Minn. 176; *Bouligny v. Fortier*, 17 La. An. 121; *White v. Sutherland*, 64 Ill. 181.

² *Western B'k v. Sherwood*, 29 Barb. 383; *Ellis v. Messervie*, 11 Paige, 467; *Weaver v. McCorkle*, 14 Serg. & R. 304; *McMullen v. Wenner*, 16 Serg. & R. 18; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Myers v. United & Co., Ass. Co.*, 7 De G. M. & G. 112; *Tooth v. Hallett*, L. R. 4 Ch. 242.

³ *Louden v. Tiffany*, 5 Watts & S. 367; *Rider*

v. Johnson, 8 Harris, 190; *Campbell v. Day*, 16 Vt. 558; *Loomis v. Loomis*, 26 Vt. 198.

⁴ *Ord v. White*, 3 Beav. 357; *Kelly v. Roberts*, 40 N. Y. 432; *Simson v. Brown*, 68 N. Y. 355, 361.

⁵ *Upton v. Moore*, 44 Vt. 552; *Cook v. Mut. Ins. Co.*, 53 Ala. 37; *Brashear v. West*, 7 Pet. 608; *Muir v. Schenck*, 3 Hill, 228; *Bishop v. Garcia*, 14 Abb. Pr. (N. S.) 69; *Loomis v. Loomis*, 26 Vt. 198; *Campbell v. Day*, 16 Vt. 558; *N. Y. Life Ins. & Co. v. Smith*, 2 Barb. Ch. 82; *James v. Morey*, 2 Cow. 246; *Atkinson v. Runnells*, 60 Me. 440; *Rider v. Johnson*, 8 Harris, 190; *Louden v. Tiffany*, 5 Watts & S. 367; *Reed v. Marble*, 10 Paige, 409; *Kellogg v. Smith*, 26 N. Y. 18; *Van Keuren v. Corkins*, 66 N. Y. 77.

to be a *bona fide* purchaser, and has no notice of the defenses arising between the successive assignors of the thing in action; nevertheless, he takes such thing in action subject to such defenses, so that the prior assignor can enforce his right in and to the thing in action against this ultimate assignee; as much so, as if it was still the property of the prior assignee who had procured it in this wrongful way, or subject to these limitations of title.¹ This rule is applied, not only where the original assignment is accomplished by some fraud, or forgery, or is made upon an illegal consideration;² but as a general rule the same conclusion is reached, and the same rule applied, where the original assignment is conditional or subject to a certain reservation of claims in favor of the assignor, and the instrument of assignment is absolute on its face, and gives no notice to any subsequent assignee or purchaser of the limited or conditional character of the title of the prior assignee to the thing in action. In such cases, it is generally held that the subsequent assignee takes the thing in action subject to all the equities, claims and rights of the original holder or assignor.³ But an exception to this rule has been recognized by some of the modern cases. In obedience to the increasing demands of commerce for the application of the doctrine of negotiability to instruments of indebtedness other than bills and notes, the courts to some extent recognize them as negotiable. This is the case with bills of lading, warehouse receipts, and the like. That is, in respect to those kinds of things in action, the courts are inclined to hold that, whenever the holder makes a transfer by an instrument in writing which conveys to the purchaser the *indicia* of title and such assignment is absolute on its face, such an assignee acquires an absolute title thereto, if he be a *bona fide* purchaser, notwithstanding the limited title of the immediate assignor. This new rule has been applied by these cases to the transfers of non-negotiable notes,⁴ and to certificates of stock.⁵ But inasmuch as the extent of this exception is to be deter-

¹ Poillon v. Martin, 1 Sandf. Ch. 569; Maybin v. Kirby, 4 Rich. Eq. 105; Judson v. Corcoran, 17 How. (U. S.) 612; Bush v. Lathrop, 22 N. Y. 535; Anderson v. Nicholas, 28 N. Y. 600; approved by Woodruff, J., in Reeves v. Kimball, 40 N. Y. 299, 311; Bradley v. Root, 5 Paige, 632; Marvin v. Inglis, 39 How. Pr. 329; Mangles v. Dixon, 3 H. L. Cas. 702; Williams v. Thorn, 11 Paige, 459.

² Mason v. Lord, 40 N. Y. 476, 487; Anderson v. Nicholas, 28 N. Y. 600; Reid v. Sprague, 72 N. Y. 457, 462; Davis v. Bechstein, 69 N. Y. 440; Ingraham v. Disborough, 47 N. Y. 421; Barry v. Equit. Life Ins. Co., 59 N. Y. 587, 591; Cutts v. Guild, 57 N. Y. 229, 232, 233; Ledwich v. McKim, 53 N. Y. 307; Schafer v. Reilly, 50 N. Y. 61, 67, 68; Trustees, &c. v. Wheeler, 61 N. Y. 88, 104-106, 113 114; Greene v. Warnick, 64 N. Y. 220, 224, 225; Hall v. Erwin, 66 N. Y. 649; Crane v. Turner, 67 N. Y. 437, 440.

³ See Ballard v. Burgett, 40 N. Y. 314; Davis

v. Bechstein, 69 N. Y. 440, 442; Bush v. Lathrop, 22 N. Y. 525; Moore v. Metrop. Nat. B'k, 55 N. Y. 41; McNeil v. Tenth Nat. B'k, 46 N. Y. 325; Greene v. Warnick, 64 N. Y. 220, 224, 225; Marvin v. Inglis, 39 How. Pr. 329; Sherwood v. Meadow Val. M. Co., 50 Cal. 412; Matthews v. Sheehan, 69 N. Y. 585; Trustees, &c. v. Wheeler, 61 N. Y. 88; Barry v. Equit. Life Ins. Co., 59 N. Y. 587, 591; Cutts v. Guild, 57 N. Y. 229, 232, 233, per Dwight, J., Ledwich v. McKim, 53 N. Y. 307; Schafer v. Reilly, 50 N. Y. 61, 67, 68, per Allen, J.; Ingraham v. Disborough, 47 N. Y. 421; Reeves v. Kimball, 40 N. Y. 299, 304, per Lott, J.; 311, per Woodruff, J.; Winter v. Belmont M. Co., 53 N. Y. 428, 432, W.

⁴ Combes v. Chandler, 33 Ohio St. 178, 181-185; Holmes v. Kidd, 3 H. & N. 891; Hayward v. Stearns, 39 Cal. 58; Kyle v. Thompson, 11 Ohio St. 616.

⁵ Holbrook v. N. J. Zinc Co., 57 N. Y. 616, 622, 623; McNeil v. Tenth Nat. B'k, 46 N. Y. 325,

mined only by the adjudications of the courts, it is very difficult to say how far the doctrine can be applied to things in action in general. Some of the cases seem to apply the exception to all kinds of instruments of indebtedness in respect to the defenses or rights or claims which the prior assignor could set up, but which could not prevail against the original debtor.¹ The better opinion, however, seems to be, that the exception to the general rule, that the defenses shall prevail against the subsequent assignee, must be confined to cases in which the instrument of indebtedness which is assigned is given by the customs of the commercial world a *quasi* negotiable character.²

§ 65. **Acquisition by such subsequent assignee of the legal title.**—It must be borne in mind in all these cases of successive assignments, that the assignee by such assignment ordinarily acquires only the equitable title to the thing in action. Wherever such subsequent assignee perfects his equitable title by acquiring the legal title to the thing which is represented by the thing in action; as, for example, when he procures from the debtor the complete performance of the thing in action, by the transfer to him of the property which is called for by such thing in action; in such a case he has both the legal and the equitable titles and is able to assert such legal title, if procured by him without any notice of the prior equities in favor of another, free from such equities; in consequence of the doctrine, that a purchaser of the legal title has a superior right to the property over the prior purchaser, who only acquires thereby an equitable claim. A good illustration is where a certificate of stock is transferred by an independent instrument of assignment through fraud, and such assignee makes a second transfer of it to a *bona fide* purchaser who then goes to the corporation, surrenders his old certificate of stock, and procures in the place of it a new certificate. The original holder of the certificate of stock cannot, on the ground that the assignment of such old certificate had been procured by fraud or conditionally, or subject to some other reservation of right in such assignor, recover of the *bona fide* purchaser, any certificate which he has acquired through the surrender of the old, for by the acquisition of the new certificate he has in good faith changed the equitable into a legal title.³ His only remedy, where the assign-

reversing S. C. 55 Barb. 59; Johnston v. Laflin, 103 U. S. 800; Cushman v. Thayer Mfg. Co., 76 N. Y. 371; Thompson v. Toland 48 Cal. 99; Wood's Appeal, 92 Pa. St. 379; Prall v. Tilt, 28 N. J. Eq. 480; Mt. Holly Turnpike Co. v. Ferree, 2 C. E. Green, 117; Burton's Appeal, 93 Pa. St. 214; Bridgeport Bank v. New York, &c., R. R. Co., 30 Conn. 275; Duke v. Cahawba Co., 10 Ala. 82; Leitch v. Wells, 48 N. Y. 585; Moore v. Metropolitan Nat. B'k, 46 N. Y. 325; Burrall v. Brunswick R. R. Co., 75 N. Y. 220; Fraser v. Charleston, 11 S. C. 486; Commercial Bank v. Kortright, 22 Wend. 348; N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30.

¹ Farmers' Nat. B'k v. Fletcher, 44 Iowa, 352; Moore v. Metropolitan B'k, 55 N. Y. 41, 46-49.

² Sherwood v. Meadow, Val. M. Co., 50 Cal. 412; Winter v. Belmont Min. Co., 53 Cal. 428, 432; Thompson v. Toland, 48 Cal. 99; Brewster v. Sime, 42 Cal. 139, 147; Winter v. Belmont M. Co., 53 N. Y. 428, 432, W.; Reeves v. Kimball, 40 N. Y. 299, 304, *per* Lott, J.; 311, *per* Woodruff, J.; Ingraham v. Disborough 47 N. Y. 421; Schaffer v. Reilly, 50 N. Y. 61, 67; 68 *per* Allen, J.; Ledwich v. McKim, 53 N. Y. 307; Cutts v. Guild, 57 N. Y. 229, 232, 233, *per* Dwight, J.; Barry v. Equit. Life Ins. Co., 59 N. Y. 587, 591; Trustees, &c. v. Wheeler, 61 N. Y. 88, 104-106, 113, 114; Greene v. Warnick, 64 N. Y. 220, 224, 225.

³ See, also, Sewall v. Boston Water P. Co., 4 Allen, 277; Loring v. Salisbury Mill, 125 Mass. 138; Pratt v. Boston & A. R. R., 126 Mass. 443;

ment was a forgery, would be against the corporation for the enforcement of the original stock.¹

§ 66. **Assignment of things in action to successive assignees by same assignor.**—Where the holder of a thing in action undertakes, by an independent instrument of assignment, to transfer such thing in action successively to two independent persons, it would be another case of successive purchasers of equitable interests in good faith and for value; and inasmuch as in this case the equities are equal, neither party could claim any priority on the score of being a *bona fide* purchaser, and the priority can be determined only by the element of time. The rights of the first assignee are considered, in respect to such question of priority in point of time, superior to the subsequent assignee. Such would be the general rule where such a case arises in the transfer or creation of equitable estates or interests in lands, and of personal property in possession.² But when it is proposed to apply this rule of priority to successive assignments of a thing in action, a new element is found to enter the case, materially modifying the question of the equality of the equities of the parties. Where lands are conveyed or personal property of a tangible character is sold, the purchaser is enabled to acquire a perfect title, in the case of the lands by having the deed of conveyance recorded in this country, and in England by securing possession of the title deeds; and, in the case of personal property of a tangible character, by securing the possession of such property. In these cases, anyone purchasing the same property from the vendor would be charged with notice of his prior sale of the same. But where B. simply owes A. a sum of money, and A. has at a prior time made an assignment of such debt to C., and then proposes to assign the same debt for value to D., no provision is made whereby D. might ascertain, except of course from A., the character and present validity of A.'s title to the debt. In no way could D. ascertain the fact that A. had previously assigned the same debt to C. In view of the helpless condition of D. under the circumstances of the case, the courts have recognized that this case calls for the special application of a new rule of priority; and they have consequently held that in order that the prior assignee, C., may be able to claim his priority over the subsequent assignee, D., in consequence of his being prior in point of time, he must notify the debtor of such assignments; and if he fails to give such notice to the debtor, the subsequent assignee, upon giving his notice to the debtor of his own assignment prior to the receipt of the notice of the first assignee, can acquire

Machinists' Nat. Bank v. Field, 126 Mass. 345; *Brewster v. Sime*, 42 Cal. 139, 147; *Thompson v. Toland*, 48 Cal. 99; *Winter v. Belmont Min. Co.*, 53 Cal. 423, 432; but see *Sherwood v. Meadow Valley M. Co.*, 50 *Id.* 412; *Telegraph Co. v. Davenport*, 7 Otto, (97 U. S.) 369; *People v. Elmore*, 25 Cal. 653; *Weston v. Bear Riv., & Co.*, 5 Cal. 186; 6 *Id.* 425; *Naglee v. Pac. Wharf Co.*,

20 Cal. 529, 533; *Cottam v. Eastern Co. Ry.*, 1 Johns. & Hem. 243; *Denny v. Lyon*, 38 Pa. St. 98; *Bank v. Lanier*, 11 Wall. 369; *Pollock v. Nat. Bank*, 7 N. Y. 274.

¹ *Pratt v. Taunton Copper M. Co.*, 123 Mass. 110, 112; *Pollock v. Nat. Bank*, 7 N. Y. 274; *Midland Ry. v. Taylor*, 8 H. L. Cas. 751.

² See *ante*, § 43.

the priority of title.¹ This special rule thus formulated has been adopted by the English courts,² and by the majority of the American courts;³ but it has been rejected by the courts of some of the states, and the ordinary rule applied, which obtains in the general doctrine of priority.⁴ Under this rule, where the creditor makes an assignment of the same debt to two persons successively, and the notes are given by them to the debtor simultaneously, the assignee whose debt is prior in point of time will prevail over the prior assignment.⁵

§ 67. **Same principles applying to successive assignments by cestui que trust.**—Not only does this principle of notice apply to cases of ordinary indebtedness, but likewise to the case of the successive assignments of a fund, held by another in trust by the beneficiary of such fund. It is the duty of such an assignee to notify the trustee or holder of the fund of such assignment, not only in order to hold the trustee liable as to the fund to such assignee, but also to enable the assignee by such prior notice to acquire priority of title to such fund over some prior assignee of the fund.⁶ The notice in such case should be given to the trustee.⁷ If there are two or more trustees, notice to one of them is generally sufficient.⁸ But if one of the trustees is the assignee, notice should be given to the other trustee.⁹ If there

¹ "If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. It is true that a *chase in action* does not admit of tangible actual possession. But in *Ryall v. Rowles* (1 Ves. Sen. 348; 1 Atk. 165), the judges held that in the case of a *chase in action*, you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person." From the opinion of Sir Thomas Plumer M. R., in *Dearle v. Hall*, 3 Russ. P. 1, 2, and 3.

² *In re Freshfield's Trusts*, L. R. 11 Ch. D. 198, 200, 202, *per* Jessel, M. R.; *Ryall v. Rowles*, 1 Ves. Sen. 348; 1 Atk. 165; 2 Eq. Lead Cas. 1533, 1579 (4th Am. ed.).

³ *Foster v. Mix*, 20 Vt. 395; *Van Buskirk v. Hartford, &c. Ins. Co.*, 14 Vt. 141, 144; *Harrop v. Landers, &c., Co.*, 45 Vt. 561; *Hobson v. Stevenson*, 1 Tenn. Ch. 203; *Gayoso Sav. Inst. v. Fellows*, 6 Coldw. 467; *Clodfelter v. Cox*, 1 Sneed, 330; *McWilliams v. Webb*, 32 Iowa, 577; *Murdoch v. Finney*, 21 Mo. 138; *Spain v. Hamilton's Ex'r*, 1 Wall. 604, 624; *Campbell v. Day*, 16 Vt. 558; *Barney v. Douglas*, 19 Vt. 98; *Judah v. Judd*, 5 Day, 534; *Woodbridge v. Perkins*, 3 Vt. 364; *Dews v. Olwill*, 3 J. Bax. 432 (Tenn.); *Flickey v. Loney*, 4 Vt. 169; *Ward v. Morrison*, 25 Vt. 593; *Loomis v. Loomis*, 26 Vt. 198, 204; *Dale v. Kimpton*, 46 Vt. 76; *Barron v. Porter*, 44 Vt. 587; *Bishop v. Holcomb*, 10 Conn. 444; *Adams v. Leavens*, 20 Vt. 72.

⁴ *Dix v. Cobb*, 4 Mass. 508, 511; *Wood v. Partridge*, 11 Mass. 488, 491; *Littlefield v. Smith*, 17 Me. 327; *Beckwith v. Union B'k*, 9 N. Y. 211; *Kennedy v. Parke*, 17 N. J. Eq. (2 C. E. Green) 415; *Thayer v. Daniels*, 113 Mass. 129; *Bohlen v. Cleveland*, 5 Mason, 174; *Warren v. Copelin*, 4 Mete. 594; *Stevens v. Stevens*, 1 Ashm. 190; *U. S. v. Vaughan*, 3 Binn. 394; *Muir v. Schenck*, 3 Hill, 228.

⁵ *Callisher v. Forbes*, L. R., 7 Ch. 109; *Addison v. Cox*, L. R. 8 Ch. 76, 79; *Ex parte Garrard*, L. R. 5 Ch. D. 61; 4 *Id.* 101.

⁶ *Lloyd v. Banks*, L. R. 3 Ch. 488 490, *per* Lord Cairns, reversing S. C. *Id.*, 4 Eq. 222.

⁷ *Saffron, &c. Soc. v. Rayner*, L. R. 14 Ch. D. 406; *In re Tichener*, 35 Beav. 317.

⁸ *Wise v. Wise*, 2 Jo. & Lat. 403; *Timson v. Ramsbottom*, 2 Keen, 85.

⁹ *Comm'rs v. Harby*, 23 Beav. 508; *Willes v. Greenhill*, 29 Beav. 376, 387, 391.

be but one trustee, and he is the assignee, then of course no notice is necessary.¹ But in order that the notice to the trustee may be sufficiently effective in protecting the interests of such subsequent assignee against the prior claim of the earlier assignee, the notice should be given to such trustee while he is acting towards the fund in the character of a trustee. If the notice be given to him after he resigns the trust or before he accepts it, it will be of no value.²

§ 68. **Principles applied to assignments of certificates of stock.**—Where the thing in action which is assigned, instead of being an oral indebtedness, is itself a written instrument of indebtedness, the best and only safe method of transfer is the delivery and formal assignment of the instrument of indebtedness; and if there is a prior assignment by a separate instrument of assignment, the first assignee will not, by virtue of such assignment, have as good a title as the subsequent assignee. For the second assignee has by virtue of the possession of the legal instrument itself, not only the equitable title, but likewise the legal title to such fund; and hence the second assignee will have priority over the first assignee if he be a *bona fide* purchaser, in conformity with the general principles heretofore set forth in the preceding paragraphs. This phase of the question is found to be particularly true in the transfer of certificates of stock. While the corporation laws require, in order that the rights of a stockholder may be acquired by the assignment of the certificate of stock, that such assignment must be formally made upon the books of the company; yet in order that the assignee may acquire the legal title to such certificate as against other persons than the corporation, it is not necessary for the transfer of the stock to be made upon the company's books; it will be sufficient, and it is the business custom, to transfer the certificate itself by a written assignment on the certificate.³ Where, therefore, the certificate of stock is transferred to one by delivery and formal assignment of the certificate of stock, it is impossible for a second transfer of the same sort to be made. But where the first assignment is by a separate instrument of assignment, or verbal, and the certificate of stock is retained by the assignor, he then is enabled to make a second transfer of the same stock. If this second assignee acquires the certificate of stock, either with or without assignment, his equity is superior to the equity of the prior assignee; and if he be a *bona fide* purchaser for value, he can enforce his right to the stock against this prior assignee.⁴ But where the sub-

¹ *Ex parte* Garrard, L. R. 5 Ch. D. 61; 4 Beav. 401; *Elder v. Maclean*, 3 Jur. n. s. 284.

² *Buller v. Plunkett*, 1 J. & H. 441; *Addison v. Cox*, L. R. 8 Ch. 76.

³ *Comm. B'k v. Kortright*, 22 Wend. 348; N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30, 80, *per* Davis, J.; *Cushman v. Thayer Man. Co.*, 76 N. Y. 365, 371; *Dunn v. Commer. B'k*, 11 Barb. 580; *People v. Crockett*, 9 Cal. 112; *Mt. Holly*

Co. v. Ferree, N. J. Eq. (2 C. E. Green) 117; *McCready v. Rumsey*, 6 Duer, 574; *People v. Elmore*, 35 Cal. 653; *Parrott v. Byers*, 40 Cal. 614.

⁴ *Mt. Holly Co. v. Ferree*, 17 N. J. Eq. (2 C. E. Green) 117; *McNiel v. Tenth Nat. B'k*, 46 N. Y. 325; *Bank of Commerce's Appeal*, 73 Pa. St. (23 P. F. Sm.) 59, 64; *Sabin v. B'k of Woodstock*, 21 Vt. 353; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616. But see *contra* *Shropshire Union R. & C.*

sequent assignee of the stock is a judgment creditor, and the transfer is made and the certificate of stock is delivered to such judgment-creditor in satisfaction of his debt, until the transfer of the stock to such judgment-creditor is made on the books of the company, such assignee is not a *bona fide* purchaser for value and therefore cannot claim priority over the prior equitable assignee.¹ This at least is the rule as settled by very many of the cases; but some cases, nevertheless, repudiate the doctrine, and hold that a judgment-creditor who takes stock under these circumstances in satisfaction of such judgment-debt, is a *bona fide* purchaser and can therefore claim priority for his assignment over the prior assignee.²

§ 69. **Diligence of the assignee.**—Irrespective of any rule, which requires that the subsequent assignee of a debt must give notice to the debtor or trustee of the fund of such assignment, in order to acquire priority; the courts recognize the fact, that all equitable remedies are denied to anyone who permits any unreasonable delay to occur, before he attempts to secure an enforcement of his rights. Where, therefore, the prior assignee is guilty of any unreasonable delay in asserting his right to the debt or fund, and in consequence of such delay the subsequent assignee is permitted to proceed to the enforcement of the claim, and either acquires the absolute possession of the debt or fund, or the debtor or creditor has entered into binding obligations with such subsequent assignee to recognize him as the owner of the debt or fund; in all such cases the transaction, coupled with the negligence or delay of the prior assignee, gives to the subsequent assignee a priority which he could not otherwise claim.³

§ 70. **Equities in favor of third persons.**—Not only is it possible for prior equitable interests in and to a fund or debt to be set up against a subsequent assignee who is a [*bona fide* purchaser; but so also may the equitable claims against the fund or debt of third persons, who have never had title to such fund or deed, be set up against the subsequent assignee. Such would be some lien of a third person on such fund or debt; so also, the claims of creditors in cases where the prior transfer of the property was made in fraud of creditor; and the like. In all such cases these third persons can assert their rights against the fund or debt, it matters not whether such fund or debt has

Co. v. The Queen, L. R. 7 H. L. Cas. 496; Driscoll v. W. Bradley, &c., C. M. Co., 59 N. Y. 96. See, also, Bank v. Lanier, 11 Wall. 369.

¹ Fisher v. Essex B'k, 5 Gray, 373; Blanchard v. Dedham Gas Co., 12 Gray, 213; Pinkerton v. Manchester, &c., R. R., 42 N. H. 424; Shipman v. Aetna Insurance Co., 29 Conn. 245; but see Bolt v. Ives, 31 Conn. 25; Weston v. Bear River, &c., Co., 5 Cal. 186; S. C., 6 Cal. 425, 429; Naglee v. Pacific Wharf Co., 20 Cal. 530, 533; People v. Elmore, 35 Cal. 653, 655.

² U. S. v. Vaughn, 3 Binney, 394; People v. Elmore, 35 Cal. 653; Dale v. Kimpton, 46 Vt. 76; Grymes v. Hone, 49 N. Y. 17, 22; Comm. v.

Watmough, 6 Whart. 117; Broadway B'k v. McElrath, 2 Beas. 24; Commer. B'k v. Kortright, 22 Wend. 348; McNiel v. Tenth Nat. B'k, 46 N. Y. 335; Mt. Holly Co. v. Ferree, 17 N. Y. Eq. (2 C. E. Green) 117; Rogers v. N. J. Ins. Co., 4 Halst. Ch. 167. See, also, U. S. v. Vaughn, 3 Binney, 394; Stevens v. Stevens, 1 Ashmead, 190; Dix v. Cobb, 4 Mass. 508.

³ Maybin v. Kirby, 4 Rich. Eq. 105; Fisher v. Knox, 1 Harris, 622; Fraley's Appeal, 76 Pa. St. (26 P. F. Sm.) 42; Richards v. Griggs, 16 Mo. 416; Judson v. Corcoran, 17 How. (U. S.) 612; Mercantile Ins. Co. v. Corcoran, 1 Gray, 75.

been transferred to a *bona fide* purchaser. This at least has been the ruling of a great many of the courts.¹ On the other hand, the contrary rule has been laid down, that assignees of things in action take them subject to the defenses in favor of the debtor, and subject to the equitable rights and claims of a prior assignor or assignee in and to the deed or fund; yet free from equities existing against such thing in action in favor of third persons.²

§ 71. **Effect of statutory provision concerning assignments of things in action.**—It will be remembered that in a preceding paragraph it is stated, that the ground for the application of the equitable doctrine of priority to cases of assignment was founded upon the fact, that assignments of things in action in general are void at law and valid only in equity. This common-law doctrine has been repealed in most, if not in all the states, thus making an assignment of a thing in action legal instead of equitable in character, and giving to the assignee the legal title to the thing instead of a mere equitable title. If the statutory modification stopped there in the conversion of the assignee's title into a legal title, the equitable doctrine of priority would be permitted no longer to apply, and the general rule would prevail that the first assignee, having acquired the legal title to such thing in action, would be able to enforce it against a subsequent assignee on account of his priority in point of time.³ But in the majority, if not in all of the states, in which there are statutes giving to assignment of things in action the legal character, the express provision is inserted, that the assignee in the case of the assignment of a thing in action shall take subject to any set-off or any defense existing and recognized independently of statute; and hence the assignee under this statutory provision acquires the legal title to such thing in action, but takes it

¹ *Bush v. Lathrop*, 22 N. Y. 535, *per* Denio, J.; *Trustees, &c. v. Wheeler*, 61 N. Y. 88, *per* Dwight, J.; *Van Rensselaer v. Stafford*, Hopk. Ch. 569, 575; 9 Cow. 316, 318; *Taylor v. Bates*, 5 Cow. 376; *Muir v. Schenck*, 3 Hill, 228; *Allen v. Watt*, 79 Ill. 284; *Trabue v. Bankhead*, 2 Tenn. Ch. 412; *Bradley v. Root*, 5 Paige, 632; *Maybin v. Kirby*, 4 Rich. Eq. 106; *Judson v. Corcoran*, 17 How. 612; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Parrish v. Brooks*, 4 Brews. (Pa.) 154; *Pindall v. Trevor*, 30 Ark. 249; *Brooks v. Record*, 47 Ill. 30; *Greene v. Warnick*, 64 N. Y. 220; *Schafer v. Reilly*, 50 N. Y. 61; *Shropshire, &c. R. R. Co. v. The Queen, L. R.* 7 H. L. 496; *Davies v. Austin*, 1 Ves. 247; *Mangles v. Dixon*, 7 H. L. Cas. 702; *Beebe v. Bank of N. Y.*, Johns. 529; *James v. Morey*, 2 Cow. 246; *Sutherland, J.*

² *Livingston v. Dean*, 2 Johns. Ch. 479; *Murray v. Lylburn*, 2 Johns. Ch. 441, (overruled by succeeding cases in New York, cited in preceding note); *McConnell v. Wenrich*, 4 Harris, 365; *Moore v. Holcombe*, 3 Leigh. 597; *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 25, 39; *Sleeper v. Chapman*, 121 Mass. 404; *Sumner v. Waugh*, 56 Ill. 531; *Losey v. Simp-*

son, 3 Stockt. Ch. 246; *Bloomer v. Henderson*, 8 Mich. 395, 402; *Croft v. Bunster*, 9 Wis. 503, 508; *Mott v. Clark*, 9 Pa. St. (9 Barr.) 399, 404; *Taylor v. Gitt*, 10 *Id.* 428; *Metzgar v. Metzgar*, 1 Rawle, 227.

³ *Martin v. Kuntzmuller*, 37 N. Y. 396; *Beckwith v. Union B'k*, 9 N. Y. 211, 212, *per* Johnson, J.; *Meyers v. Davis*, 22, N. Y. 489, 490, *per* Denio, J.; *Barlow v. Myers*, 64 N. Y. 41; reversing 6 N. Y. Sup. Ct. 183; *Roberts v. Carter*, 38 N. Y. 107; *Wells v. Stewart*, 3 Barb. 40; *Ogden v. Prentice*, 33 Barb. 160; *Maas v. Goodman*, 2 Hilt. 275; *Lathrop v. Godfrey*, 6 T. & C. 96; *Robinson v. Howes*, 20 N. Y. 84; *Merrill v. Green*, 55 N. Y. 270, 274; *Frick v. White*, 57 N. Y. 103; *Adams v. Rodarmel*, 19 Ind. 339; *Morrow's Assignees v. Bright*, 20 Mo. 298; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Blydenburg v. Thayer*, 3 Keys, 293; *Williams v. Brown*, 2 Keys, 486; *Watt v. Mayor, &c.*, Sandf. 23; *Martin v. Richardson*, 68 N. C. 255, and cases cited; *McCabe v. Grey*, 20 Cal. 509; *Herrick v. Wolverton*, 41 N. Y. 581; *Miller & Co. v. Florer*, 15 Ohio St. 148, 151; *Gildersleeve v. Burrows*, 24 Ohio St. 204; *Norton v. Foster*,

subject to the equitable doctrine of priority, as it has been explained in the preceding paragraphs. Such is found to be the case especially in all the states in which the New York code of procedure has been adopted.

12 Kans. 44, 47, 48; *Leavenson v. Lafontaine*, 3 Kans. 523, 526; *Loomis v. Eagle B'k*, 10 Ohio St. 327; *Casad v. Hughes*, 27 Ind. 141; *Lawrence v. Nelson*, 21 N. Y. 158; *Osgood v. DeGroot*, 35 N. Y. 348; *Harris v. Burwell*, 65 N. C. 584;

Richards v. Daily, 34 Iowa, 427, 429; *Smith v. Fox*, 48 N. Y. 674; *Smith v. Felton*, 43 N. Y. 419; *Bradley v. Angell*, 3 N. Y. 475, 478; *Chance v. Isaacs*, 5 Paige, 592; *Merritt v. Seaman*, 6 N. Y. 168; *Field v. Mayor, &c.*, 6 N. Y. 179.

CHAPTER V.

NOTICE.

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§ 73. **General statement and definition of notice.**—In the preceding chapter on the equitable doctrine of priority, the right of a *bona fide* purchaser to priority over the person, who claims and has a prior equity in the property purchased, was set forth; and it was shown that the purchaser's claim of priority was dependent upon the fact, that he takes his interest in the property without notice of the existence of the prior equity therein. His having notice of the prior equity destroys the *bona fide* character of the purchase, and he thereby loses the superior claim of priority which he would otherwise have, in consequence of his possession of both the legal and equitable title to the property. So important, therefore, is the possession of notice of the prior equity in determining this question of priority, that a special discussion of what constitutes notice and what is essential to a thorough comprehension of the subject is both proper and necessary. Notice may, therefore, be defined in general terms as a communication of the information of a fact, and one is said to have notice of a fact when information concerning its existence has either been communicated to him or it is presumed by law from the existence of certain facts that such information has been communicated to him.¹

¹ See Pomeroy's Eq. Jur., sect. 594.

§ 74. **Notice distinguished from knowledge.**—It will be observed in the definition of notice just given in the preceding paragraph, that it constitutes the communication of information concerning facts. Knowledge, on the other hand, is the possession of such information, it matters not how it is acquired. One may, therefore, have knowledge of the fact, without having received any technical notice of such fact; that is, one may know of the existence of a prior right in and to the property which he purchases, without having received from the owner of such prior interest any technical notice of its existence; on the other hand, the notice which would be sufficient in law to destroy the priority of a subsequent purchaser, may not be sufficiently complete to give to such subsequent purchaser a full knowledge of the character and terms of the prior equity, and yet the notice would be sufficient. Notice, therefore, may be considered rather as a substitute for actual knowledge, and the knowledge itself be treated and considered as the primary fact of importance. For this reason, the possession of information concerning the prior right or equity by a subsequent purchaser ought to have the same effect in destroying the claim to priority of such subsequent purchaser, as would be the receipt by him of a technical notice, and such is the conclusion of the cases in which the question has been raised. But a difference must be observed between the amount of such information required to be communicated in the giving of the notice and the amount of information one must have concerning the prior equity, in order that such subsequent purchaser might, in the absence of technical notice, be charged with knowledge of the existence of such prior equity. It is not sufficient, in the latter case, that he should have information creating or raising suspicions concerning the existence of such prior equity; but the information must be so extensive and complete as to support the conclusion of fact that he knew enough of the existence and nature of the prior claim, or equity, to induce any reasonably prudent man to assume the existence of such right or interest, and govern himself by such information in the conduct of his business.¹ The failure to recognize the distinction between notice and knowledge, and the disposition to ignore the equal effect of knowledge with that of notice, has produced no little confusion among the authorities in determining when the subsequent purchaser loses his priority in consequence of having notice.

§ 75. **Kinds of notice, actual or constructive.**—In the technical

¹ *Brown v. Wells*, 44 Ga. 573, 575; *Price v. McDonald*, 1 Md. 403; *Winchester v. Baltimore, &c.*, R. R. 4 Md. 231; *Johns v. Scott*, 5 Md. 81; *Lloyd v. Banks*, L. R. 3 Ch. 488; 490 *per* Lord Cairns; *In matter of Conrad Leiman*, 32 Md. 225, 244; *Pringle v. Dunn*, 37 Wis. 449, 465-467; *Jones v. Lapham*, 15 Kans. 540, 545, 546; *Virgin v. Wingfield*, 54 Ga. 451, 454; *Blatchley v. Osborn*, 33 Conn. 226, 233; *Butcher v. Yokum*, 61 Pa. St. (11 P. F. Sm.) 168, 171; *Lawton v. Gordon*, 37 Cal. 202, 205; *Dickerson v. Camp-*

bell, 32 Mo. 544; *Henry v. Raiman*, 1 Casey, (25 Pa. St.) 354; *Phillipps v. Bank of Lewistown*, 6 Harris (18 Pa. St.), 394, 404; *McKinney v. Brights*, 4 Harris (16 Pa. St.), 399; *Curtis v. Mundy*, 3 Met. 405, 407, *per* Putnam, J.; *Stevens v. Goodenough*, 26 Vt. 676; *Mulliken v. Graham*, 72 Pa. St. (22 P. F. Sm.) 484, 490; *Vanduyne v. Vreeland*, 1 Beasley, 142, 155; *Rupert v. Mark*, 15 Ill. 540; *Cox v. Milner*, 23 Ill. 476; *Hankinson v. Barbour*, 29 Ill. 80.

sense, in which the term *notice* is employed in the law, it may be divided into two kinds: *actual* and *constructive*. *Actual notice* constitutes the communication of information concerning a fact; that is, when applied to the particular question under inquiry, the subsequent purchaser is charged with actual notice of the existence of a prior equity, or equitable interest in the property which he purchases, whenever the fact of the existence of such prior equity or interest has been communicated to him.¹ On the other hand, a notice is said to be *constructive*, whenever the fact of the existence of such prior interest or equity has not been actually communicated to the purchaser, but he is informed of certain facts or circumstances from the knowledge of which the law presumes that he did have information concerning the existence of such prior equitable right or claim; because the information he did have was sufficient to put him upon an inquiry which, if carefully and diligently pursued, would have brought him to an acquaintance with the fact that such prior equity or equitable interest did exist.²

§ 76. **Actual notice established by direct and indirect evidence.**—A great many of the authorities have created no little confusion about *actual* and *constructive* notice, by confounding cases of constructive notice with those of actual notice which are established by indirect evidence. In many of the cases, the actual notice is construed to be a constructive notice; while on the other hand, clear cases of constructive notice are held to be cases of actual notice. In America, the importance of determining exactly and minutely the difference between actual and constructive notice, is in connection with the provision of the recording law, that the failure to record an instrument will cause the interest created by such instrument to lose priority over the subsequent purchaser who does not take it with *actual* notice of prior conveyance; that is, the subsequent purchaser who records his deed and takes it without actual notice, can claim the priority over the prior unrecorded conveyance, notwithstanding the existence of a constructive notice, the recording law of these states denying to constructive notice the same effect as is accorded to actual notice. This provision, however, is not common to all the recording laws; it is only a peculiar principle found in some of the recording acts. Wherever the principle does prevail, the effort of the prior purchaser is to make actual notice out of every kind of notice, while the subsequent purchaser

¹ *Speck v. Riffin*, 40 Mo. 405; *Maupin v. Emmons*, 47 Mo. 304, 306, 307; *Maul v. Rider*, 59 Pa. St. (9 P. F. Smith) 167, 171, 172; *Tillinghast v. Champlin*, 4 R. L. 173, 215; *Warren v. Swett*, 31 N. H. 332, 341, 342; *Hull v. Noble*, 40 Me. 459, 480; *Buck v. Pain*, 50 Miss. 648, 655; *Carter v. City of Portland*, 4 Oreg. 339, 350; *per McArthur J.*; *Buttrick v. Holden*, 13 Met. 355, 357; *Trefts v. King*, 6 Harris. (18 Pa. St.) 157, 160; *Rogers v. Jones*, 8 N. H. 264; *Griffith v. Griffith*, 1 Hoff. Ch. 153; *Buck v. Paine*, 50 Miss. 648, 655; *Epley*

v. Witherow, 7 Watts, 163, 167; *Jaques v. Weeks*, 7 Watts, 261, 274; *Blatchley v. Osborn*, 33 Conn. 226, 233; *Nelson v. Sims*, 1 Cush. 383, 388; *Curtis v. Blair*, 4 Cush. 309, 328; *Bartlett v. Glascock*, 4 Mo. 62, 66.

² *Espin v. Pemberton*, 3 De G. & J. 547, 554, 555; *Atterbury v. Wallis*, 8 De G. M. & G. 454; *Ware v. Lord Egmont*, 4 Id. 460, 473, 474; *Penny v. Watts*, 1 Mac. & G. 150, 167; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652, 654; *Maxfield v. Burton*, L. R. 17 Eq. 15, 18.

endeavors to have every kind of notice declared to be constructive notice. The result of this contention has made considerable confusion among the cases. The confusion does not arise in determining whether a notice is actual or constructive, where there has been a direct communication of the information concerning the existence of the prior claim or conveyance, and when that direct communication of the fact is proven by direct evidence. Under these circumstances, there can be no doubt that the notice is actual. The difficulty of distinguishing between actual and constructive notice arises only when there has been no direct proof of a direct communication to the subsequent purchaser; but the effort is made to prove that he did have actual notice or actual knowledge of the existence of the prior interest or claim, by evidence concerning the facts or circumstances from which the possession of such equitable notice or knowledge can be inferred as a fact. Inasmuch as constructive notice is, by the definition given in the preceding paragraph, a presumption of law, that the subsequent purchaser has actual notice when he has information sufficient to put a reasonably prudent man upon inquiry which would lead to the actual acquisition of knowledge, the line of distinction between such constructive notice and actual notice established by indirect evidence, appears without doubt to be a very fine one. But the distinction is a well established one. In the case of actual notice established by indirect evidence, the court or jury claims as a conclusion of fact, that the subsequent purchaser did have actual notice of the prior equity or interest; and the conclusion is based upon circumstances which are established by a competent testimony and which are inconsistent with his ignorance of such prior equity.

In the case of constructive notice, the court concedes the fact that there has been no actual communication of information concerning the existence of the prior equitable interest, but that the communication of information concerning other facts or circumstances was sufficient to induce any reasonably prudent man to make an inquiry into the condition of the grantor's title to the property which would have led to the discovery of the existence of such prior interest or claim in some third person. In illustration of the distinction of these two classes of notice, the following examples may be given: where A. has bought property from B. under conditions which leave in B. an equitable claim against the property, and A. should subsequently sell the property to C., and certain facts are shown to exist; as for example, that C. was A.'s confidential clerk at the time when A. bought the property from B., and that C. did in fact represent A. in the negotiation with B., proof of these facts would indirectly establish the fact that C. must have known of the existence of B.'s equitable claim upon the property. This is a case of actual notice established by circumstantial evidence. On the other hand, where A. is about to sell property to C., B. is in actual possession of the land under the claim of some interest or right in and to the land, the fact that B. is in such possession,

and that A. is not in actual possession of the land, is not a fact from which it can be inferred that C. must have known of the existence of B.'s claim to the land; but it is a fact, or circumstance, from which the law may assume that the purchaser, C., did know; for he could have known of the existence of B.'s prior claim or interest and of its nature, if he had made the inquiry that a reasonably prudent man would have made under the circumstances. In other words, the information acquired by C., or which he could have obtained by inquiring after the possession of the property, was not such as to give him information concerning the existence and nature of B.'s claim to the property, but it was sufficient to put a reasonably prudent man upon his inquiry to find out what was the nature of B.'s claim to the possession to the property; and the law imposes upon B. the duty of making such an inquiry, and charges him with notice of the existence of such interest in B. if he failed to make the proper inquiry. This is a case of constructive notice. The cases are very numerous in which the distinction here laid down is made, and while there are cases which will not be found to be in accord with this distinction,¹ yet it is sufficiently accurate and in accord with the trend of authority in this country as to be taken as a reliable guide.²

§ 77. **What amount of information necessary to constitute actual notice.**—In a preceding paragraph it has been explained, that notice and knowledge are not identical terms, and that there may be notice without complete knowledge, and complete knowledge without notice; in other words, there are cases, in which the subsequent purchaser is not in possession of the full knowledge of the character and nature of the prior interest which is claimed to be held by some third person against the property purchased; and yet he has received so distinct a notice of the existence of such right or interest, as to be charged with an actual knowledge of the nature and character of such interest, so as to destroy his claim to priority over the prior interest outstanding in the third person. Hence it becomes an important question, what amount of information concerning the existence of an outstanding interest or claim to the pro-

¹ *Lamb v. Pierce*, 113 Mass. 72; *Crasson v. Swoveland*, 22 Ind. 428, 434; *Sibley v. Leffingwell*, 8 Allen, 584; *White v. Foster*, 102 Mass. 375; *Parker v. Osgood*, 3 Allen, 487; *Dooley v. Wolcott*, 4 Allen, 406.

² *Bartlett v. Glascock*, 4 Mo. 62, 66; *Epley v. Witherow*, 7 Watts, 163, 167; *Jacques v. Weeks*, Watts, 261, 274; *Buttrick v. Holden*, 13 Met. 355, 357; see *Brinkman v. Jones*, 44 Wis. 498, 517, 519, 521, 523; *Brown v. Volkening*, 64 N. Y. 76, 82, 83; *Lambert v. Newman*, 56 Ala. 623, 625; *Curtis v. Blair*, 4 Cushm. (Miss.) 309, 328; *Hull v. Noble*, 40 Me. 459, 480; *Warren v. Swett*, 31 N. H. 332, 341; *Helms v. Chadbourne*, 45 Wis. 60, 70; *per Cole, J.*; *Chicago, &c., R. R. v. Kennedy*, 70 Ill. 350, 361, *per Walker J.*; *Tillinghast*

v. Champlin, 4 R. I. 173 215; *Buck v. Paine*, 50 Miss. 648, 655; *Shepardson v. Stevens*, 71 Ill. 209, 212; *Carter v. City of Portland*, 4 Oreg. 339, 350; *Pringle v. Dunn*, 37 Wis. 449, 460, 461, 465; *Parker v. Kane*, 4 Wis. 1; *Reynolds v. Buckman*, 35 Mich. 80; *Loughridge v. Bowland*, 52 Miss. 546, 553, 555; *Shotwell v. Harrison*, 30 Mich. 179; *Munroe v. Eastman*, 31 Mich. 283; *Eck v. Hatcher*, 58 Mo. 235; *Tefts v. King*, 6 Harris, (18 Pa. St.) 157, 160; *Rogers v. Jones*, 8 N. H. 264; *Maupin v. Emmons*, 47 Mo. 304, 306, 307; *Parker v. Foy*, 43 Miss. 260, 266; *Wailles v. Cooper*, 24 Miss. 208, 228; *Griffith v. Griffith*, 1 Hoff. Ch. 153; *Nelson v. Sims*, 1 Cushm. (Miss.) 383, 388; *Barnes v. McClinton*, 3 Penn. 67.

perty will constitute an actual notice of its existence and of its nature. As already stated, it is not necessary that the notice should be so complete as to give full information as to the character of the interest or claim; but on the other hand, it must be something more than mere vague rumors of a defect in the title of the vendor. The information communicated must be sufficiently definite in character to raise the presumption that such a prior claim or interest in the property did exist; and that presumption must be sufficiently definite and strong, as a conclusion of fact, as to lead a reasonably prudent man to make an inquiry into the existence of such interest or claim, and into its nature and character, in order that the purchaser might be charged with actual notice of its existence and thus lose his priority over such prior claim or interest. If such was the nature of the information, although he did not thereby acquire actual knowledge of the nature and character of the prior interest, yet he will be charged with this actual knowledge if he failed to make the inquiry which could be expected of a reasonably prudent man and which the law requires of every one.¹ If the information which is actually communicated is of such a vague character that a reasonably prudent man would not give it consideration, and would, therefore, not be induced to make an inquiry into the condition of the vendor's title; then the fact of actual notice has not been made out at all, and proof of the communication of this information to the subsequent purchaser would not cause him to lose his priority of title.² Among the facts which

¹ *Chicago v. Witt*, 75 Ill. 211; *Loughridge v. Bowland*, 52 Miss. 546, 555; *Reynolds v. Ruckman*, 35 Mich. 80; *Lambert v. Newman*, 56 Ala. 623, 625, 626; see *Butcher v. Yocum*, 61 Pa. St. (11 P. F. Smith) 168, 171; *Lawton v. Gordon*, 37 Cal. 202, 205, 206; *Russell v. Petree*, 10 B. Mon. 184, 186; *Reynolds v. Ruckman*, 35 Mich. 80; *Chicago v. Witt*, 75 Ill. 211; *Ponder v. Scott*, 44 Ala. 241, 244, 245; *Hudson v. Warner*, 2 Har. & Giff. 415; *Price v. McDonald*, 1 Md. 403; *Reynolds v. Ruckman*, 35 Mich. 80; *Blatchley v. Osborn*, 33 Conn. 226, 233; *Nelson v. Sims*, 1 Cush. 383, 388; *Bartlett v. Glascock*, 4 Mo. 62, 66; *Barnes v. McClinton*, 3 Penn. 67; *Jaques v. Weeks*, 7 Watts, 261, 274; *Epley v. Withrow*, 7 Watts, 163, 167; *Center v. The Bank*, 22 Ala. 743; *McGehee v. Gindrat*, 20 Ala. 95; *Ringgold v. Waggoner*, 14 Ark. 69; *Doyle v. Teas*, 4 Scam. 202; *Spofford v. Weston*, 29 Me. 140; *Warren v. Swett*, 31 N. H. 332, 341; *Nute v. Nute*, 41 N. H. 60; *Hoxie v. Carr*, 1 Sumn. 193; *Hinde v. Vattier*, 1 McLean, 110; 7 Peters, 252; *Lambert v. Newman*, 56 Ala. 623, 625; *Blaisdell v. Stevens*, 16 Vt. 179, 186; *Stafford v. Ballou*, 17 Vt. 329; *McDaniels v. Flower, Brook, &c.*, M. Co. 22 Vt. 274; *Stevens v. Goodenough*, 26 Vt. 676; *Blatchley v. Osborn*, 33 Conn. 226, 233; *Hoxie v. Carr*, 1 Sumn. 193; *Lambert v. Newman*, 56 Ala. 623, 625; *Sigourney v. Munn*, 7 Conn. 324; *Peters v. Goodrich*, 3 Conn. 146; *Raritan Water, &c., Co. v. Veghte*, 6 C. E. Green (21 N. J. Eq.)

462, 478; *Hoy v. Bramhall*, 4 C. E. Green (19 N. J. Eq.) 563; *Helms v. Chadbourne*, 45 Wis. 60, 70; *Brinkman v. Jones*, 44 Wis. 498, 519; *Chicago, &c., R. R. v. Kennedy*, 70 Ill. 350, 361; *Williamson v. Brown*, 15 N. Y. 354, 362; *Swarthout v. Curtis*, 5 N. Y. 301; *Pendleton v. Fay*, 2 Paige, 202; *Shepardson v. Stevens*, 71 Ill. 646; *Erickson v. Rafferty*, 79 Ill. 209, 212; *Reynolds v. Ruckman*, 35 Mich. 80; *Loughridge v. Bowland*, 52 Miss. 546, 555; *Danforth v. Dart*, 4 Duer, 101; *Jackson v. Caldwell*, 1 Cow. 622; *Hawley v. Cramer*, 4 Cow. 717; *Parrish v. Brooks*, 4 Brews. 154; *Brown v. Volkening*, 64 N. Y. 76, 82; *Chicago v. Witt*, 75 Ill. 211; *Buck v. Paine*, 50 Miss. 648, 655; *McLeod v. First Nat. B'k*, 42 Miss. 99, 112; *Kernes v. Swope*, 2 Watts, 75; *Jaques v. Weeks*, 7 Watts, 261, 274; *Epley v. Withrow*, Watts, 163, 167; *Parker v. Foy*, 43 Miss. 260; *Carter v. City of Portland*, 4 Oreg. 339, 350, *per* McArthur, J.; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Stockett v. Taylor*, 3 Md. Ch. 537; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *Gibbes v. Cobb*, 7 Rich. Eq. 54; *Maybin v. Kirby*, 4 Rich. Eq. 105; *Pringle v. Dunn*, 37 Wis. 449, 465; *Shotwell v. Harrison*, 30 Mich. 179; *Munroe v. Eastman*, 31 Mich. 283; *Eck v. Hatcher*, 58 Mo. 235; *Lawton v. Gordon*, 37 Cal. 202, 205; *Maul v. Rider*, 59 Pa. St. (9 P. F. Smith), 167, 171, 172.

² *Buttrick v. Holden*, 13 Met. 355, 357; *Curtis v. Blair*, 4 Cush. (Miss.) 309, 328; *Chicago v.*

are held as tending to establish the fact of actual notice, are, close relationship, personal intimacy, or business connections between the subsequent purchaser and either of the parties to the prior transaction, which results in the creation of the prior interest or claim.¹ The great inadequacy of the price which the vendor had paid for the property, which would lead a purchaser from such a person to suspect that the property was purchased by his vendor subject to some outstanding equitable claim.² And, so also, the sight or knowledge of the presence of material objects on the premises, which would indicate the existence of some outstanding easement or right over the property.³ But in all of these cases, it must be observed that these facts or circumstances only tend to establish the fact of actual notice, and do not necessarily of themselves prove such actual notice, unless supported by corroborating circumstances; and in those cases where the conclusion is reached, that the notice is not proven by the existence of certain facts, it is based upon the absence of other corroborating circumstances.

Actual notice is also held to be established when it is shown that the deed which on account of the defectiveness of its execution, or for other reasons, has been improperly admitted to record has been actually read by the subsequent purchaser, during the investigation of the title to the property; although he cannot thereby be charged with the constructive notice created by the recording act, yet he may be charged with actual notice of the contents of such deed through having read the record of it.⁴

§ 78. **By whom may the information be given.**—It is held, as a general rule, that where actual notice is relied upon for the purpose of supporting the claim of priority against the subsequent purchaser, such notice must have been communicated or made to such subsequent purchaser, either by the party himself who claims or holds the prior equity or interest, or by some one who stands to him in a representative character, or in personal relationship with him of such a nature as that the party giving the information may be implied to have the authority to represent him in giving such notice. The general rule is that vague reports from strangers and from persons having no interest either in the property or in the person who claims the prior interest or

Witt, 75 Ill. 211; *Ponder v. Scott*, 44 Ala. 241, 244, 245.

¹ *Trefts v. King*, 18 Pa. St. (6 Harris) 157, 160; *Phillips v. Bank of Lewistown*, Pa. St. 394, 404; *Hoxie v. Carr*, 1 Sumn. 173, 192; *Tillinghast v. Champlin*, 4 R. I. 173, 204, 215; *Spurlock v. Sullivan*, 36 Tex. 511; *Flagg v. Mann*, 2 Sumn. 486; *Dubois v. Barker*, 4 Hun. 80, 86; 6 T. & C. 349; *Reynolds v. Ruckman*, 35 Mich. 80.

² *Eck v. Hatcher*, 58 Mo. 235; *Hoppin v. Doty*, 25 Wis. 573, 591; *Peabody v. Fenton*, 3 Barb.

Ch. 451; *Hoppin v. Doty*, 25 Wis. 573; *Beadles v. Miller*, 9 Bush. 405.

³ *Randall v. Silverthorn*, 4 Barr. 173; *Hervey v. Smith*, 22 Beav. 299; and see *Davies v. Sear*, L. R. 7 Eq. 427; *Blatchley v. Osborn*, 33 Conn. 226, 233; *Paul v. Connersville, &c.*, R. R., 51 Ind. 527, 530; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. (6 C. E. Green) 463, 478; *Hoy v. Bramhall*, 19 N. J. Eq. (4 C. E. Green) 563.

⁴ See *Pringle v. Dunn*, 37 Wis. 449, 461, 464; *Partridge v. Smith*, 2 Biss. 183, 185, 186; *Kerns v. Swope*, Watts, 75; *Hastings v. Cutler*, 4 Fost. (N. H.) 481.

right, will not constitute such a notice as would put the purchaser upon his inquiry into the authenticity of the information.¹ While, however, this is the case, yet it must not be supposed that no communication of any sort from strangers will have the effect of destroying the priority of the subsequent purchaser. Where the information is so definite and exact as that it amounts to actual knowledge of the existence of the prior interest or claim; then inasmuch as the actual knowledge supersedes and does away altogether with the necessity of any technical notice at all, it would be sufficient to overcome the priority of the subsequent purchaser and to give a priority to the owner of the prior equity or interest.² Not only must the information, as a general rule, be communicated by some one interested in the property or in the person who claims the prior interest, but the notice must be given at the time when the subsequent purchase is made, in order to put such person upon his inquiry. For if it were made at some remote time in the past, it is likely that it would escape his attention; inasmuch as at that time he would not be presumed to have any interest in the property and would therefore not charge his memory with the notice then received. For this reason, an actual notice given in a prior transaction is not a sufficient notice in a subsequent and different transaction.³

§ 79. When presumption from constructive notice is conclusive.—Where the party is charged with constructive notice of the prior interest or claim, because of information received by him concerning the facts which would put him upon inquiry, which if diligently pursued would necessarily and beyond peradventure bring to his knowledge the nature and the character of the prior interest or equity; then he is conclusively presumed to have notice of such prior interest or equity, and it is impossible for him to establish, by any proof of inquiry without success, that he failed to get the expected information, and that, therefore, he did not have notice of such prior equity or interest in the property. Inasmuch as a due inquiry would necessarily lead him to the acquisition of the information, his failure to acquire such information would be conclusive proof of the inefficiency of the inquiry.

¹ *Woods v. Farmere*, 7 Watts, 382, 387, *per* Gibson, C. J.; *Jolland v. Stainbridge*, 3 Ves. 478, *per* Lord Loughborough; *Butcher v. Yocum*, 61 Pa. St. (11 P. F. Smith) 168, 171; *Mulliken v. Graham*, 72 Pa. St. (22 P. F. Smith) 384; *Ripple v. Ripple*, 1 Rawle, 386.

² *Butcher v. Yocum*, 61 Pa. St. 168, 171; *Lawton v. Gordon*, 37 Cal. 202, 205, 206; *Pringle v. Dunn*, 37 Wis. 441, 465-467; see in general *Price v. McDonald*, 1 Md. 403; *Winchester v. Baltimore, &c.*, R. R., 4 Md. 231; *Johns v. Scott*, 5 Md. 81; *Lloyd v. Banks*, L. R. 3 Ch. 488, 490, *per* Lord Cairns; in matter of *Conrad v. Lelman*, 32 Md. 225, 244; *Brown v. Wells*, 44 Ga. 573, 575; *Pringle v. Dunn*, 37 Wis. 449, 465-467; *Jones v. Lapham*, 15 Kans. 540, 545, 546; *Virgin v. Wing-*

field, 54 Ga. 451, 454; *Blatchley v. Osborn*, 33 Conn. 226, 233; *Henry v. Raiman*, 1 Casey (25 Pa. St.) 354; *Phillips v. Bank of Lewiston*, 6 Harris, (18 Pa. St.) 394, 404; *McKinney v. Brights*, 4 Harris, (16 Pa. St.) 399; *Curtis v. Mundy*, 3 Met. 405, 407, *per* Putnam, J.; *Stevens v. Goodenough*, 26 Vt. 676; *Mulliken v. Graham*, 72 Pa. St. (22 P. F. Sm.) 484, 490; *Vanduyne v. Vreeland*, 1 Beasley, 142, 155; *Rupert v. Mark*, 15 Ill. 540; *Cox v. Milner*, 23 Ill. 476; *Hankinson v. Barbour*, 29 Ill. 80.

³ See *Lowther v. Carlton*, 2 Atk. 242; *Fuller v. Benett*, 2 Hare, 394, 404; *Boggs v. Varner*, 6 Watts & S. 469; *Meehan v. Williams*, 12 Wright, 238; *Bank of Louisville v. Curren*, 36 Iowa, 555

Among the cases in which the constructive notice is absolute and the presumption of notice is conclusive are the following: *first*, that derived from a statutory record or registration; *secondly*, the statutory *lis pendens*; *thirdly*, definite recitals in deeds which constitute links in the chain of title; *fourthly*, notice to the agent by the subsequent purchaser.¹

§ 80. **When presumption from constructive notice is rebuttable.**—The presumption of actual notice² of the existence and nature of the prior equity or interest, which arises from the possession of information sufficient to put a reasonably prudent man upon his inquiry, is rebuttable whenever the facts are sufficient to put him upon his inquiry, but insufficient to raise any conclusive presumption that the inquiry would necessarily lead to the acquisition of the information. If the inquiry, when pursued intelligently and diligently, may result in a failure to ascertain the existence of the prior interest or equity; and the fact that such holder inquired without success has been established; the presumption of notice of the existing prior interest or equity would have been rebutted. Such would be the case, *first*, where the constructive notice rests upon the proof of extraneous facts and circumstances which establish, or tend to establish, the existence of equitable claims by third persons resulting from fraud, accident or mistake in prior transactions; *secondly*, where the constructive notice arises from the possession of the land by some one other than the vendor.³ If, however, in these cases the purchaser fails to make the due inquiry, the presumption becomes conclusive that he did receive notice of the prior equity or interest.

In this connection, it may be observed, that a new departure has been made by some of the later English cases in holding that one is not charged with the duty of making an inquiry, resulting from the possession by him of information concerning facts which would put a reasonably prudent man on his inquiry; but only when as a matter of fact, the information was sufficient to arouse in this particular purchaser the suspicion of the existence of such prior equity or interest, whether the information was sufficient or insufficient to put a reasonable man upon inquiry.³ Under these English cases, it seems necessary, in order to charge one with the duty of making an inquiry and to support a conclusive presumption, from the failure to make such inquiry, that he had notice of the existence and nature of the prior

¹ Maul v. Rider, 59 Pa. St. (9 P. F. Sm.) 187, 171; Mullison's Estate, 68 Pa. St. (18 P. F. Sm.) 212; Kennedy v. Green, 3 My. & K. 699; Helms v. Chadbourne, 45 Wis. 60, 70, 71; Chicago, &c. R. R. v. Kennedy, 70 Ill. 350, 361; Loughridge v. Bowland, 52 Miss. 546, 553.

² Espin v. Pemberton, 3 De G. & J. 547; Roberts v. Coft, 2 De G. & J. 1; Ware v. Lord Egmont, 4 De G. M. & G. 460; Hewitt v. Loosemore, 9 Hare, 449; Griffith v. Griffith, 1 Hoff, Ch. 153; Whitbread v. Boulnois, 5 Y. & C. 303,

per Alderson, J.; Jones v. Smith, 1 Hare, 43 per Vice-Chancellor Wigram; Hanbury v. Litchfield, 2 My. & K. 629; Hunt v. Elmes, 2 De G. F. & J. 578; Williamson v. Brown, 15 N. Y. 354, 360; Flagg v. Mann, 2 Sumn. 486, 554, per Story, J.; Rogers v. Jones, 8 N. H. 264, per Parker, J.

³ Ware v. Lord Egmont, 4 De G. M. & G. 460, 473, by Lord Chanworth; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; decided by V. C. Turner, and see Woodworth v. Paige, 5 Ohio St. 70, 76.

equity or interest, to show that the failure to pursue the inquiry was a case of gross and culpable negligence on the part of this purchaser under the facts and the circumstances of the case, and particularly in the light of the personal element in the case, viz: the character of the purchaser. If he cannot be charged with gross and culpable negligence in failing to make the inquiry, he is not charged with constructive notice.¹ But this departure of the English courts has not been completely endorsed by all of the English cases;² nor has it been recognized by the American courts. It is uniformly held in this country that the subsequent purchaser is charged with constructive notice and is put upon his inquiry, whenever he receives information of facts which are sufficient to put a reasonably prudent man upon his inquiry, notwithstanding his own personal peculiarities may have prevented his suspicion of the existence of a prior claim or interest.³

§ 81. **What constitutes a due inquiry.**—It would be an impossibility to state in general terms, when and under what circumstances one has made a sufficient inquiry to enable him to rely upon his failure to ascertain the existence of a prior claim of equity, which the possession of certain information would lead him to suspect to exist. As a general proposition, what amounts to a due inquiry will depend upon the circumstances of each case, and cannot be ascertained by rules of a

¹ "I must not part with this case without expressing my entire concurrence in what has on many occasions, of late years, fallen from judges of great eminence, on the subject of constructive notice; namely, that it is highly inexpedient for the courts of equity to extend the doctrine, and attempt to apply it to cases in which it has not hitherto been held applicable. When a person has not *actual* notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he *ought* to have acquired, the notice with which it is sought to affect him, that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he has the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining of it was an act of gross and culpable negligence. It is obvious that no definite rule as to what will amount to gross and culpable negligence, so as to meet every case, can possibly be laid down." Lord Cranworth in *Ware v. Lord Egmont*, 4 De G. M. & G. 460, 473.

² *Broadbent v. Barlow*, 3 De G. F. & J. 570, 581; *Hunt v. Elmes*, 2 *Id.* 578, 587, 588; *Perry v. Holl*, 2 *Id.* 38; *Atterbury v. Wallis*, 8 De G. M. & G. 454; *Ware v. Lord Egmont*, 4 *Id.* 460, 473, 474; *Penny v. Watts*, 1 Mac. & G. 150, 167; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652, 654; *Maxfield v. Burton*, L. R. 17 Eq. 15, 18; *Rolland v. Hart*,

L. R. 6 Ch. 678, 681, 682; *Espin v. Pemberton*, 3 De G. & J. 547, 554, 555; *Roberts v. Croft*, 2 *Id.* 1, 5, 6; *Jackson v. Rowe*, 2 S. & S. 472; *Hewitt v. Loosmore*, 9 Hare, 449, 456, 458. In *Broadbent v. Barlow*, 3 De G. F. & J. 570, 581, *per* Lord Chan., Campbell said: "By 'the means of knowledge' by which anyone is to be affected, must be understood means of knowledge which are practically within reach, and of which a prudent man might have been exacted to avail himself."

³ *Deadson v. Taylor*, 53 Miss. 697, 701; *Brown v. Volkening*, 64 N. Y. 76, 82; *Cambridge Valley B'k v. Delano*, 48 N. Y. 326, 336, 339; *Rogers v. Jones*, 8 N. H. 264; *Griffith v. Griffith*, 1 Hoff. Ch. 153; *Hull v. Noble*, 40 Me. 459, 480; *Bennett v. Buchan*, 61 N. Y. 222, 225; *Kellogg v. Smith*, 26 N. Y. 18; *Baker v. Bliss*, 39 N. Y. 70, 74, 78; *Reed v. Gannon*, 50 N. Y. 345; *Warren v. Swett*, 31 N. H. 332, 341, 342; *Briggs v. Taylor*, 28 Vt. 180; *Littleton v. Giddings*, 47 Tex. 109; *Allen v. Poole*, 54 Miss. 323; *Pendleton v. Fay*, 2 Paige, 202, 205; *Edwards v. Thompson*, 71 N. C. 177, 179; *Major v. Buckley*, 51 Mo. 227, 231; *Woods v. Krebs*, 30 Gratt. 708; *Cordova v. Hood*, 17 Wall. 1, *per* Strong, J.; *Brush v. Ware*, 15 Peters, 93, 112; *Helms v. Chadbourne*, 45 Wis. 60, 70, 71, 73; *Russell v. Sweezey*, 22 Mich. 235, 239; *O'Rourke v. O'Connor*, 39 Cal. 442, 446; *Chicago, &c., R. R. v. Kennedy*, 70 Ill. 350, 361, 362; *Blanchard v. Wave*, 43 Iowa, 530; 37 *Id.* 305; *Loughridge v. Bowland*, 52 Miss. 446, 553, 555; *Dutton v. Warschauer*, 21 Cal. 609; *Pell v. McElroy*, 36 Cal. 268; *Witter v. Dudley*, 42 Ala. 616, 621 625.

general character.¹ But, notwithstanding this general caution against the reliability of general rules, certain general principles may be laid down, which may indicate in general terms the scope that the inquiry should take. In the first place, in all of the American states where recording acts prevail, the subsequent purchaser would be charged with the duty of examining the records for the purpose of ascertaining therefrom the existence or non-existence of the prior interest or equity, whose existence he has been led to suspect. If the information which he has received pointed to the existence of an outstanding claim or interest, which if it existed at all must appear upon the records and could not appear anywhere else, the due examination of the records would constitute all the inquiry that he must make.² It is, however, as a general rule, impossible for the purchaser to end his inquiry after the prior claim or interest with the examination of the records; for ordinarily the information received by him would lead him to suspect the existence of a claim or interest which could exist or arise outside of the records and the existence of which he could ascertain by information derived from other sources than the record. Whenever this is the nature of the information he has received, while he would be obliged to make an examination of the records, yet he could not have his inquiry stop at that point. And if he failed to pursue the inquiry further, it would not constitute such a due inquiry as would overthrow the presumption of notice of the existence of the prior claim or interest.³ After the examination of the record, it is necessary, ordinarily, for the purchaser to make personal inquiry of his own grantor or vendor, and the failure to make such inquiry would ordinarily make the inquiry insufficient to rebut the presumption of constructive notice.⁴ While there may be peculiar circumstances under which the inquiry of the grantor or vendor would be considered a sufficient inquiry to rebut the presumption of constructive notice;⁵ yet the general rule is that the inquiry must be continued further, and extended to third persons who claim the interest, and to all other persons who are supposed to know of the facts or the circumstances which would lead to the discovery of the prior interest or equity; and a failure to make this inquiry would prevent any rebuttal of the presumption of constructive notice.⁶ Although most of the cases on

¹ *Whitbread v. Boulnois*, 1 Y. & C. 303, *per* Alderson, J.; *Jones v. Smith*, 1 Hare, 43, *per* vice-Chancellor Wigram; *Williamson v. Brown*, 15 N. Y. 354, 360; *Flagg v. Mann*, 2 Sumn. 486, 554, *per* Story, J.; *Rogers v. Jones*, 8 N. H. 264, *per* Parker, J.; *Griffith v. Griffith*, 1 Hoff. Ch. 153.

² *Barnard v. Campan*, 29 Mich. 162; *Jackson v. Van Valkenburg*, 8 Cow. 260; *Bellas v. McCarthy*, 10 Watts, 13, 28; *Van Keuren v. Cent. R. R.*, 38 N. J. Law (9 Vroom), 165, 167; but see *contra*, *Illinois Cent. R. R. v. McCullough*, 59 Ill. 166; *Reynolds v. Ruckman*, 35 Mich. 80.

³ *Randall v. Silverthorn*, 4 Barr, 173; *Baker v. Bliss*, 39 N. Y. 70; *Littleton v. Giddings*, 47 Tex. 109; *Deason v. Taylor*, 53 Miss. 697, 701; *Munroe v. Eastman*, 31 Mich. 283; *Shotwell v. Harrison*, Mich. 179; *Russell v. Sweezey*, 22 Mich. 235, 239; *Wilson v. Hunter*, 30 Ind. 466, 472.

⁴ *Sergeant v. Ingersoll*, 7 Barr, 340; 3 Harris, 343, 348, 349.

⁵ See *Espin v. Pemberton*, 3 De G. & J. 547, 556.

⁶ *Espin v. Pemberton*, 3 De G. & J. 547, 556.

the question, what constitutes a due inquiry, are cases of constructive notice, yet the same principles apply in determining when there has been a sufficient inquiry to overcome the inference of facts of an actual notice which is drawn from circumstantial evidence. In both cases, the same principles determine when there has been a due inquiry after the existence or state of the prior equity or interest.¹

§ 82. **How far one can rely upon information received.** — The further question arises, how far the inquirer may rely upon the information of a positive character which he receives from some particular source. That is, suppose he learned that the prior claim or equity did once exist but that it had since been satisfied or released, can he rely upon the statement that the prior claim or equity which he has discovered to have once existed has been released or satisfied? The answer to this question depends upon the source of his information concerning the extinction of such prior interest or equity. If he has received the information of the existence of such prior claim or equity from a third party who is not interested in the property or in the prior equity or interest, then he may accept as reliable not only the information that such prior equity or equitable interest had existed, but also that it had been released or extinguished; for the disinterested character of his informant justifies him in giving credence to the subsequent statement.² So also, if when he inquired into the existence of this prior equity or equitable interest of the party who was supposed to have been the claimant of such prior equity, he could get no information whatever from such a party; or if such a person in response to his inquiry should deny the existence of the claim, or state that the claim which had once existed had been indeed satisfied or released; then the information concerning the release or satisfaction of the claim or interest may be relied upon, not only because it was an admission against the interest of the party making it and therefore worthy of credence; but for the further reason that such claimant for the prior equity or equitable interest would thereby be estopped from asserting such prior claim against the subsequent purchaser, whom he has misled by his information concerning the existence of his claim.³ But where the information concerning the existence of the prior equity or claim, as well as the information concerning its satisfaction and release, has been received from the grantor or vendor of the property, instead of from the party in whose favor the claim could be asserted, or from some disinterested party; then while the admission, by such grantor or vendor, of the existence of the prior outstanding or equity is worthy of credence,—

¹ *Barnard v. Campau*, 27 Mich. 162; *Pringle v. Dunn*, 37 Wis. 449, 465, 467; *Brinkman v. Jones*, 44 Wis. 498, 519; *Littleton v. Giddings*, 47 Tex. 109; *Shotwell v. Harrison*, 30 Mich. 179; *Munroe v. Eastman*, 31 Mich. 283.

² *Rodgers v. Wiley*, 14 Ill. 65; *Williamson v. Brown*, 15 N. Y. 354, 360; in *Pringle v. Dunn*, 27

Wis. 449, 465, 467; *In re Bright's Trusts*, 21 Beav. 430; *Buttrick v. Holden*, 13 Met. 355, 357; *Curtis v. Blair*, 4 Cush. (Mass.) 309, 328.

³ *Ibbotson v. Rhodes*, 2 Vern. 554; *Bridge v. Beadon*, L. R., 3 Eq. 664; *McGehee v. Gindrat*, 20 Ala. 95; *Burrowes v. Locke*, 10 Ves. 470; *Slim v. Croucher*, 1 De G. F. & J. 518.

because it is an admission against the interest of such grantor or vendor, —inasmuch as his statement concerning the satisfaction or release of such outstanding claim or equity is strongly in his favor and in accord with its interest, the courts require, as a general rule, that the inquiry should be pursued further, and the corroboration of the grantor's statement should be obtained if possible from the claimant of such supposed equitable interest.¹ But this statement must be made and taken with the caution, that wherever the facts of the case are of such a peculiar character that a reasonably prudent man would be induced to rely upon the statement of the creditor or vendor concerning the satisfaction of the outstanding claim, the failure to make further inquiry will not be considered as tending to prove the want of good faith or diminish the effectiveness of the inquiry, to rebut the presumption of the continued existence of the prior equity or equitable interest.²

§ 83. **Registration of deeds and other instruments.**—Except in respect to the enrollment of deeds of bargain and sale, deeds were not required by the English law to be registered or recorded. And, although a system of registration has been in operation since the reign of Queen Anne in some of the counties of England, no general registration law has ever been in force there.³ But in the United States from an early period, every state in the Union has had a general registration law and officers appointed, whose duty it was to record all deeds or conveyances, and other written instruments mentioned in the statute. The object of recording a deed is to furnish subsequent purchasers with reliable means of investigating titles. And hence it must be recorded in the county in which the land lies.⁴ The record simply furnishes evidence of the conveyance, and the law provides that if a deed is recorded, the record is constructive notice of the conveyance, and that an unrecorded deed shall not prevail against subsequent purchasers without notice.⁵

§ 84. **Requisites of a proper record.**—But in order that the record may be constructive notice of the deed and its contents, the deed must be a valid one, and possess all the requisites of a valid deed. The record of a defective deed furnishes no notice, except to one who has seen it. And the deed or other instrument must further be one required or permitted by law to be recorded.⁶ A quit-claim deed is

¹ Littleton v. Giddings, 47 Tex. 109; Bunting v. Ricks, 2 Dev. & Bat. Eq. 130; Russell v. Petree, 10 B. Mon. 184; Price v. McDonald, 1 Md. 403; Hudson v. Warner, 2 Har. & Gill, 415.

² Ponder v. Scott, 44 Ala. 341, 244, 245; Chicago v. Witt, 75 Ill. 211; Curtis v. Blair, 4 Cush. (Miss.) 309, 328; Rogers v. Jones, 8 N. H. 264; Jones v. Smith, 1 Hare, 43.

³ Wash. on Real Prop. 313; Williams on Real Prop. 466, 467.

⁴ Oberholtzen's Appeal, 124 Pa. St. 583.

⁵ Earle v. Fiske, 103 Mass. 492; Trull v. Bigelow, 16 Mass. 406; Stephens v. Morse, 47 N. H. 433; Murphy v. Nathans, 46 Pa. St. 512; King v. Gil-

son, 32 Ill. 654; Sicard v. Davis, 6 Pet. 124; Irvin v. Smith, 17 Ohio, 226; Van Rensselaer v. Clark, 17 Wend. 25; Jackson v. Leek, 19 Wend. 339; Corliss v. Corliss, 8 Vt. 373; Wells v. Morrow, 38 Ala. 125; Martin v. Quattlebaum, 3 McCord 205; Rogers v. Jones, 8 N. H. 264; Burkhalter v. Ector, 25 Ga. 55; Ricks v. Reed, 19 Cal. 571; Lillard v. Rucker, 9 Yerg. 64; Dixon v. Doe, 1 Smed. & M. 70; Giyan v. Doe, 7 Blackf. 210; Applegate v. Gracy, 9 Dana, 224; Hopping v. Burham, 2 Greene (Iowa), 39; Fitzhugh v. Barnard, 12 Mich. 10.

⁶ De Witt v. Moulton, 17 Me. 418; Shaw v. Poor, 6 Pick. 88; Blood v. Blood, 23 Pick. 80; Graves

sufficient to give the grantee priority over the prior unrecorded deed.¹ And a subsequent grantee, who takes without notice of the prior unrecorded deed, can claim priority over such prior conveyance, although his own deed may be unrecorded.² If a deed has been properly recorded, in most of the states it may be used in evidence without any other proof of its execution.³ And in some of them a certified copy of the record is made original evidence in establishing the claim of title from one grantor to another.⁴ But in other states the deed must be proved as at common law, unless it comes under the head of *ancient deeds*, *i. e.*, deeds thirty years old.⁵

§ 85. **To whom is record constructive notice.**—This record is constructive notice to only subsequent purchasers claiming under the grantor, *i. e.*, those who acquire an interest in the property subsequently, and as privy to the grantor, whether as grantee, mortgagee, or attaching creditor.⁶ It is not notice to those who claim independently of the grantor⁷ as, for example, where a mortgagee assigns the

v. Graves, 6 Gray, 391; *Isham v. Bennington Co.*, 19 Vt. 230; *Peck v. Mallams*, 10 N. Y. 518; *Carter v. Champion*, 8 Conn. 549; *Meighen v. Strong*, 6 Miss. 177; *Kerns v. Swope*, 2 Watts, 75; *McKean v. Mitchell*, 35 Pa. St. 269; *Bossard v. White*, 9 Rich. Eq. 483; *Harper v. Barsh*, 10 Rich. Eq. 149; *Harper v. Tapley*, 35 Miss. 510; *Herndon v. Kimball*, 7 Ga. 432; *Burnham v. Chandler*, 15 Texas, 441; *Stevens v. Hampton*, 46 Mo. 408; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Ely v. Wilcox*, 20 Wis. 529; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Stewart v. McSweeney*, 14 Wis. 468; *Lands v. Beardsley*, 32 W. Va. 594; *Johns v. Reardon*, 3 Md. Ch. 57; 5 Md. 81; *Work v. Harper*, 24 Miss. 517; *Thomas v. Grand Gulf Bank*, 9 Sm. & Mar. 201; *Pringle v. Dunn*, 37 Wis. 449, 460, 461; *Brown v. Lunt*, 37 Me. 423; *Graham v. Samuel*, 1 Dana, 166; *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 554; *White v. Denman*, 1 Ohio St. 110; *Stevens v. Morse*, 47 N. H. 532; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Sumner v. Rhodes*, 14 Conn. 135; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Barney v. Little*, 15 Iowa, 527; *Brinton v. Seevres*, 12 Iowa, 389; *Carter v. Champion*, 8 Conn. 548; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Green v. Drinker*, 7 W. & S. 440; *Hodgson v. Butts*, 3 Cranch, 140; *Shults v. Moore*, 1 McLean, 521; *Harper v. Reno*, 1 Freem. Ch. 323; *Helstner v. Fortner*, 2 Binn. 40; *Strong v. Smith*, 3 McLean, 362; *Cockey v. Milne*, 16 Md. 200. In *Mugrove v. Bouser*, (5 Oreg. 313; 20 Am. Rep. 737,) the Supreme Court of Oregon held that the record of a deed, not properly admitted to record, furnishes constructive notice of the contents of the deed to all who have actually seen the record. See, also, to same effect, *Kerns v. Swope*, 2 Watts, 75; *Hastings v. Cutler*, 4 Fost. 481. It is also a general rule that the record must be properly made, in order to raise constructive notice to subsequent purchasers; and it has been held in Wisconsin, though denied in Missouri and Pennsylvania,

that a record without an index furnishes no notice. *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 553; *Schell v. Stein*, 76 Pa. St. 398; 18 Am. Rep. 416.

¹ *Cutler v. James*, 64 Wis. 173, (54 Am. Rep. 603.)

² *Edwards v. Thom.*, 25 Fla. 222.

³ *Young v. Guilbeau*, 3 Wall. 640; *Houghton v. Jones*, 1 Wall. 702; *Carpenter v. Dexter*, 8 Wall. 532; *Ball v. McCawley*, 29 Ga. 355; *Hutchinson v. Rust*, 2 Gratt. 394; *Doe v. Prettyman*, 1 Houst. 339; *Samuels v. Borrowscale*, 104 Mass. 207; *Simpson v. Mundy*, 3 Kan. 181; *Young v. Ringo*, 1 B. Mon. 30; *Clark v. Troy*, 20 Cal. 219; *Fell v. Young*, 63 Ill. 106; *Sanders v. Bolton*, 26 Cal. 405; *Hinchliffe v. Hinman*, 18 Wis. 135; *Toulmin v. Austin*, 5 Stew. & P. 410.

⁴ *Scanlan v. Wright*, *Samuels v. Borrowscale*, 104 Mass. 207; *Harvey v. Mitchell*, 31 N. H. 532; *Farrar v. Fassenden*, 39 N. H. 268; *Dixon v. Doe*, 5 Blackf. 106; *Bogan v. Frisby*, 36 Miss. 178; *Clague v. Washburn*, 42 Minn. 371, (44 N. W. 130.)

⁵ See *Woolfolk v. Graniteville Mfg. Co.*, 23 S. C. 332.

⁶ *Tilton v. Hunter*, 24 Me. 35; *Shaw v. Poor*, 6 Pick. 35; *Bates v. Norcross*, 14 Pick. 224; *Flynt v. Arnold*, 2 Metc. 619; *Doe v. Beardsley*, 2 McLean, 412; *Whittington v. Wright*, 9 Ga. 23; *Miller v. Bradford*, 12 Iowa, 18; *Crochett v. Maguire*, 10 Mo. 34; *Lozey v. Simpson*, 3 Stockt. Ch. 246; *Ely v. Wilcox*, 20 Wis. 530; *Traphagen v. Irwin*, 13 Neb. 195.

⁷ *Long v. Dollarhide*, 24 Cal. 218, 453; *Crockett v. Maguire*, 10 Mo. 34; *St. John v. Conger*, 40 Mo. 535; *Iglehart v. Crane*, 42 Ill. 261; *Blake v. Graham*, 6 Ohio St. 580; *Baker v. Griffin*, 50 Miss. 158; *Tilton v. Hunter*, 24 Me. 29; *Bates v. Norcross*, 14 Pick. 224; *George v. Wood*, 9 Allen, 80; *Murray v. Ballou*, 1 Johns. Ch. 566; *Embury v. Conner*, 2 Sandf. 98; *Stuyvesant v. Hall*, 2 Barb. Ch. 151, 158; *Page v. Waring*, 76 N. Y.

mortgage. The record of the assignment is not constructive notice to the mortgagor or his assignees.¹ So also, is the mortgagee or his assignee not charged with constructive notice by the record of the mortgagor's assignment.² The same rule applies in general to those who acquire their interest from the grantor by a prior deed.³ It has also been held that the doctrine of constructive notice from the record, does not apply where A.'s deed to B. is unrecorded and B. then conveys to C. who puts his deed upon record without notice of the fact that B., the grantor, derived his title from A. It is held that a subsequent purchaser from A. is not charged with constructive notice of the prior recorded deed from B. to C.⁴

It is a doubtful question whether the registration of the prior deed, before the title has been acquired by the grantor and his deed recorded, would properly be considered constructive notice of the estoppel. It is certainly in violation of the spirit of the registration law which only requires the investigator to search the records for any incumbrance or conveyance which occurs between the time when the grantor acquired the title, and the time when he offers the title for conveyance.⁵

It has also been held by some of the courts that a purchaser from the heir cannot claim precedence for his recorded deed over the unre-

463; *Cook v. Travis*, 20 N. Y. 402; *Farmers L. & T. Co. v. Maltby*, 8 Paige, 361; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359; *Wood v. Farmere*, 7 Watts, 289; *Lightner v. Mooney*, 10 Watts, 412; *Hetherington v. Clark*, 6 Casey, 393, 395; *Keller v. Nutz*, 5 Serg. & R. 246; *Hoy v. Brumhall*, 4 Green Ch. 563; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Whittington v. Wright*, 9 A. 23; *Brock v. Headen*, 13 Ala. 3 0; *Dolin v. Gardner*, 15 Ala. 758; *Leiby v. Wolf*, 10 Ohio, 80, 83.

¹ *Jones v. Gibbons*, 9 Ves. 410; *Mitchell v. Burnham* 44 Me. 302; *James v. Johnson*, 6 Johns. Ch. 417; *Walcott v. Sullivan*, 1 Edw. Ch. 399; *Ely v. Scofield*, 35 Barb. 330; *Belden v. Meeker*, 47 N. Y. 307; *Bank v. Anderson*, 14 Iowa, 544; *Johnson v. Carpenter*, 7 Minn. 176; *Titus v. Haynes*, 9 N. Y. S. 742; *Castle v. Castle*, (Mich. '90) 44 N. W. 378; *Jones on Mort.*, sect. 473; 2 Washb. on Real Prop. 148; see *Watson v. Dundee Mortgage, &c. Co.*, 12 Or. 474.

² 4 Kent's Com. 174; *Stuyvesant v. Hall*, 2 Barb. Ch. 153; *Bell v. Fleming*, 12 N. J. Eq. 16; *Blair v. Ward*, 10 N. J. Eq. 126; *Groesbeck v. Mattison*, 43 Minn. 547; *Clark v. McNeal*, 114 N. Y. 237; *First Nat. Bank v. Honeyman*, (Dak. '89) 42 N. W. 771.

³ *George v. Wood*, 9 Allen, 80; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Holley v. Hawley*, 39 Vt. 532; *Boone v. Clark*, 129 Ill. 466; *Birnie v. Main*, 29 Ark. 591; *Ward's Ex'r v. Hague*, 25 N. J. Eq. (10 E. E. Green) 397; *Leach v. Beattie*, 33 Vt. 125; *Kyle v. Thompson*, 11 Ohio St. 616; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Taylor v. Maris' Ex'rs*, 5 Rawle, 51; see *Maul v. Rider*, 59 Pa. St. (9 P. F.

Sm.) 167, 171; *Cheesebrough v. Millard*, 1 Johns. Ch. 414; *Guion v. Knapp*, 6 Paige, 42; *Chancellor v. Walworth*, 2 Barb. Ch. 151, 157, 158; see, also, *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Hill v. McCarter*, 27 N. J. Eq. 41; *Hoy v. Brumhall*, 19 N. J. Eq. 563; *Van Orden v. Johnson*, 1 McCarter, 376; *Blair v. Ward*, 2 Stockt. Ch. 126; *Taylor v. Harris*, 5 Rawle, 51; *Leiby v. Wolf*, 10 Ohio, 83; *James v. Brown*, 11 Mich. 25; *Cooper v. Bigly*, 13 Mich. 63; *Doolittle v. Cook*, 75 Ill. 354; *Iglehart v. Crane*, 42 Ill. 261; *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509; *Halstead v. Bank of K'y*, 4 J. J. Marsh. 558.

⁴ *Veazie v. Parker*, 23 Me. 170; *Pierce v. Taylor*, 23 Me. 246; *Felton v. Pitman*, 14 Ga. 530; *Roberts v. Bourne*, 23 Me. 165; *Harris v. Arnold*, 1 R. I. 125; *Cook v. Travis*, 22 Barb. 338; 20 N. Y. 402; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Lightner v. Mooney*, 10 Watts, 407; *Calder v. Chapman*, 52 Pa. St. 359; *Fenne v. Sayre*, 3 Ala. 478; *Chicago v. Witt*, 75 Ill. 211.

⁵ *Calder v. Chapman*, 2 P. F. Smith, 359; *McCusker v. McEvy*, 10 R. I. 606; dissenting opinion of Judge Potter; *Great Falls Co. v. Worcester*, 15 N. H. 452; *Bivins v. Binzant*, 15 Ga. 521; *Gouchenour v. Moury*, 33 Ill. 331; *Bright v. Buckman*, 39 Fed. Rep. 243; *Farmers' L. & T. Co. v. Maltby*, 8 Paige, 361; *Boyle v. Peerless Pet. Co.*, 44 Barb. 239; *Somes v. Skinner*, 3 Pick. 52; *Tefft v. Munson*, 57 N. Y. 97; *White v. Patten*, 24 Pick. 324; *Jarvis v. Aikens*, 25 Vt. 635; *Kimball v. Blaisdell*, 5 N. H. 533; *Wark v. Willard*, 13 N. H. 389; *Pike v. Galvin*, 29 Me. 185; but see *Wilson v. Smith*, 52 Hun, 171.

corded deed of the ancestor, on the ground that since the unrecorded deed was a good conveyance against the heir, nothing descended to the heir which he could convey.¹ But the better opinion seems to be that the deed from the heir in such a case would be entitled to priority, and would vest the superior title in his grantee, for the reason that the registry laws declare a deed void against all subsequent purchasers without notice, if it has not been recorded.² If one has a recorded deed which has a priority over an antecedent unrecorded deed, the holder of the recorded deed acquires an absolute paramount title, which he can convey even to those who have notice of the prior unrecorded deed, with the exception of his own grantor, who originally acquired title with notice of the prior unrecorded deed. Such a person cannot improve his title by conveying the land to an innocent purchaser, and repurchasing it, relying upon the superior title of the intermediate grantee.³ And if the recorded deed is to one who has notice of the prior deed, although in his hands the recorded deed does not have precedence,⁴ if he conveys to one having no notice, his grantee acquires a good title. But if the prior deed is recorded before the conveyance by the first grantee who has had notice, the grantee of the second conveyance is bound by the constructive notice.⁵ But no one can take advantage of the record for the purpose of giving his deed priority over another unrecorded deed, who has not paid a substantial valuable consideration therefor, and he must show by extraneous evidence that it has been paid.⁶

§ 86. **Of what is record constructive notice.**—Not only is the record constructive notice of the recorded deed and its contents, but it will also be notice of all other deeds and their contents, to which reference is made in the recorded deed.⁷ But it has been held that the record of a deed which describes the subject of the grant in very general terms as, for example, “all the lands the grantor owns in Louis-

¹ *Hill v. Meeker*, 24 Conn. 211; *Hancock v. Beverly*, 6 B. Mon. 532; *Harlan v. Seaton*, 18 B. Mon. 312.

² *Earle v. Fiske*, 103 Mass. 491; *Powers v. McFerron*, 2 Serg. & R. 47; *McCulloch v. Endaly*, 3 Yerg. 346; *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Northrup*, 15 Ill. 148.

³ *Clark v. McNeal*, 114 N. Y. 287; *Lowther v. Carlton*, 2 Atk. 139; *Trull v. Bigelow*, 16 Mass. 406; *Bumpus v. Platner*, 1 Johns. Ch. 219; *Bell v. Twilight*, 18 N. H. 159.

⁴ *Cox v. Wayt*, 26 W. Va. 807.

⁵ *Flynt v. Arnold*, 2 Metc. 619; *Trull v. Bigelow*, 16 Mass. 406; *Adams v. Cuddy*, 13 Pick. 480; *Bracket v. Ridlon*, 54 Me. 434; *Hagthorp v. Hook*, 1 Gill & J. 270; *Baylis v. Young*, 51 Ill. 127; *Morse v. Curtis*, 140 Mass. 112 (54 Am. Rep. 456); *Slattery v. Schwannecke*, 118 N. Y. 543.

⁶ *Boone v. Chiles*, 10 Pet. 211; *Watkins v. Edwards*, 23 Texas. 447; *Parker v. Foy*, 43 Miss. 260; *Maupin v. Emmons*, 47 Mo. 304; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Shotwell*

v. Harrison, 22 Mich. 410; *Cox v. Wayt*, 26 W. Va. 807.

⁷ *White v. Foster*, 102 Mass. 375; *Gilbert v. Peteler*, 38 N. Y. 165; *Acer v. Westcott*, 46 N. Y. 384; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Hamilton v. Nutt*, 34 Conn. 501; *Baker v. Matcher*, 25 Mich. 53; *Grandin v. Anderson*, 15 Ohio St. 286; *Kyle v. Thompson*, 11 Ohio St. 616; *Leiby v. Wolf*, 10 Ohio, 83; *Doyle v. Stevens*, 4 Mich. 87; *Bancroft v. Consen*, 13 Allen, 50; *Orvis v. Newell*, 17 Conn. 97; *Bush v. Golden*, 17 Conn. 594; *Harrison v. Cachelin*, 23 Mo. 117, 127; *Mesick v. Sunderland*, 6 Cal. 297; *Buchanan v. International B'k*, 78 Ill. 500; *Ogden v. Walters*, 12 Kans. 282; *McCabe v. Grey*, 20 Cal. 509; *George v. Kent*, 7 Allen, 16; *Hetherington v. Clark*, 30 Pa. St. 303; *Morris v. Wadsworth*, 17 Wend. 103; *Dennis v. Burgett*, 6 Cal. 670; *Montefiore v. Browne*, 7 H. L. Cas. 241; *Viele v. Judson*, 82 N. Y. 32; *Thomson v. Wilcox*, 7 Lans. 373; *Youngs v. Wilson*, 27 N. Y. 351; *Dimon v. Dunn*, 15 N. Y. 498; *Parkist*

iana" does not furnish constructive notice of any particular tract.¹ The record is constructive notice of the contents of the deed only as they appear upon the record. A mistake of the register in the description of the property, or the amount of the mortgage, will fall upon the holder of the deed.² Such would also be the case where a deed absolute on its face was recorded without the defeasance deed which was intended to operate as a mortgage. A purchaser from such a mortgagee would not be charged with notice of any other title than that of an absolute owner.³ The same rule applies where an absolute conveyance is made to one who was intended to take title as trustee for another.⁴ But the absence in the record of some material part of the deed is not conclusive proof of the fact that the defect appears in the original.⁵ It is also a requisite of the registration, in order to raise constructive notice to a purchaser, that the deed be recorded in the county and state in which the land conveyed lies.⁶ And in some states a failure to index the deed will deprive the record of the constructive notice.⁷ So, also, will the record be defective where a mistake is made as to the books in which the instrument is recorded,

v. Alexander, 1 Johns. Ch. 394; *Peters v. Goodrich*, 3 Conn. 146; *Barbour v. Nichols*, 3 R. I. 187; *Souder v. Morrow*, 33 Pa. St. 83; *Clabaugh v. Byerly*, 7 Gill, 354; *Humphreys v. Newman*, 51 Me. 40; *Hall v. McDuff*, 24 Me. 311; *Tripe v. Macy*, 39 N. H. 439; *Leach v. Beattie*, 33 Vt. 195; *Bollas v. Chauncy*, 8 Conn. 389.

¹ *Green v. Witherspoon*, 37 La. An. 751.

² *Frost v. Beekman*, 1 Johns. Ch. 299; *Beekman v. Frost*, 18 Johns. 544; *Heistner v. Portner*, 2 Binn. 40; *Strong v. Smith*, 3 McLean, 362; *Cockey v. Milne*, 16 Md. 200; *Pringle v. Dunn*, 37 Wis. 449, 460, 461; *Brown v. Lunt*, 37 Me. 423; *De Witt v. Moulton*, 17 Me. 418; *Johns v. Reardon*, 3 Md. Ch. 57; 5 Md. 81; *Herndon v. Kimball*, 7 Ga. 432; *Work v. Harper*, 24 Miss. 517; *Thomas v. Grand Gulf B'k*, 9 Sm. & Mar. 201; *Stevens v. Morse*, 47 N. H. 532; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Blood v. Blood*, 23 Pick. 80; *Sumner v. Rhodes*, 14 Conn. 135; *Carter v. Champion*, 8 Conn. 548; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Green v. Drinker*, 7 W. & S. 440; *Graham v. Samuel*, 1 Dana, 166; *Halstead v. B'k of K'y*, 4 J. J. Marsh. 554; *White v. Denman*, 1 Ohio St. 110; *Watson v. Mercer*, 8 Pet. 88; *Gillespie v. Reed*, 3 McLean, 377; *Barnet v. Barnet*, 15 Serg. & R. 72; *Tate v. Stoeltzfoos*, 16 Serg. & R. 35; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Barney v. Little*, 15 Iowa, 527; *Brinton v. Seevres*, 12 Iowa, 389; *Hughes v. Cannon*, 2 Humph. 589; *Reed v. Kemp*, 16 Ill. 445; *Allen v. Moss*, 27 Mo. 354; *Brown v. Simpson*, 4 Kans. 76; *Wallace v. Moody*, 26 Cal. 387; *Hodson v. Butts*, 3 Cranch, 140; *Shults v. Moore*, 1 McClean, 521; *Harper v. Reno*, 1 Freeman. Ch. 323.

³ *Bailey v. Myrick*, 50 Me. 171; *Hart v. Farm. & Mech. B'k*, 33 Vt. 252; *Mesick v. Sutherland*, 6 Cal. 297; *Harrison v. Cachelin*, 23 Mo. 117, 126; *Bush v. Golden*, 17 Conn. 594; *Orvis v. Newell*,

17 Conn. 97; *Jacques v. Weeks*, 7 Watts, 261, 271; *Hendrickson's Appeal*, 12 Harris, 363; *Edwards v. Trumbull*, 14 Wright, 509; *Jacques v. Weeks*, 7 Watts, 261, 287; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Dey v. Dunham*, 2 Johns. Ch. 182; *James v. Morey*, 2 Cow. 246; *Brown v. Dean*, 3 Wendl. 208.

⁴ *Digman v. McCollum*, 47 Mo. 372, 375, 376; *Crane v. Turner*, 7 Hun, 357; 67 N. Y. 437; *Lozey v. Simpson*, 3 Stockt. Ch. 246; *Ely v. Wilcox*, 20 Wis. 523, 530; *Gliddon v. Hunt*, 24 Pick. 221; *Trull v. Bigelow*, 16 Mass. 406; *Connecticut v. Bradish*, 14 Mass. 296, 303; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359; *Buckingham v. Hanna*, 2 Ohio St. 551; *Doswell v. Buchanan*, 3 Leigh, 365, 381; *Hetzel v. Barber*, 69 N. Y. 1; *Page v. Waring*, 76 N. Y. 463, 467-469; *Farmers' Loan Co. v. Maltby*, 8 Paige, 361; *Schutt v. Large*, 6 Barb. 373; *Ring v. Richardson*, 3 Keyes, 450; *Goelet v. McMannus*, 1 Hun, 306; *Van Rensselaer v. Clark*, 17 Wend. 25; *Sims v. Hammond*, 33 Iowa, 368; *Fallas v. Pierce*, 30 Wis. 433; *Mahoney v. Middleton*, 41 Cal. 41, 50; *Flynt v. Arnold*, 2 Mete. 619; ⁵ *Todd v. Union Dime Sav. B'k*, 118 N. Y. 337 (23 N.E. 299).

⁶ *Kerns v. Swope*, 2 Watts, 75; *King v. Portis*, 77 N. C. 25; *Astor v. Wells*, 4 Wheat. 466; *Lewis v. Baird*, 3 McLean, 56; *Stevens v. Brown*, 3 Vt. 420; *Perrin v. Reed*, 35 Vt. 2; *Hundley v. Mount*, 8 Sm. & Mar. 387; *Crosby v. Huston*, 1 Tex. 203; *St. John v. Conger*, 40 Ill. 535; *Stewart v. McSweeney*, 14 Wis. 468.

⁷ *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Barney v. McCarty*, 15 Iowa, 522; *Whately v. Small*, 25 Iowa, 188; *contra*, *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Schell v. Stein*, 76 Pa. St. 398; 18 Am. Rep. 416; *Lane v. Duchac*, 73 Wis. 646.

as where a mortgage is recorded in the book for absolute conveyance, and *vice versa*.¹

§ 87. **From what time does priority take effect.**—As a general proposition, in the absence of special rules, the priority acquired by the registration takes effect from the date of the record.² And a date of the record is taken at the time when the deed was deposited for registration.³ But in some of the states the recording law provides

¹ *Viele v. Judson*, 83 N. Y. 32; *Mut. Life Ins. Co. v. Drake*, 1 Abb. N. C. 381; *Grimstone v. Carter*, 3 Paige, 421; *Verges v. Prejean*, 24 La. An. 78; *Fisher v. Tunnard*, 25 La. An. 179; *Succession of Cordeviolle v. Dawson*, 26 La. An. 534; *Colomer v. Morgan*, 13 La. An. 202; *McLanahan v. Reeside*, 9 Watts, 508; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359; *Leech's Appeal*, 8 Wright, 140; *Pringle v. Dunn*, 37 Wis. 449, 460, 461; *Van Thorniley v. Peters*, 26 Ohio St. 471; but see, *per contra*, *Speer v. Evans*, 47 Pa. St. 141, *per Woodward, J.*; *Green v. Garrington*, 16 Ohio St. 548; *B'd of Comm'rs v. Babcock*, 5 Or. 472; *Throckmorton v. Price*, 28 Tex. 605; *Bishop v. Schneider*, 46 Mo. 472; *Curtis v. Lyman*, 24 Vt. 338.

² 4 Kent's Com. 457; *Cushing v. Hurd*, 4 Pick. 252; *Goodsell v. Sullivan*, 40 Conn. 83; *Hubbart v. Walker*, 19 Neb. 94; *Lane v. Duchac*, 75 Wis. 646; *Doyle v. Stevens*, 4 Mich. 87; *Warner v. Whittaker*, 6 Mich. 133; *Barrows v. Baughman*, 9 Mich. 213; *Willcox v. Hill*, 11 Mich. 256, 263; *Rood v. Chapin*, Walk. Ch. 79; *Smith v. Gibson*, 15 Minn. 89, 99; *Coy v. Coy*, 15 Minn. 119, 126; *Grellett v. Heilshorn*, 4 Nev. 526; *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. Eq. 584; *Leggett v. Bullock*, Busb. L. 283; *Westbrook v. Gleason*, 79 N. Y. 23; *Judson v. Dade*, 79 N. Y. 373; *Page v. Waring*, 76 N. Y. 463; *Lacustrine, &c. Co. v. Lake Guano, &c. Co.*, 82 N. Y. 476; *Hoyt v. Thompson*, 5 N. Y. 347; *Newton v. McLean*, 41 Barb. 285; *Schutt v. Large*, 6 N. Y. 373; *Truscott v. King*, 6 N. Y. 346; *Fort v. Burch*, 6 N. Y. 60; *Odd Fellows' S. B'k. v. Banton*, 46 Cal. 603; *McMinn v. O'Connor*, 27 Cal. 238; *Fogarty v. Sawyer*, 23 Cal. 570; *Woodworth v. Gausman*, 1 Cal. 203; *Call v. Hastings*, 3 Cal. 179; *Bird v. Dennison*, 7 Cal. 287; *Chamberlain v. Bell*, 7 Cal. 292; *Denniss v. Burritt*, 1 Cal. 670; *Hunter v. Watson*, 12 Cal. 263; *McCabe v. Grey*, 20 Cal. 509; *Snodgrass v. Ricketts*, 13 Cal. 359; *Landers v. Bolton*, 26 Cal. 399; *Frey v. Clafford*, 44 Id. 335; *Packard v. Johnson*, 51 Id. 545; *Wilcoxson v. Miller*, 49 Id. 193; *Patterson v. Donner*, 48 Id. 369; *Long v. Dollarhide*, 24 Id. 218; *Fair v. Stevenot*, 29 Id. 486; *Mahoney v. Middleton*, 41 Id. 41; *Jones v. Marks*, 47 Id. 242; *O'Rourke v. O'Connor*, 39 Id. 442; *Smith v. Yule*, 31 Id. 180; *Thompson v. Pioche*, 44 Id. 508; *Lawton v. Gordon*, 37 Id. 202; *Vassault v. Austin*, 36 Id. 691; *Griswold v. Smith*, 10 Vt. 452; *Patten v. Moore*, 32 N. H. 382, 384; *Dickenson v. Glenney*, 27 Conn. 104; *Hartmyer v. Gates*, 1 Root, 61; *Ray v. Bush*, 1 Id. 81; *Franklin v. Cannon*, 1 Id.

500; *Welch v. Gould*, 2 Id. 287; *Judd v. Woodruff*, 2 Id. 298; *St. Andrews v. Lickwood*, 2 Root, 239; *Hall's Heirs v. Hall*, 2 Id. 383; *Beers v. Hawley*, 2 Conn. 467; *Hinman v. Hinman*, 4 Id. 575; *Hine v. Robbins*, 8 Id. 342; *Wheaton v. Dyer*, 15 Id. 307; *Watson v. Wells*, 5 Conn. 468; *Carter v. Champion*, 8 Id. 549; *Sumner v. Rhoda*, 14 Id. 135; *Byers v. Engles*, 16 Ark. 543; *Hamilton v. Fowlkes*, 16 Id. 340; *Dacoway v. Galt*, 20 Ark. 190; *School Dist. v. Taylor*, 19 Kans. 287; *Simpson v. Munder*, 3 Kans. 172; *Brown v. Simpson*, 4 Id. 76; *Claggett v. Crall*, 12 Id. 393, 397; *Wickersham v. Chicago, &c. Co.*, 18 Id. 487; *Johnson v. Clark*, 18 Id. 157, 164; *Jones v. Lapham*, 15 Id. 540; *Senter v. Turner*, 10 Iowa, 517; *Brinton v. SeEVERS*, 12 Id. 389; *Dargin v. Beeker*, 10 Id. 571; *Koons v. Grooves*, 20 Id. 373; *Bringhoff v. Munzenmaier*, 20 Iowa, 513; *Gardner v. Cole*, 21 Iowa, 205; *Willard v. Kramer*, 36 Id. 22; *Calvin v. Bowman*, 10 Iowa, 529; *Scoles v. Wilsey*, 11 Id. 261; *Miller v. Bradford*, 12 Id. 14; *Bostwick v. Powers*, 12 Id. 456; *English v. Waples*, 13 Id. 570; *Haynes v. Seachrest*, 13 Id. 455; *Breed v. Conley*, 14 Id. 269; *Stewart v. Huff*, 19 Id. 557; *Gower v. Doheney*, 33 Id. 36; *Thomas v. Blakemore*, 5 Yerg. 113, 124; *Hayes v. McGuire*, 8 Id. 92, 100; *Vance v. McNairy*, 3 Id. 176; *Shields v. Mitchell*, 10 Id. 8; *May v. McKeenon*, 6 Humph. 209; *Berkley v. Lamb*, 8 Neb. 399; *Merriman v. Hyde*, 9 Neb. 120; *Harra v. Gray*, 10 Id. 189; *Lincoln B. & S. Association v. Hass*, 10 Id. 583; *Hooker v. Hammill*, 7 Id. 234; *Jones v. Johnson Harvester Co.*, 8 Id. 451; *Mansfield v. Gregory*, 8 Id. 435; *Edminster v. Higgins*, 6 Neb. 269; *Galway v. Malchow*, 7 Id. 339; *overruling Bennet v. Fooks*, 1 Id. 465; *Metz v. State B'k of Brownville*, 7 Id. 171; *Colt v. Du Bois*, 7 Id. 394; *Dorsey v. Hall*, 7 Id. 465; *Reed v. Ownby*, 44 Mo. 204; *Valentine v. Harner*, 20 Id. 133; *Davis v. Ownsby*, 14 Id. 170; *Rev. Code (1871)*, p. 503; *Porter v. Sevey*, 43 Me. 519; *Goodwin v. Cloudman*, 43 Id. 577; *Merrill v. Ireland*, 40 Id. 569; *Hanly v. Morse*, 32 Id. 287; *Spofford v. Weston*, 29 Id. 140; *Butler v. Stevens*, 26 Id. 484; *Roberts v. Bourne*, 23 Id. 165; *Veazie v. Parker*, 23 Id. 170; *Pierce v. Taylor*, 23 Id. 246; *Rackleff v. Norton*, 19 Id. 274; *Lawrence v. Tucker*, 7 Id. 195; *Kent v. Plummer*, 7 Id. 461; see *Graves v. Ward*, 2 Dev. 301; *Forepaugh v. Appold*, 17 B. Mon. 625, 631.

³ *Den v. Richman*, 1 Green, (N. J.) 52; *Nichols v. Reynolds*, 1 R. I. 30; *Horseley v. Garth*, 2 Gratt. 471; *Bigelow v. Topliff*, 25 Vt. 274; *Warrnack v. Wightman*, 1 Brev. 331; *Hine v. Rob.*

that if a deed is recorded within the time allowed by law, it relates back to the time of delivery of the deed, and has priority over a subsequently executed deed which has been previously recorded. Statutory provisions of this character are to be found in Ohio, Kentucky, Mississippi, Georgia, South Carolina, Pennsylvania, Alabama, Indiana, Delaware, Tennessee, and Maryland.¹ The time allowed for recording varies with the different states. If in these states a deed has been recorded after the expiration of the time allowed by law, the record gives constructive notice from the time of the record, but does not relate back to the time of delivery.²

bins, 8 Conn. 347; Gill v. Fauntleroy, 3 B. Mon. 177; Lane v. Duchao, 73 Wis. 646; Kessler v. State, 23 Ind. 315; Quirk v. Thomas, 6 Mich. 76; Harrold v. Simonds, 9 Mo. 326; Davis v. Ownsby, 14 Mo. 175; McRaven v. McGuire, 9 Smed. & M. 34; Dubose v. Young, 10 Ala. 365; McCabe v. Gray, 20 Cal. 569.

¹ 3 Washb. on Real Prop. 320, 321; Stansell v. Roberts, 13 Ohio, 148; Price v. Methodist Episcopal Church, 4 Ohio, 515; Leiby's Ex'rs v. Wolf, 10 Ohio, 83; Spader v. Lawler, 17 Ohio, 371; Lessee of Irvin v. Smith, 17 Ohio, 226; Northrup's Lessee v. Brehmer, 8 Ohio, 392; Lessee of Allen v. Parish, 3 Ohio, 107; Lessee of Cunningham v. Buckingham, 1 Ohio, 264; Smith v. Smith, 13 Ohio St. 532; see Doe v. B'k of Cleveland, 3 McLean, 140; Hardaway v. Semmes, 24 Ga. 305; Herndon v. Kimball, 7 Ga. 432; Rushin v. Shields, 11 Ga. 636; Felton v. Pitman, 14 Ga. 536; Wyatt v. Elam, 19 Ga. 335; Buckhalter v. Ector, 25 Ga. 55; Lee v. Cato, 27 Ga. 637; Allen v. Holding, 29 Ga. 485; S. C. 32 Ga. 418; Williams v. Logan, 32 Ga. 165; Williams v. Adams, 43 Ga. 407; Mims v. Mims, 35 Ala. 23; Wyatt v. Stewart, 34 Ala. 716; Ohio Life, & C. Co., v. Ledyard, 8 Ala. 866; Daniel v. Sorrells, 9 Ala. 436; Andrews v. Burns, 11 Ala. 691; Smith v. Branch B'k, 21 Ala. 125; Center v. P. & M. B'k, 22 Ala. 743; Coster v. B'k of Ga., 24 Ala. 37; De Vendal v. Malone, 25 Ala. 272; Gray's Adm'rs v. Cruise, 36 Ala. 559; Wallis v. Rhea, 10 Ala. 451; 12 Ala. 646; Jordan v. Mead, 12 Ala. 247; Dearing v. Watkins, 10 Ala. 20; Boyd v. Beck, 29 Ala. 703; Reardon v. Edmundson, 5 Ind. 393; Glazebrook's Adm'r v. Ragland's Adm'r, 8 Gratt. 344; Clure v. Thistle's Ex'rs, 2 Gratt. 182; see Beverly v. Ellis, 1 Rand. 102; Bird v. Wilkinson, 4 Leigh, 266; Beck's Adm'rs v. De Baptists, 4 Leigh, 349; Lane v. Mason, 5 Leigh, 520; Hayham v. Combs, 14 Ohio, 428; Bloom v. Noggle, 4 Ohio St. 45; Bercau v. Cockerill, 20 Ohio St. 163; Williams v. Beard, 1 S. C. 309; Boyce v. Shiver, 3 S. C. 515; Steele v. Mansell, 6 Rich. 437; Stokes v. Hodges, 11 Rich. Eq. 135; B'k of State v. S. C. Man. Co., 3 Strobb. 190; Tract v. Crawford, 1 McCord, 265; Massey v. Thompson, 2 Nott & McC. 105; Dawson v. Dawson, Rice Eq. 243; McFall v. Sherrard, Harper, 295; Byles v. Tome, 39 Md. 461; Abrams v. Sheehan, 40 Md. 446; Kane v. Roberts, 40 Md. 590; Homer v. Grosholz, 38 Md. 521; Busey v. Reese, 38 Md. 264; Glenn v. Davis,

35 Md. 215; Walsh v. Boyle, 30 Md. 267; Nelson v. Hagerstown Bank, 27 Md. 51; Willard's Ex'rs v. Ramsburg, 22 Md. 206; Cockey v. Milne's Lessee, 16 Md. 207; Estate of Leiman, 32 Md. 225; Lester v. Hardesty, 29 Md. 50; Adm'rs of Carson, v. Phelps, 40 Md. 97; Knell v. Building Ass'n, 34 Md. 67; Leppoc v. Nat. Union B'k, 32 Md. 136; Owens v. Miller, 29 Md. 144; Building Ass'n v. Willson, 41 Md. 514; Hoopes v. Knell, 31 Md. 550; Cooke's Lessee v. Knell, 13 Md. 469; Nice's Appeal, 54 Pa. St. 200; Speer v. Evans, 47 Pa. St. 141; Britton's Appeal, 45 Pa. St. 172; Mellor's Appeal, 32 Pa. St. 121; Adam's Appeal, 1 Pa. St. 447; Brooke's Appeal, 64 Pa. St. 127; Dungan v. Am., & C. Ins. Co., 52 Pa. St. 253; Bratton's Appeal, 8 Pa. St. 164; Foster's Appeal, 3 Pa. St. 79; Ebner v. Goundie, 5 W. & S. 49; Poth v. Anstadt, 4 W. & S. 307; Lightner v. Mooney, 10 Watts, 407; Cover v. Black, 1 Barr. 493; Stewart v. Freeman, 10 Harris, 123; Hoffman v. Strohecker, 7 Watts, 86; Mott v. Clark, 9 Barr. 399; Phillips v. B'k of Lewiston, 6 Harris, 394; Bellas v. McCarty, 10 Watts, 13; Hetherington v. Clark, 6 Casey, 393; Randall v. Silverthorn, 4 Barr. 173; Lewis v. Bradford, 10 Watts, 67; Kerns v. Swope, 2 Watts, 75; Rankin v. Porter, 7 Watts, 387; Epley v. Witherow, 7 Watts, 167; Krider v. Lafferty, 1 Whart. 303; Green v. Drinker, 7 W. & S. 440; Miller v. Cresson, 5 W. & S. 284; Parke v. Chadwick, 8 W. & S. 96; Boggs v. Varner, 6 W. & S. 469; Harris v. Bell, 10 R. & S. 39; Chen v. Barnet, 11 S. & R. 389; Snider v. Snider, 3 Phila. 160; Sailor v. Hertzog, 4 Whart. 264; Union Canal Co. v. Young, 1 Whart. 432; Jacques v. Weeks, 7 Watts, 261; Hoffman v. Strohecker, 7 Watts, 90; Braken v. Miller, 4 W. & S. 102; Plumer v. Robertson, 6 S. & R. 179; 40 N. J. Eq. 364.

² Walk. Am. Law, 358; McRaven v. McGuire, 9 Smed. & M. 39; Leger v. Doyle, 11 Rich. L. 109; Anderson v. Dugas, 29 Ga. 440; Lighter v. Mooney, 10 Watts, 407; Souder v. Morrow, 33 Pa. St. 83; Den v. Richman, 1 Green, (N. J.) 43; Mallory v. Stodder, 6 Ala. 801; Helms v. O'Bannon, 26 Ga. 132; Belk v. Massey, 11 Rich. L. 614; Northrup v. Brehmer, 8 Ohio, 392; Poth v. Anstadt, 4 Watts & S. 307; Brem v. Lockhart, 92 N. C. 191; King v. Frases, 23 S. C. 543; Fleschner v. Sumpter, 12 Oreg. 161; Harding v. Allen, 70 Md. 395.

§ 88. **Effect of other kinds of notice in the absence of registration.**—The recording of a deed is not essential to its validity as between the parties,¹ and all others having any other actual or constructive notice of it. If a subsequent purchaser has notice of a prior unrecorded deed, or if he is a voluntary purchaser, the prior deed will be a good conveyance against him.² If notice of the conveyance is obtained in any other way, the deed will be as valid as if it was recorded. And notice after the delivery of the deed, but before the payment of the consideration, will be sufficient notice to give precedence to the prior unrecorded deed.³ While this is true as a general proposition; yet, in a few of the states it is expressly provided that no other notice will serve as a substitute for the constructive notice of registration. Such is found to be the law in Connecticut, North Carolina, and Louisiana.⁴

It is also worthy of observation that the recording acts do not always expressly provide, that the unrecorded deed shall be valid against subsequent purchasers who take their title with notice of the prior unrecorded conveyance. Some of these statutes simply provide that prior conveyances, not duly recorded, shall be void as against subsequent purchasers and mortgagees in good faith, and having a valuable consideration when this conveyance is first duly recorded. No reference is made in such statutes to the effect of notice, either actual or constructive, as a substitute for the constructive notice of the registration; but in all these states the courts have, as a necessary implication from the statement of the statute that an unrecorded conveyance shall be void against subsequent purchasers and mortgagees in good faith, deduced the rule that a subsequent purchaser cannot claim to be one in good faith, unless he takes the deed without notice of the prior unrecorded deed. Such is found to be the condition of the law in New York, California, Colorado, Dakota, Idaho, Michigan, Minnesota, Montana, Nevada, Washington, Wisconsin, New Hampshire, Rhode Island, Vermont, Indiana, Maryland, New Jersey, Oregon, Pennsylvania, Wyoming.⁵

¹ *Forrester v. Parker*, 14 Daly, 208; *James v. Penny*, 76 Ga. 796; *Bacon v. Northwestern &c. Ins. Co.*, 131 U. S. 258.

² *Hill v. Epley*, 31 Pa. St. 335; *Barney v. McCarty*, 15 Iowa, 514; *Galland v. Jackman*, 26 Cal. 87; *Shotwell v. Harrison*, 22 Mich. 410; *Dixon v. Lacoste*, 1 Smed. & M. 107; *Wilkins v. May*, 3 Head, 176; *Maupins v. Emmons*, 47 Mo. 306; *Patterson v. Dela Ronde*, 8 Wall. 300; *Morrison v. Kelly*, 22 Ill. 610; *Jamaica Pond v. Chandler*, 9 Allen, 169; *Speer v. Evans*, 47 Pa. St. 144; *Bilk v. Massey*, 11 Rich. 614; *Ellison v. Wilson*, 36 Vt. 67; *Home Building & Loan Ass'n v. Clark*, 43 Ohio St. 427; *Dravo v. Fabel*, 25 Fed. Rep. 116; *Maun v. State*, 116 Ind. 383; but see *contra*, *Hinton v. Leigh*, 102 N. C. 28.

³ *Blanchard v. Tyler*, 12 Mich. 339.

⁴ *Dickenson v. Glenney*, 27 Conn. 104; *Carter*

v. Champion, 8 Conn. 549; *Sumner v. Rhoda*, 14 Conn. 135; *Watson v. Wells*, 5 Conn. 468; *Wheaton v. Dyer*, 15 Conn. 307; *Hine v. Robins*, 8 Conn. 342; *Hinman v. Hinman*, 4 Conn. 575; *Beers v. Hawley*, 2 Conn. 467; *Hall's Heirs v. Hall*, 2 Conn. 383; *St Andrews v. Lockwood*, 2 Root, 239; *Judd v. Woodruff*, 2 Conn. 298; *Welch v. Gould*, 2 Conn. 287; *Franklin v. Cannon*, 1 Conn. 500; *Ray v. Bush*, 1 Conn. 81; *Hartmyer v. Gates*, 1 Root 61; *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. Eq. 584; *Leggette v. Bullock*, Busb. L. 283.

⁵ *Westbrook v. Gleason*, 79 N. Y. 23, and cases cited; *Judson v. Dada*, 79 N. Y. 373; *Page v. Waring*, 76 N. Y. 463; *Lacustrine, &c. Co. v. Lake Guano, &c. Co.*, 82 N. Y. 476; *Hoyt v. Thompson*, 5 N. Y. 347; *Newton v. McLean*, 41

In the other states, however, the recording act expressly provides that the unrecorded deed shall be void as against subsequent purchasers for value and without notice. But they are divided into two classes; one of which provides generally and without qualification that the unrecorded deed shall be void as against subsequent purchasers without notice, no specifications being given as to the character of the notice which will postpone the priority of the deed of the subsequent purchaser. In these states, the doctrine obtains that the subsequent purchaser will lose the priority given to him by the statute, whenever he takes his deed with actual or constructive notice of the prior unrecorded deed; and the meanings of the terms, actual and constructive notice, as laid down and settled by the adjudications of the court of equity independently of the recording law, are still recognized as valid and correct, so that the subsequent purchaser in these states will be charged with notice, whenever facts and circumstances exist in connection with the case which would charge him under the rules of equity with actual or constructive notice of the prior deed. Such will be found to be the law and the ruling of the courts in the states of Delaware, Florida, Illinois, Iowa, Kentucky, Mississippi, Nebraska,

Barb. 285; *Schutt v. Large*, 6 N. Y. 373; *Truscott v. King*, 6 N. Y. 346; *Fort v. Burch*, 6 N. Y. 60; *Wilcoxson v. Miller*, 49 Cal. 193; *Patterson v. Donner*, 48 Cal. 369; *Long v. Dollarhide*, 24 Cal. 218; *Fair v. Stevenot*, 29 Cal. 286; *Mahoney v. Middleton*, 41 Cal. 41; *Jones v. Marks*, 47 Cal. 242; *O'Rourke v. O'Connor*, 39 Cal. 442; *Smith v. Yule*, 31 Cal. 180; *Thompson v. Pioche*, 44 Cal. 508; *Lawton v. Gordon*, 37 Cal. 202; *Vassault v. Austin*, 36 Cal. 691; *Chamberlain v. Bell*, 7 Cal. 292; *Dennis v. Burritt*, 6 Cal. 670; *Hunter v. Watson*, 12 Cal. 363; *McCabe v. Grey*, 20 Cal. 509; *Snodgrass v. Ricketts*, 13 Cal. 359; *Landers v. Bolton*, 26 Cal. 393; *Frey v. Clifford*, 44 Cal. 335; *Packard v. Johnson*, 51 Cal. 545; *Odd Fellows' S. B'k v. Banton*, 46 Cal. 603; *McMinn v. O'Connor*, 27 Cal. 238; *Fogarty v. Sawyer*, 23 Cal. 570; *Woodworth v. Guzman*, 1 Cal. 203; *Call v. Hastings*, 3 Cal. 179; *Bird v. Dennison*, 7 Cal. 297; *Barrows v. Baughman*, 6 Mich. 213; *Wilcox v. Hill*, 11 Mich. 256, 263; *Rood v. Chapin*, Walk. Ch. 79; *Godfrey v. Disbrow*, Walk. Ch. (Mich.) 280; *Boyle v. Stevens*, 4 Mich. 87; *Warner v. Whittaker*, 6 Mich. 133; *Coy v. Coy*, 6 Minn. 119, 126; *Smith v. Gibson*, 15 Minn. 89, 99; *Grellet v. Heilshorn*, 4 Nev. 526; *Ely v. Wilcox*, 20 Wis. 551; *Stewart v. McSweeney*, 14 Wis. 468; *Fery v. Pfeifer*, 18 Wis. 510; *Gee v. Bolton*, 17 Wis. 604; *Patten v. Moore*, 32 N. H. 382, 384; *Griswold v. Smith*, 10 Vt. 452; *Reasoner v. Edmundson*, 5 Ind. 393; *Byles v. Tome*, 39 Md. 461; *Abrams v. Sheehan*, 40 Md. 446; *Kane v. Roberts*, 40 Md. 590; *Homer v. Groscholz*, 38 Md. 521; *Bussey v. Reese*, 38 Md. 264; *Glenn v. Davis*, 35 Md. 215; *Walsh v.*

Boyle, 30 Md. 267; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Millard's Ex'rs v. Ramsburg*, 22 Md. 206; *Cockey v. Milne's Lessee*, 16 Md. 207; *Estate of Leiman*, 32 Md. 225; *Lester v. Hardesty*, 29 Md. 50; *Knell v. Building Ass'n*, 34 Md. 67; *Adm'rs of Carson v. Phelps*, 40 Md. 97; *Leppoc v. Nat. Union B'k*, 32 Md. 136; *Owens v. Miller*, 29 Md. 144; *Cooke's Lessee v. Knell*, 13 Md. 469; *Hoopes v. Knell*, 31 Md. 550; *Building Ass'n v. Willson*, 41 Md. 514; *Stewart v. Freeman*, 10 Harris, 123; *Cover v. Black*, 1 Barr. 493; *Lightner v. Mooney*, 10 Watts, 407; *Poth v. Anstadt*, 4 W. & S. 307; *Ebner v. Goundie*, 5 W. & S. 49; *Foster's Appeal*, 3 Pa. St. 79; *Bratton's Appeal*, 8 Pa. St. 164; *Dungan v. Am., &c. Ins. Co.*, 59 Pa. St. 253; *Brooke's Appeal*, 32 Pa. St. 121; *Britton's Appeal*, 45 Pa. St. 172; *Speer v. Evans*, 47 Pa. St. 141; *Nice's Appeal*, 45 Pa. St. 200; *Snider v. Snider*, 3 Phila. 160; *Chen v. Barnett*, 11 S. & R. 389; *Harris v. Bell*, 10 S. & R. 39; *Boggs v. Varner*, 6 W. & S. 469; *Parke v. Chadwick*, 8 W. & S. 96; *Miller v. Cresson*, 5 W. & S. 284; *Green v. Drinker*, 7 W. & S. 440; *Krider v. Lafferty*, 1 Whart. 303; *Epley v. Witherow*, 7 Watts, 167; *Rankin v. Porter*, 7 Watts, 387; *Kerns v. Swope*, 2 Watts, 75; *Lewis v. Bradford*, 10 Watts, 67; *Randall v. Silverthorn*, 4 Barr. 173; *Hetherington v. Clark*, 6 Casey, 393; *Plumer v. Robertson*, 6 S. & R. 179; *Bracken v. Miller*, 4 W. & S. 102; *Hoffman v. Strohecker*, 7 Watts, 90; *Jacques v. Week*, 7 Watts, 261; *Union Canal Co. v. Young*, 1 Whart. 432; *Sailor v. Hertzog*, 4 Whart. 264; *Bellas v. McCarty*, 10 Watts, 13; *Philips v. B'k of Lewistown*, 6 Harris, 394; *Mott v. Clark*, 9 Barr. 399; *Hoffman v. Strohecker*, 7 Watts, 86.

Tennessee, Texas, West Virginia, Alabama, District of Columbia, Georgia, Ohio, South Carolina and Virginia.¹

On the other hand, in a few of the states the statute provides expressly that the unrecorded deed shall be void as against subsequent purchasers without actual notice; thus excluding by implication the equitable rule, that a subsequent purchaser loses his priority of right over the prior deed or claim where he is simply charged with constructive notice. The purchaser, in order that he might lose his priority under the recording acts of these states, must be shown to have had in legal contemplation actual notice of the prior unrecorded deed. Such is the law in Arkansas, Kansas, Maine, Massachusetts, Missouri, and New Mexico.² In consequence, however, of the fact that in these states, constructive notice is excluded from affecting the

¹ *Calvin v. Bowman*, 10 Iowa, 529; *Scoles v. Wilsey*, 11 Iowa, 261; *Miller v. Bradford*, 12 Iowa, 456; *English v. Waples*, 12 Iowa, 570; *Haynes v. Seachrest*, 13 Iowa, 455; *Breed v. Conley*, 14 Iowa, 269; *Stewart v. Huff*, 19 Iowa, 557; *Gower v. Doheney*, 33 Iowa, 36; *Senter v. Turner*, 10 Iowa, 517; *Brinton v. Seever*, 12 Iowa, 389; *Dargin v. Beeker*, 10 Iowa, 571; *Koons v. Grooves*, 20 Iowa, 373; *Bringinghoff v. Munzenmaier*, 20 Iowa, 513; *Gardner v. Cole*, 21 Iowa, 205; *Willard v. Kramer*, 36 Iowa, 22; *Graves v. Ward*, 2 Dev. 201; *Forepaugh v. Appold*, 17 B. Mon. 625, 631; *Edminster v. Higgins*, 6 Neb. 269; *Galway v. Malchow*, 7 Neb. 289; *Bennet v. Fooks*, 1 Neb. 465; *Metz v. State B'k of Brownville*, 7 Neb. 171; *Colt v. Du Bois*, 7 Neb. 394; *Dorsey v. Hall*, 7 Neb. 465; *Mansfield v. Gregory*, 8 Neb. 735; *Berkley v. Lamb*, 8 Neb. 399; *Merriman v. Hyde*, 9 Neb. 120; *Harral v. Gray*, 10 Neb. 289; *Lincoln B. & S. Association v. Hass*, 10 Neb. 583; *Hooker v. Hammill*, 7 Neb. 234; *Jones v. Johnson Harvester Co.*, 8 Neb. 451; *Thomas v. Blackmore*, 5 Yerg. 113, 124; *Hays v. McGuire*, 8 Yerg. 92, 100; *Vance v. McNairy*, 3 Yerg. 176; *Shields v. Mitchell*, 10 Yerg. 8; *May v. McKeenon*, 6 Humph. 209; *Coster v. B'k of Ga.*, 24 12 Ala. 37; *De Vendal v. Malone*, 25 Ala. 272; *Gray's Adm'r v. Cruise*, 36 Ala. 559; *Wallis v. Rhea*, 10 Ala. 451; 12 Ala. 646; *Jordon v. Mead*, Ala. 247; *Dearing v. Watkins*, 10 Ala. 20; *Boyd v. Beck*, 29 Ala. 703; *Wyatt v. Stewart*, 34 Ala. 716; *Center v. P. & M. B'k*, 22 Ala. 743; *Smith v. Branch B'k*, 21 Ala. 125; *Andrews v. Burns*, 11 Ala. 691; *Daniel v. Sorrells*, 9 Ala. 436; *Ohio Life, &c. Co., v. Ledyard*, 8 Ala. 866; *Williams v. Adams*, 43 Ga. 407; *Williams v. Logan*, 32 Ga. 165; *Allen v. Holding*, 29 Ga. 485; S. C., 32 Ga. 418; *Lee v. Cato*, 27 Ga. 637; *Burkhalter v. Ector*, 25 Ga. 55; *Wyatt v. Elam*, 19 Ga. 335; *Felton v. Pitman*, 14 Ga. 536; *Rushim v. Shields*, 11 Ga. 636; *Herndon v. Kimball*, 7 Ga. 432; *Hardaway v. Semmes*, 24 Ga. 305; see *Doe v. B'k of Cleveland*, 3 McLean, 140; *Smith v. Smith*, 18 Ohio St. 532; *Lessee of Cunningham v. Buckingham*, 1 Ohio, 264; *Lessee of Allen v.*

Parish, 3 Ohio, 107; *Northrup's Lessee v. Brehmer*, 8 Ohio, 392; *Lessee of Irving v. Smith*, 17 Ohio, 226; *Spader v. Lawler*, 17 Ohio, 371; *Leiby's Ex'r v. Wolf*, 10 Ohio, 83; *Price v. Methodist Episcopal Church*, 4 Ohio, 515; *Stansell v. Roberts*, 13 Ohio, 148; *Mayham v. Coombs*, 14 Ohio, 428; *Bloom v. Noggle*, 4 Ohio St. 45; *Bercaw v. Cockerill*, 20 Ohio St. 163; *Williams v. Beard*, 1 S. C. 309; *Boyce v. Shiver*, 3 S. C., 515; *Steele v. Mansell*, 6 Rich. 437; *Stokes v. Hodges*, 11 Rich. Eq. 135; *B'k of State v. S. C. Man Co.*, 3 Strobb. 190; *Tact v. Crawford*, 1 McCord, 265; *Massey v. Thompson*, 2 Nott & McC. 105; *Dawson v. Dawson, Rice Eq.* 243; *McFall v. Sherrard*, Harper, 295; *Beverley v. Ellis*, 1 Rand. 102; *Bird v. Wilkinson*, 4 Leigh, 266; *Beck's Adm'r v. De Baptists*, 4 Leigh, 349; *Lane v. Mason*, 5 Leigh, 520; *McClure v. Thistle's Ex'r*, 2 Gratt. 182; *Glazebrook's Adm'r v. Ragland's Adm'r*, 8 Gratt. 344.

² See *Byers v. Engles*, 16 Ark. 543; *Hamilton v. Fowlkes*, 16 Ark. 340; see *Dacoway v. Galt*, 20 Ark. 190; *School Dist. v. Taylor*, 19 Kans. 287; *Simpson v. Munder*, 3 Kans. 172; *Brown v. Simpson*, 4 Kans. 76; *Claggett v. Crall*, 12 Kans. 393, 397; *Wockersham v. Chicago, &c. Co.*, 18 Kans. 487; *Johnson v. Clark*, 18 Kans. 157, 164; *Jones v. Lapham*, 15 Kans. 540; *Porter v. Sevey*, 43 Me. 519; *Goodwin v. Cloudman*, 43 Me. 577; *Merrill v. Ireland*, 40 Me. 569; *Hanly v. Morse*, 32 Me. 287; *Spofford v. Weston*, 29 Me. 140; *Butler v. Stevens*, 26 Me. 484; *Roberts v. Bourne*, 23 Me. 165; *Veazie v. Parker*, 23 Me. 170; *Pierce v. Taylor*, 23 Me. 246; *Rackleff v. Norton*, 19 Me. 274; *Lawrence v. Tucker*, 7 Me. 195; *Kent v. Plummer*, Me. 464; *Stetson v. Gulliver*, 2 Cush. 494, 497; *Dole v. Thurlow*, 12 Metc. 157, 163; *Bayley v. Bailey*, 5 Gray, 505, 510; *Marshall v. Fisk*, 6 Mass. 24, 30; *Coffin v. Ray*, 1 Metc. 212; *Flynt v. Arnold*, 2 Metc. 619; *Curtis v. Mundy*, 3 Metc. 405; *Houghton v. Bartholomew*, 10 Metc. 138; *Pomroy v. Stevens*, 11 Metc. 244; *Stewart v. Clark*, 13 Metc. 79; *Reed v. Ownby*, 33 Mo. 204; *Valentine v. Harner*, 20 Mo. 133; *Davis v. Ownsby*, 14 Mo. 170.

priority of a subsequent purchaser, the disposition of the courts in these states is to stretch the meaning of the term actual notice as far as possible, in order to include under the heading of actual notice all the possible modes of giving notice to a purchaser.¹

§ 89. **Constructive notice arising from extraneous facts.**—The cases of constructive notice which would arise under this heading are so numerous and varied in character that it would be impossible to enumerate them all; and the most that can be done is to give a few illustrative examples, indicating the general character of the circumstances which would be sufficient to support the presumption of actual notice of the adverse title or claim. The general rule is, that only those facts and circumstances are sufficient to support and raise the presumption of notice, which are sufficient in character to put a careful and prudent man upon an inquiry into the existence of some adverse title or claim to the property. Any fact or circumstance which would exert that influence upon a prudent man would be sufficient to create the constructive notice.² Most of these cases indicate or convey con-

¹ See *ante*, § 76; *Bartlett v. Glascock*, 4 Mo. 62, 66; *Epley v. Witherow*, 7 Watts, 163, 167; *Jacques v. Weeks*, Watts, 261, 274; *Buttrick v. Holden*, 13 Met. 355, 357; see *Brinkman v. Jones*, 44 Wis. 498, 517, 519, 521, 523; *Brown v. Volkening*, 64 N. Y. 76, 82, 83; *Lambert v. Newman*, 56 Ala. 623, 625; *Curtis v. Blair*, 4 Cushm. (Miss.) 309, 328; *Hull v. Noble*, 40 Me. 459, 480; *Warren v. Swett*, 31 N. H. 332, 341; *Helms v. Chadbourne*, 45 Wis. 60, 70, *per* Cole, J.; *Chicago, &c. R. R. v. Kennedy*, 70 Ill. 350; 361, *per* Walker, J.; *Tillinghast v. Champlin*, 4 R. I. 173, 215; *Buck v. Paine*, 50 Miss. 648, 655; *Shepardson v. Stevens*, 71 Ill. 646; *Erickson v. Rafferty*, 79 Ill. 209, 212; *Carter v. City of Portland*, 4 Oreg. 339, 350; *Pringle v. Dunn*, 37 Wis. 449, 460, 461, 465; *Parker v. Kane*, 4 Wis. 1; *Reynolds v. Ruckman*, 35 Mich. 80; *Loughridge v. Bowland*, 52 Miss. 546, 553, 555; *Shotwell v. Harrison*, 30 Mich. 179; *Munroe v. Eastman*, 31 Mich. 283; *Eck v. Hatcher*, 58 Mo. 235; *Tefts v. King*, 6 Harris, (18 Pa. St.) 157, 160; *Rogers v. Jones*, 8 N. H. 264; *Maupin v. Emmons*, 47 Mo. 304, 306, 307; *Parker v. Foy*, 43 Miss. 260, 268; *Wallees v. Cooper*, 24 Miss. 208, 228; *Griffith v. Griffith*, 1 Hoff. Ch. 153; *Nelson v. Sims*, 1 Cushm. 383, 388; *Barnes v. McClonton*, 3 Penn. 67.

² *Bunting v. Ricks*, 2 Dev. & B. Eq. (N. Car.) 130; s. c., 32 Am. Dec. 699; *Warren v. Swett*, 31 N. H. 332; *Dow v. Sayward*, 14 N. H. 9; *Parker v. Connor*, 93 N. Y. 118; s. c., 45 Am. Rep. 178; *Heaton v. Parther*, 84 Ill. 330; *Hewitt v. Clark*, 91 Ill. 605; *Ætna L. Ins. Co. v. Ford*, 89 Ill. 252; *Lumbard v. Ebbey*, 73 Ill. 178; *Ellis v. Horeman*, 90 N. Y. 466; *Williamson v. Brown*, 15 N. Y. 354; *Howard Ins. Co. v. Halsey*, 4 Sandf. (N. Y.) 578; *Kellogg v. Smith*, 26 N. Y. 18; *Chicago v. Witt*, 75 Ill. 214; *Chicago, &c. R. Co. v. Kennedy*, 70 Ill. 350; *Erickson v. Rafferty*, 79 Ill. 209; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213; s.

c., 21 Am. Dec. 306; *Grimstone v. Carter*, 3 Paige, (N. Y.) 421; s. c. 24 Am. Dec. 230; *Jackson v. Post*, 15 Wend. (N. Y.) 588; *Stokes v. Riley*, 121 Ill. 166; *Doyle v. Teas*, 5 Ill. 202; *Shepardson v. Stevens*, 71 Ill. 646; *Hankinson v. Barbour*, 29 Ill. 80; *Redden v. Miller*, 95 Ill. 336; *Reed v. Gannon*, 50 N. Y. 345; *Fassett v. Smith*, 23 N. Y. 252; *Brown v. Taber*, 5 Wend. (N. Y.) 566; *Hunt v. Stoneburner*, 92 Ill. 75; *Russell v. Ranson*, 76 Ill. 167; *Watt v. Scofield*, 76 Ill. 261; *Morrison v. Kelley*, 22 Ill. 610; s. c., 74 Am. Dec. 169; *Cox v. Milner*, 23 Ill. 476; *Anderson v. Nicholas*, 28 N. Y. 600; *Schutt v. Large*, 6 Barb. (N. Y.) 382; *Reynolds v. Darling*, 42 Barb. (N. Y.) 423; *Butler v. Viele*, 44 Barb. (N. Y.) 68; *Indiana, &c. R. Co. v. McBroom*, 114 Ind. 598; s. c., 33 Am. & Eng. R. Cas. 90; *Wilson v. Hunter*, 30 Ind. 466; *Case v. Bumstead*, 24 Ind. 429; *Merithew v. Andrews*, 44 Barb. (N. Y.) 207; *Lamont v. Cheshire*, 65 N. Y. 30; *Pendleton v. Fay*, 2 Paige, (N. Y.) 202; *Hawley v. Gramer*, 4 Cow. (N. Y.) 717; *Moreland v. Lemasters*, 4 Blackf. (Ind.) 383; *Wallace v. Furber*, 62 Ind. 103; *Wilson v. Hunter*, 30 Ind. 466; *Swarthout v. Curtis*, 5 N. Y. 301; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Baker v. Bliss*, 39 N. Y. 70; *Pitney v. Leonard*, 1 Paige, (N. Y.) 461; *Clark v. Holland*, 72 Iowa, 34; *Coleman v. Reel*, 75 Iowa, 304; *Leas v. Garverich*, 77 Iowa, 275; *Bradlee v. Whitney*, 108 Pa. St. 362; *Mulliken v. Graham*, 72 Pa. St. 484; *Barnes v. McClinton*, 3 P. & W. (Pa.) 67; s. c., 23 Am. Dec. 62; *Wilson v. Miller*, 16 Iowa, 111; *Hull v. Noble*, 40 Me. 459; *Jacob Dold Packing Co. v. Ober*, (Md.) 18 Atl. Rep. 34; *Ringgold v. Bryan*, 3 Md., Ch. 488; *Hill v. Epley*, 31 Pa. St. 331; *Sergeant v. Ingersoll*, 15 Pa. St. 343; *Butcher v. Yocum*, 61 Pa. St. 168; s. c., 100 Am. Dec. 625; *Stockett v. Taylor*, 3 Md. Ch. 537; *Price v. McDonald*, 1 Md. 403; s. c., 54 Am. Dec. 661; *Hardy v. Summers*, 10 Gill & J. (Md.) 324; s. c., 32 Am. Dec.

structive notice of some fraud, accident or mistake in the transfer of the property, which supports an adverse claim to such property on the part of those whose rights have been injuriously affected by such fraud, accident or mistake. Among the circumstances which tend to support the constructive notice of fraud or the like, are: the great inadequacy of price which was paid for the property;¹ the withdrawal of deeds from record;² a refusal to make any full or complete assurance of title or covenant of warranty.³ On the other hand, inaccurate or vague statements, which only furnish the ground for suspicions of an indistinct character, cannot support the claim of a presumption of constructive notice. The purchaser is not charged with constructive notice of a prior claim, where the character of the information is so indefinite as to furnish him no clue for obtaining actual knowledge of the claim.⁴ Among the cases which are held to

167; *Wilson v. McCullough*, 23 Pa. St. 440; s. c., 62 Am. Dec. 347; *Knouff v. Thompson*, 16 Pa. St. 357; *Jacques v. Weeks*, 7 Watts, (Pa.) 267; *Epley v. Witherow*, 7 Watts, (Pa.) 167; *Baynard v. Morris*, 5 Gill, (Md.) 483; s. c., 46 Am. Dec. 647; *Baxter v. Sewell*, 3 Md. 334; *Michigan Mut. L. Ins. Co. v. Conant*, 40 Mich. 530; *Maul v. Rider*, 59 Pa. St. 167; *Reeves v. Sims*, 10 S. Car. 308; *Gibbes v. Cobb*, 7 Rich. Eq. (S. Car.) 54; *Allen v. Cadwell*, 55 Mich. 8; *Atty-Gen. v. Smith*, 31 Mich. 359; *James v. Brown*, 11 Mich. 25; *Wilcox v. Hill*, 11 Mich. 256; *Payne v. Abercrombie*, 10 Heisk. (Tenn.) 161; *Wethered v. Boon*, 17 Tex. 143; *Powell v. Haley*, 28 Tex. 52; *Mayfield v. Averitt*, 11 Tex. 140; *Hart v. McDade*, 61 Tex. 209; *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150; *Morrison v. March*, 4 Minn. 422; *Plant v. Shryock*, 62 Miss. 821; *Parker v. Foy*, 43 Miss. 360; s. c., 55 Am. Rep. 464; *Bacon v. O'Connor*, 25 Tex. 213; *Rorer Iron Co. v. Trout*, 83 Va. 397; *Morgan v. Fisher*, 82 Va. 417; *Robinson v. Chenshaw*, 84 Va. 348; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Loughridge v. Bowland*, 52 Miss. 546; *Rollins v. Calender*, *Freem. Ch. (Miss.)* 295; *Meier v. Blume*, 80 Mo. 179; *Graff v. Castleman*, 5 Rand. (Va.) 207; s. c., 16 Am. Dec. 741; *Town of Woodbury v. Bruce*, 59 Vt. 624; *Blarsdell v. Stevens*, 16 Vt. 179; *Lodge v. Simonton*, 2 P. & W. (Pa.) 439; s. c., 23 Am. Dec. 36; *Webb v. Robbins*, 77 Ala. 176; *Center v. Planters'*, &c. B'k, 22 Ala. 743; *Hoyt, &c. Mfg. Co. v. Turner*, 84 Ala. 523; *Stafford v. Ballou*, 17 Vt. 329; *M'Daniels v. Fowler Brook Mfg. Co.*, 22 Vt. 274; *Stevens v. Goodenough*, 26 Vt. 676; *Fidelity Ins., &c. Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 244; *Lamont v. Stimson*, 5 Wis. 447; *Boggs v. Price*, 64 Ala. 514; *Tompkins v. Henderson*, 83 Ala. 391; *Kyle v. Ward*, 81 Ala. 120; *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; *Parker v. Kane*, 4 Wis. 16; s. c., 65 Am. Dec. 283; *De Witt v. Perkins*, 22 Wis. 473; *Brewer v. Browne*, 68 Ala. 210; *McGehee v. Gindrat*, 20 Ala. 95; *Mobile, &c. R. Co. v. Felrath*, 67 Ala. 189; *Helms v. Chadbourne*, 45 Wis. 60; *Hamlin v. Wright*, 26 Wis. 50; *Brown v. Peck*, 2 Wis. 261; *Oliver v. Platt*, 3 How. (U.

S.) 333; *Hodges v. Coleman*, 76 Ala. 103; *Wiley v. Knight*, 27 Ala. 336; *Ringgold v. Waggoner*, 14 Ark. 69; *Bolles v. Chauncey*, 8 Conn. 389; *Hinde v. Vattier*, 1 McLean, (U. S.) 110; *Tardy v. Morgan*, 3 McLean, (U. S.) 358; *Sigourney v. Munn*, 7 Conn. 325; *Booth v. Barnum*, 9 Conn. 286; s. c., 23 Am. Dec. 339; *Peters v. Goodrich*, 3 Conn. 146; *Boswell v. Goodwin*, 31 Conn. 84; s. c., 81 Am. Dec. 169; *Godfrey v. Beardsley*, 2 McLean, (U. S.) 412; *Carr v. Hilton*, 1 Curt. (U. S.) 390; *United States v. Sturgess*, 1 Paine, (U. S.) 525; *Filmore v. Reitchman*, 6 Colo. 120; *Bradford v. Carpenter*, 13 Colo. 30; *Galland v. Jackman*, 26 Cal. 79; s. c., 85 Am. Dec. 172; *Lowry v. Commercial & Farmers' Bank*, 3 Am. L. J. 111; *Almy v. Wilbur*, 2 Woodb. & M. (U. S.) 371; *Wright v. Ross*, 36 Cal. 414; *Gress v. Evans*, 1 Dak. Ter. 387; *Leavenworth Co. v. Chicago, &c. R. Co.*, 13 Fed. Rep. 209; s. c., 12 Am. & Eng. R. Cas. 354; *Foster v. Ambler*, 24 Fla. 519; *Matthews v. Poythress*, 4 Ga. 237; *Planters' Rice Mill Co. v. Olstead*, 78 Ga. 586; *Duncan v. Mobile, &c. R. Co.*, 3 Woods, (U. S.) 567; *Peirce v. United States, Ct. of Cl.* 270; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Hoxie v. Carr*, 1 Sumn. (U. S.) 175; *Dueber Watch Case Mfg. Co. v. Dalzell*, 38 Fed. Rep. 597; *Trask v. Jacksonville, &c. R. Co.*, 124 U. S. 515.

¹ *Beadles v. Miller*, 9 Bush, (Ky.) 405; *Eck v. Hatch*, 58 Mo. 235; *Hoppin v. Doty*, 25 Wis. 573; *Singer v. Jacobs*, 3 McCrary, (U. S.) 638; *Runkle v. Gaylord*, 1 Nev. 123; *Hoyt v. Hoyt*, 8 Bosw. (N. Y.) 511; *Tillinghast v. Champlin*, 4 R. L. 173; s. c., 67 Am. Dec. 510; *Le Gierse v. Whitehurst*, 66 Tex. 244.

² *Lawton v. Gordon*, 37 Cal. 202.

³ *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147; s. c., 9 Am. Dec. 736; *Lowry v. Brown*, 1 Coldw. (Tenn.) 456.

⁴ *Filmore v. Reithman*, 6 Colo. 120; *Parker v. Kane*, 4 Wis. 1; s. c., 65 Am. Dec. 283; *Lamont v. Stimson*, 5 Wis. 443; *Maul v. Rider*, 59 Pa. St. 172; see, also, *Jacques v. Weeks*, 7 Watts, (Pa.) 261; *Kerns v. Swope*, 3 Watts, (Pa.) 75; *Pittman v. Sofey*, 64 Ill. 155; *Jenkins v. Rosenberg*, 105 Ill. 157; *Emmons v. Murray*, 16 N. H. 385; *Rat-*

support the constructive notice of an adverse claim, are those in which a purchaser is charged with constructive notice of an existing easement, where there are visible structures upon the land of such a character as to indicate the existence of an easement over that land in favor of another. For example, the presence of an archway under a house would indicate the existence of a right-of-way over that land in the archway in favor of the adjoining property. So also, the presence of mill-dam would indicate the existence of an easement in favor of the extraordinary use of the stream; and other examples of a like character are found in the cases cited in the note.¹

In England, a very common ground for constructive notice of an outstanding claim or title, is the absence from the possession of the vendor of the title-deeds of the property; such absence of the title-deeds serving to charge the purchaser with constructive notice of the existence of a mortgage upon the property by deposit of the title-deeds. In England, in the absence of a general recording law, the purchaser is charged with the duty of inquiring after the title-deeds which together constitute the chain of title; and if the vendor has not the possession of them, this is a fact or circumstance which at once would charge the purchaser with the duty of inquiring into the cause of their absence from the vendor's possession. He is, therefore, charged by the fact with constructive notice of the existence of whatever claim in the shape of a mortgage by the deposit of title-deeds the possessor of the title-deeds might have against the property.² The purchaser, however, is not charged with an absolute constructive notice of the mortgage by a deposit of title-deeds; he is only charged with the duty of making a due inquiry into the cause of the absence of the title-deeds from the vendor's possession. This constructive notice certainly becomes absolute when he fails to make the inquiry, or makes an insufficient inquiry into the cause of their absence.³ If, on the other hand, a rigid inquiry is made into the cause of the absence of the title-deeds without leading to the discovery of the existence of a mortgage

teree v. Conley, 74 Ga. 153; *Black v. Thornton*, 31 Ga. 641; *Churchee v. Guernsey*, 39 Pa. St. 86; *Peebles v. Reading*, 8 S. & R. (Pa.) 434; *Lewis v. Bradford*, 10 Watts, (Pa.) 67; *Miller v. Cresson*, 5 W. & S. (Pa.) 284; *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140; *Gill v. McAttee*, 2 Md. Ch. 255; *Foust v. Moorman*, 2 Ind. 17; *Otis v. Spencer*, 102 Ill. 622; s. c., 40 Am. Rep. 617; *Boggs v. Varner*, 6 W. & S. (Pa.) 469; *Mulliken v. Graham*, 72 Pa. St. 484; *Bugbee's Appeal*, 110 Pa. St. 331; *Wilson v. McCullough*, 25 Pa. St. 440; s. c., 62 Am. Dec. 347; *Norcross v. Widgery*, 2 Mass. 509; *Buttrick v. Holden*, 13 Met. (Mass.) 355; *Hewes v. Wiswell*, 8 Me. 98; *Butler v. Stevens*, 26 Me. 484; *Loughridge v. Bowland*, 52 Miss. 546; *Wallis v. Cooper*, 24 Miss. 228; *Buck v. Paine*, 50 Miss. 648; *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 190; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., Am. Dec. 128; *Condit v. Willson*, 36 N. Y. J. Eq. 370; Wil-

liamson v. Brown, 15 N. Y. 354; *Jackson v. Given*, 8 Johns. (N. Y.) 137; s. c., Am. Dec. 328.

¹ *Pyer v. Carter*, 1 H. & N. 916; *Clements v. Welles*, L. R. 1 Eq. 200; *Wilson v. Hart*, L. R. 1 Ch. 463; *Hoy v. Bramhall* 19 N. J. Eq. (4 C. E. Green) 563; *Randall v. Silverthorn*, 4 Barr. 175; *Paul v. Connersville, &c. R. R.*, 51 Ind. 527, 530; *Hervey v. Smith*, 22 Beav. 299; *Davies v. Sear*, L. R. 7 Eq. 427, 432, 433; *Morland v. Cook*, L. R. 6 Eq. 252, 263, 265; *Raritan Water P. Co. v. Veghte*, 21 N. J. Eq. (5 C. E. Green) 463, 478.

² *Kellogg v. Smith*, 26 N. Y. 18, 23; *Dryden v. Froat*, 3 My. & Cr. 670, 673, *per Lord Cotterham*; *Bradley v. Riches*, L. R. 9 Ch. D. 189, 195, 196; *Maxfield v. Burton*, L. R. 17 Eq. 15, 18.

³ *Jones v. Williams*, 24 Beav. 47; *Hopgood v. Ernest*, 3 De G. J. & S. 116, 121; *Jones v. Smith*, 1 Hare, 43; 1 Ph. 244; *Maxfield v. Burton*, L. R. 17 Eq. 15, 18; *Bradley v. Riches*, L. R. 9 Ch. D. 189, 195, 196.

by deposit of the title-deeds, then the purchaser purges himself of all charge of negligence and can claim the benefits of a *bona fide* purchaser. This is particularly the case, where the equitable mortgage is secured by the deposit, not of all the title-deeds, but of only one or two of them. In such a case, the vendor may make a satisfactory explanation of the cause of their absence; as for example, their destruction or loss. And if under the circumstances of the particular case it is impossible to discover any clue for a further investigation into the cause of the absence of the title-deed or deeds, the purchaser is then not charged with constructive notice.¹ Inasmuch as the general recording laws of this country relieve the purchaser of the duty of inquiring after the existence of the original title-deeds, the deposit of the title-deeds does not charge the purchaser with constructive notice of the equitable mortgage, certainly not where the purchaser does not know that the title-deeds have been deposited with the third person.²

§ 90. **Recitals in muniments of title.**—A purchaser of property is also charged with constructive notice of every piece of information which can be ascertained from, and which is communicated by recitals in the deed of conveyance which constitutes a link in the chain of title. He is charged with the duty of inquiring into, and becoming acquainted with, all of the essential parts of these title-deeds which together constitute the chain of title.³ The purchaser is presumed to know of all the contents of these deeds, not only in the granting clause of the deed, but likewise in the covenants,⁴ and every other provision in such deed, whereby his own interest can be affected.⁵ This rule is applied and a constructive notice raised even as to the contents of deeds constituting

¹ Colyer v. Finch, 5 H. L. Cas. 905; Dixon v. Muckleston, L. R. 8 Ch. 155, 158, 161; Ratcliffe v. Barnard, L. R. 6 Ch. 652, 654.

² See post §§ 300, 304.

³ Merrick v. Wallace, 19 Ill. 486; Morrison v. Kelley, 22 Ill. 610; Morris v. Hoyle, 37 Ind. 150; Doyle v. Teas, 4 Seam. 202; Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Johnston v. Gwathmey, 4 Litt. (Ky.) 317; Corbitt v. Clenny, 52 Ala. 480, 483; Frye v. Partridge, 82 Ill. 267, 270; Chicago, &c. R. R. v. Kennedy, 70 Ill. 350, 361, 362; Rupert v. Mark, 15 Ill. 540; McConnell v. Reed, 4 Ill. 117; Allen v. Poole, 54 Miss. 323; Deason v. Taylor, 53 Ill. 697, 701; Rafferty v. Mallory, 3 Biss. 362, 368, 369; Green v. Early, 39 Md. 223, 229; White v. Foster, 102 Mass. 375, 380; Dudley v. Witter, 46 Ala. 664, 694, 695; Burch v. Carter, 44 Ala. 115, 117; Campbell v. Roach, 45 Ala. 667; Witter v. Dudley, 42 Ala. 616, 621, 625; Acer v. Westcott, 1 Lans. 193, 197; Sigourney v. Munn, 7 Conn. 324; Christman v. Mitchell, 3 Ired. Eq. 535; Hagthorpe v. Hook's Adm'rs, 1 Gill & J. 270; Newson v. Collins, 43 Ala. 656, 663; Major v. Buckley, 51 Mo. 227, 231; Ridgeway v. Holliday, 59 Mo. 444; Willis v. Gray, 48 Tex. 463; Greenfield v. Edwards, 2 De G. J. & S. 582; Wood v. Krebs, 30 Gratt. 708; Burwell's Ex'rs v. Fau-

ber, 21 Gratt. 446; Long v. Weller's Ex'rs, 29 Gratt. 347; Brush v. Ware, 15 Pet. 93, 114; Kerr v. Kitchen, 5 Harris (17 Pa. St.) 433; Mueller v. Engeln, 12 Bush. 441, 444; Stidham v. Matthews, 29 Ark. 650, 659, 660; Pringle v. Dunn, 37 Wis. 449, 464; Fitzhugh v. Barnard, 12 Mich. 105; Case v. Erwin, 18 Mich. 434; Baker v. Mather, 25 Mich. 51, 53; Frost v. Beekman, 1 Johns. Ch. 288, 298; Howard Ins. Co. v. Halsey, 8 N. Y. 271; Gilbert v. Peteler, 38 N. Y. 165; Acer v. Westcott, 46 N. Y. 384; Murrell v. Watson, 1 Tenn. Ch. 342.

⁴ Martin v. Cotter, 3 Jo. & Lat. 496, 506; Wilbraham v. Livesey, 18 Beav. 206; Drysdale v. Mace, 2 Sm. & Gif. 225; Smith v. Capron, 7 Hare, 185; Clements v. Welles, L. R. 1 Eq. 200.

⁵ Acer v. Westcott, 1 Lans. 193; Jumel v. Jumel, 7 Paige, 591; Briggs v. Palmer, 20 Barb. 392; 20 N. Y. 15; 21 N. Y. 574; Babcock v. Lisk, 57 Ill. 327; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 4 Sandf. 565; Guion v. Knapp, 6 Paige, 35; Harris v. Fly, 7 Paige, 421; Dargin v. Beeker, 10 Iowa, 571; Hamilton v. Nutt, 34 Conn. 501; McAteer v. McMullen, 2 Barr. 32; Martin v. Nash, 31 Miss. 324; Sanborn v. Robinson, 54 N. H. 239; Brown v. Simons, 44 N. H. 475; Pike v. Goodnow, 12 Allen, 472; George v. Kent, 7 Allen, 16.

the chain of title, even though they may be unrecorded.¹ Thus for example, a deed, which contains an acknowledgment of the fact that the purchase-money remains unpaid, is constructive notice of the existence of a vendor's lien, unless the deed contains an express waiver of such lien.² So also would terms in a deed which indicate the consideration of the conveyance tend to charge the purchaser with constructive notice of the existence of an adverse claim.³ So, likewise, statements or recitals in the deeds or other instruments of conveyance, like a certificate of stock, that the stock or other property is held by the vendor in trust for another, will charge the purchaser with constructive notice of the rights of the *cestui que trust*.⁴ But the recitals in the deed will not charge a purchaser with constructive notice, where such recitals are collateral in character, and do not relate to, or affect in any manner, the purchaser's interest in the property purchased; recitals in the deed are only constructive notice of claims against the property purchased in that particular transaction.⁵

Not only is the purchaser bound with constructive notice by recitals of deeds constituting the chain of title which directly indicate the character as well as the existence of an adverse claim; but the purchaser is also charged with constructive notice of all of the recitals to be found in deeds and other instruments of conveyance, which are referred to in the muniments of title as affecting or controlling the interests of property conveyed by such muniments of title. The reference to these other deeds makes these deeds a part of the muniments of title; and hence the recitals contained in these latter deeds support the presumption of notice to the purchaser as effectively as if they were directly contained in the muniments of title.⁶ This rule will apply, and the constructive notice arise from the recital of a collateral deed, where it is referred to in one of the title-deeds, even though such collateral deed has not been recorded. The constructive notice is not affected by the want of record, although it might serve to make an unsuccessful inquiry sufficient to purge the purchaser from the want of constructive notice,

¹ *Nelson v. Allen*, 1 Yerg. 360; *Honore's Ex'rs v. Blakewell*, 6 B. Mon. 67; *Wailles v. Cooper*, 24 Miss. 208; *Johnson v. Thweatt*, 18 Ala. 741; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 4 Sandf. 565; *Stidham v. Matthews*, 29 Ark. 650, 659, 660; *Corbitt v. Clenny*, 52 Ala. 480, 483.

² *Willis v. Gay*, 48 Tex. 463; s. c., 26 Am. Rep. 328; *Lytle v. Turner*, 12 Lea. (Tenn.) 641; *Wiseman v. Hutchinson*, 20 Ind. 40; *Orrick v. Dunham*, 79 Mo. 179; *Major v. Buckley*, 51 Mo. 227; *Tydings v. Pitcher*, 82 Mo. 379.

³ *Briggs v. Rice*, 130 Mass. 50; *contra*, *Hume v. Franzen*, 73 Iowa 25.

⁴ *Bayard v. Farmers', &c. Bank*, 52 Pa. St. 232; *Shaw v. Spencer*, 100 Mass. 382; s. c., 1 Am. Rep. 115; *Jaudon v. Nat. City Bank*, 8 Blatchf. (U. S.) 439; s. c., 82 U. S. 165; *Rafferty v. Mallory*, 3 Biss. 362, 368, 369; *Campbell v. Roach*, 45 Ala. 667; *Newsome v. Collins*, 43 Ala. 656, 663; *Johnson v. Thweatt*, 18 Ala. 741; *Witter v. Dudley*,

42 Ala. 616, 621, 625; *Coy v. Coy*, 15 Minn. 119; *Sergeant v. Ingersoll*, 7 Barr. 340; 3 Harris, (15 Pa. St.) 343, 348; *Dudley v. Witter*, 46 Ala. 664, 664.

⁵ *Mueller v. Engeln*, 12 Bush, 441, 444; *Burch v. Carter*, 44 Ala. 115, 117; *Boggs v. Varner*, 6 Watts & Serg. 469; *Sleeper v. Chapman*, 121 Mass. 404; *Kansas City Land Co. v. Hill*, 87 Tenn. 589.

⁶ See *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 4 Sandf. 565; *Guion v. Knapp*, 6 Paige, 35; *Honore v. Bakewell*, 6 B. Mon. 67; *Thornton v. Knox*, 6 B. Mon. 74; *Avent v. McCorkle*, 45 Miss. 221; *Wiseman v. Hutchinson*, 20 Ind. 40; *Croskey v. Chapman*, 26 Ind. 333; *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317; *Green v. Slayter*, 4 Johns. Ch. 38; *Cambridge Bank v. Delano*, 43 N. Y. 326; *Deason v. Taylor*, 53 Miss. 697, 701; *George v. Kent*, 7 Allen, 16; *Judson v. Dada*, 79 N. Y. 373, 379.

whereas the record of such a deed would make it impossible for an inquiry to result in failure to obtain the information.¹ Thus, an instrument which purports to be the execution of some decree or judicial order, is constructive notice of the contents and of the character of such decree or order.² But constructive notice will not arise from the recitals to be found in those papers or instruments not executed when the conveyance was made; the doctrine only applies to the recitals in deeds found already executed when the conveyance is made.³ Here, as in the case of constructive notice, arising from extraneous facts, it is necessary that the recitals in the deed should be sufficiently clear and distinct to indicate the existence of some outstanding adverse claim. If they are not sufficient to arouse the suspicion and attention of a reasonably prudent man, they cannot charge the purchaser with the constructive notice of an adverse claim or title.⁴ Although it has been held that this constructive notice which arises from the recitals of title-deeds is conclusive, and that the presumption cannot be rebutted;⁵ yet it has been held, and there can be very little doubt that the ruling of the court is correct, that whenever, as a matter of fact, the purchaser has made a diligent inquiry to satisfy himself of the existence and of the character of the adverse claim, of which he is charged with constructive notice by the recitals of deeds, and the inquiry has resulted in a failure to discover the character or existence of such claim, the purchaser, by proof of such diligent inquiry, purges himself of the otherwise existing constructive notice.⁶ Finally, it must be borne in mind, that the recitals of deeds which do not themselves constitute, either actually or by references to such recitals in deeds which are, a link of the chain of title, are not sufficient to charge the purchaser with constructive notice of an adverse claim.⁷

§ 91. **Constructive notice arising from possession.**—Where one purchases property in the possession of some one other than the vendor, the general ruling of the courts charges him with constructive notice of whatever claim the party having the possession might have

¹ Howard v. Chase, 104 Mass. 249; George v. Kent, 7 Allen, 16; Garrett v. Puckett, 15 Ind. 485; Stidham v. Matthews, 29 Ark. 650, 659, 660; Baker v. Mather, 25 Mich. 51, 53; White v. Foster, 102 Mass. 375, 380; Ross v. Worthington, 11 Minn. 438; Price v. McDonald, 1 Md. 403; Hudson v. Warner, 2 Har. & G. 415; Ætna L. Ins. Co. v. Bishop, 69 Iowa, 645; Dunham v. Dey, 15 Johns. (N. Y.) 556; Childs v. Clark, 3 Barb. Ch. (N. Y.) 52; s. c., 49 Am. Dec. 164; Central Trust Co. v. Wabash, & c. R. Co., 29 Fed. Rep. 546.

² Lewis v. Bourbon Co., 12 Kans. 186; Martin v. Neblett, 86 Tenn. 383.

³ Cothay v. Sydenham, 2 Bro. Ch. 391; see, also, Cook v. Travis, 22 Barb. N. Y. 338; Claibough v. Byerly, 7 Gill, (Md.) 354; s. c., 48 Am. Dec. 575.

⁴ Bell v. Twilight, 22 N. H. 500; s. c., 45 Am. Dec. 367; Kaine v. Denniston, 22 Pa. St. 202; Lodge v. Simonton, 2 P. & W. (Pa.) 217; White

v. Carpenter, 2 Paige, (N. Y.) 217; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Van Slyck v. Skinner, 41 Mich. 186; Morris v. Murray, 82 Ky. 36; French v. Loyal Land Co., 5 Leigh, (Va.) 627; White v. Carpenter, 2 Paige, 217, *per* Walworth, Chan.

⁵ Nelson v. Allen, 1 Yerg. (Tenn.) 360; Wailes v. Cooper, 24 Miss. 208.

⁶ Ware v. Lord Egmont, 4 De G. M. & G. 460, 473; Harryman v. Collins, 18 Beav. 11; Bird v. Fox, 11 Hare, 40; Allen v. Knight, 5 Hare, 272.

⁷ Ware v. Egmont, 31 Eng. L. & Eq. 89; Dingman v. McCollum, 47 Mo. 372; Tyding v. Pitcher, 82 Mo. 379; Corbin v. Sullivan, 47 Ind. 356; Burke v. Beveridge, 15 Minn. 205; Crockett v. Maguire, 10 Mo. 34; Burch v. Carter, 44 Ala. 115; Hazlett v. Sinclair, 76 Ind. 400; s. c., 40 Am. Rep. 254; Coleman v. Barklew, 27 N. J. L. 357; Boggs v. Varner 6 W. & . (Pa.) 469; Polk v. Cosgrove, 4 Biss. (U. S.) 487.

against the vendor's interest in the land. The purchaser is, therefore, bound to make an inquiry into the character of such adverse title; and failing to do so, he is charged with notice of all the facts concerning such adverse title which he could have ascertained by making the due inquiry.¹ While this is the general rule, that such possession charges

¹ *Beal v. Gordon*, 55 Me. 482; *Hull v. Noble*, 40 Me. 459; *McKeeknie v. Hoskins*, 23 Me. 230; *Howe v. Willis*, 51 Me. 226; *Butler v. Stevens*, 26 Me. 484; *Garrett v. Lyle*, 27 Ala. 586; *Phillips v. Costley*, 40 Ala. 486; *Burt v. Cassety*, 12 Ala. 734; *McCaskle v. Amarine*, 52 Ala. 17; *Clark v. Bosworth*, 51 Me. 528; *Baynard v. Norris*, 5 Gill, (Md.) 468; s. c., Am. Dec. 647; *Hardy v. Summers*, 10 Gill & J. (Md.) 316; s. c., 32 Am. Dec. 167; *Price v. McDonald*, 1 Md. 403; s. c., 54 Am. Dec. 657; *Hamilton v. Fowlkes*, 16 Ark. 340; *Daubenspeck v. Platt*, 22 Cal. 330; *Lestrade v. Barth*, 19 Cal. 660; *Bryan v. Harvey*, 18 Md. 113; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Border State Sav. Inst. v. Wilcox*, 63 Md. 525; *Jenkins v. Redding*, 8 Cal. 598; *Morrison v. Wilson*, 13 Cal. 494; s. c., 73 Am. Dec. 593; *Bloomer v. Henderson*, 8 Mich. 395; s. c., 77 Am. Dec. 453; *McGee v. Wilcox*, 11 Mich. 358; *Converse v. Blumrich*, 14 Mich. 109; s. c., 90 Am. Dec. 230; *Partridge McKinney*, 10 Cal. 181; *Smith v. Yule*, 31 Cal. 180; s. c., 89 Am. Dec. 167; *Parsell v. Thayer*, 39 Mich. 467; *Hommel v. Devinney*, 39 Mich. 522; *Weisberger v. Wisner*, 55 Mich. 246; *Morrison v. March*, 4 Minn. 428; *Seager v. Burns*, 4 Minn. 141; *Peasley v. McFadden*, 68 Cal. 611; *Thompson v. Pioche*, 44 Cal. 516; *Pell v. McElroy*, 36 Cal. 268; *Landers v. Bolton*, 26 Cal. 393; *Fair v. Sterenot*, 29 Cal. 486; *Bryan v. Ramirez*, 8 Cal. 461; s. c., 68 Am. Dec. 340; *Minor v. Willoughby*, 3 Minn. 225; *New v. Wheaton*, 24 Minn. 406; *Siebert v. Rosser*, 24 Minn. 155; *Taylor v. Lowenstine*, 50 Miss. 278; *Taylor v. Eckford*, 11 Smed. & M. (Miss.) 21; *Dreyfuss v. Hirt*, (Cal.) 123 Pac. Rep. 193; *Harral v. Leverty*, 50 Conn. 46; s. c., 47 Am. Rep. 608; *McRae v. McMinin*, 17 Fla. 876; *Jones v. Loggins*, 37 Miss. 546; *Vaughn v. Tracy*, 25 Mo. 318; s. c., 69 Am. Dec. 471; *Witman v. Taylor*, 60 Mo. 135; *Pike v. Robertson*, 97 Mo. 615; *Wyatt v. Elam*, 23 Ga. 301; s. c., 68 Am. Dec. 518; *Vessey v. Graham*, 17 Ga. 99; s. c., 63 Am. Dec. 228; *Cox v. Jones*, 76 Ga. 296; *Helms v. O'Bannon*, 26 Ga. 132; *Clark v. Morris*, 23 Ill. 434; *Frothingham v. Stacker*, 11 Mo. 77; *Wise v. Wimer*, 23 Mo. 237; *Lipp v. Hunt*, 25 Neb. 91; *Conlee v. McDowell*, 15 Neb. 184; *Patten v. Moore*, 32 N. H. 382; *Morrison v. Kelly*, 22 Ill. 610; s. c., 74 Am. Dec. 169; *Metro-politan Bank v. Godfrey*, 23 Ill. 579; *Flint v. Lewis*, 61 Ill. 306; *Rupert v. Mark*, 15 Ill. 540; *Pritchard v. Brown*, 4 N. H. 397; s. c., 17 Am. Dec. 431; *Janvrin v. Janvrin*, 60 N. H. 169; *Bank v. Eastman*, 44 N. H. 431; *Hodges v. Ammerman*, 40 N. J. Eq. 99; *Phillips v. Pitts*, 78 Ill. 72; *Brainard v. Hudson*, 103 Ill. 218; *Druley v. Adam*, 103 Ill. 177; *McCall v. Yard*, 3 Stockt. (N. J.) 58; *Losey v. Simpson*, 3 Stockt. (N. J.) 246; *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 372; *Grimstone v. Carter*, 3 Paige,

(N. Y.) 437; s. c., 24 Am. Dec. 230; *Maghee v. Robinson*, 98 Ill. 458; *Walsh v. Wright*, 101 Ill. 178; *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273; *Higgins v. White*, 18 Ill. App. 480; *Jacquet v. Lester*, 118 Ill. 246; *De Ruyler v. Trustees of St. Peter's Church*, 2 Barb. Ch. (N. Y.) 558; *Cook v. Travis*, 22 Barb. (N. Y.) 359; *Harris v. McIntyre*, 518 Ill. 275; *Bartling v. Brasuhu*, 102 Ill. 441; *Porter v. Clark*, 22 Ill. App. 567; *Griffin v. Haskins*, 22 Ill. App. 264; *Moyer v. Hinman*, 13 N. Y. 188; *Troup v. Hurlburt*, 10 Barb. (N. Y.) 354; *Pheland v. Brady*, 19 Abb. N. C. (N. Y.) 289; *Tunson v. Chamberlain*, 88 Ill. 378; *Stagg v. Small*, 4 Ill. App. 192; *Partridge v. Chapman*, 81 Ill. 137; *Williams v. Brown*, 14 Ill. 200; *Reeves v. Ayers*, 38 Ill. 418; *Lawrence v. Conklin*, 17 Hun. (N. Y.) 228; *Hensler v. Seffrin*, 19 Hun. (N. Y.) 564; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 33; *Laverty v. Moore*, 32 Barb. (N. Y.) 347; *Keyes v. Test*, 35 Ill. 316; *Cabeen v. Breckenridge*, 48 Ill. 91; *Aldrich v. Aldrich*, 37 Ill. 32; *White v. White*, 105 Ill. 313; *Staton v. Davenport*, 95 N. Car. 11; *Webber v. Taylor*, 2 Jones Eq. (N. Car.) 9; *McKenzie v. Perrill*, 15 Ohio St. 162; *Day v. Atlantic, & Co.* 41 Ohio St. 392; *Meni v. Rathbone*, 21 Ind. 454; *Glidewell v. Spraugh*, 26 Ind. 319; *Tuttle v. Churchman*, 74 Ind. 311; *Ramsey v. Hardy*, 43 Ohio St. 157; *McCulloch v. Cowher*, 5 W. & S. (Pa.) 427; *Jacques v. Weeks*, 7 Watts, (Pa.) 261; *Barnes v. Union School Town-ship*, 91 Ind. 301; *Lash v. Butch*, 4 Iowa 215; *Moore v. Pierson*, 6 Iowa, 579; s. c., 71 Am. Dec. 209; *Woods v. Farmer*, 7 Watts, (Pa.) 382; s. c., 32 Am. Dec. 772; *Randall v. Sil-verthorn*, 4 Pa. St. 173; *Jamison v. Dimock*, 95 Pa. St. 52; *Humphrey v. Moore*, 17 Iowa, 193; *Sears v. Munson*, 23 Iowa, 380; *Leebrick v. Stable*, 68 Iowa, 515; *Hubbard v. Long*, 20 Iowa, 149; *Rowe v. Ream*, 105 Pa. St. 543; *Berg v. Ship-ley*, 1 Grant Cas. (Pa.) 429; *Sheorn v. Robinson*, 22 S. Car. 32; *Brimann v. White*, 23 S. Car. 490; *School Dist. No. 82 v. Taylor*, 19 Kan. 287; *Knox v. Thompson*, 1 Litt. (Ky.) 350; s. c., 13 Am. Dec. 246; *Graham v. Nesmith*, 24 S. Car. 285; *Watkins v. Edwards*, 23 Tex. 443; *Pouton v. Ballard*, 24 Tex. 619; *Goins v. Allen*, 4 Bush. (Ky.) 608; *McLaughlin v. Shepherd*, 32 Me. 143; s. c., 52 Am. Dec. 646; *Hawley v. Bullock*, 29 Tex. 216; *Muhins v. Wimberly*, 50 Tex. 457; *Mainwarring v. Templeman*, 51 Tex. 205; *Wood-son v. Collins*, 56 Tex. 168; *Johnston v. Glancy*, 4 Blatchf. (U. S.) 94; s. c., 28 Am. Dec. 45; *Noyes v. Hall*, 97 U. S. 34; *Weld v. Madden*, 2 Cliff. (U. S.) 584; *Thompson v. Westbrook*, 56 Tex. 265; *Laroe v. aunt*, 62 Tex. 481; *Ruble v. Mead*, 2 Vt. 544; *St. Johnsbury v. Morrill*, 55 Vt. 165; *Ehle v. Brown*, 31 Wis. 405; *Lamoreux v. Huntley*, 63 Wis. 24; *Lea v. Polk County C.*

a subsequent purchaser with constructive notice of the claim to the property of the party in possession, even though such purchaser does not actually know that the property is in the possession of some one other than the vendor; yet, in a number of the states, where the recording laws provide that an unrecorded deed shall only prevail against the subsequently recorded deed, where the subsequent purchaser has taken the title with actual notice of the prior conveyance, it is plain that the mere constructive notice which arises from the possession of the land by such prior grantee or other claimant of a prior equity in the property, will not be sufficient to overcome the priority in the title acquired by the subsequent purchaser's earlier record of his title. Such subsequent purchaser must have actual knowledge of the possession by such prior grantee, in order that such prior grantee might claim priority over the subsequent purchaser.¹ There has been a disposition on the part of some of the courts to lay down the doctrine of constructive notice arising from the possession in a slightly different form, sufficient in character to create the impression that the rule is not the same in different states; but it is believed, if such distinction does exist at all, that it is not sufficient to create any material variation in the rule of constructive notice. In some of the cases it is laid down without qualification, that the possession of the property by a third person is sufficient to charge the purchaser with constructive notice of the adverse title of the property, even though such purchaser does not know of the possession of the property by this third person.² According to the other authorities, he is charged with constructive notice whenever he is informed or knows, or is not in a condition to deny that he knows, that the property is in the possession of a third person claiming to have a right to the property.³ Except where the recording act requires a subsequent purchaser to have actual notice of an equitable claim or an unrecorded title, one could properly be said to be in such

Co., 21 How. (U. S.) 493; *Crews v. Burcham*, 1 Blackf. (Ind.) 352; *Parker v. Kane*, 4 Wis. 1; s. c., 65 Am. Dec. 283; *School Dist. v. Macloon*, 4 Wis. 98; *Stewart v. McSweeney*, 14 Wis. 468; *Gee v. Bolton*, 17 Wis. 604; *Warner v. Fountain*, 28 Wis. 405; *Fery v. Pfeiffer*, 18 Wis. 510; *First Nat. Bank v. Damm*, 63 Wis. 249.

¹ *Vaughn v. Tracy*, 22 Mo. 415; 25 Mo. 318; s. c., 69 Am. Dec. 471; *Dooley v. Wolcott*, 4 Allen, (Mass.) 406; *Casey v. Steinmeyer*, 7 Mo. App. 556; *Rogers v. Jones*, 8 N. H. 264; *Harris v. Arnold*, 1 R. I. 121; *Pomroy v. Stevens*, 11 Mete. (Mass.) 244; *Mara v. Pierce*, 9 Gray, (Mass.) 306; *Moore v. Jourdan*, 14 La. An. 417; *Hubbard v. Smith*, 2 Mich. 207; *Sibley v. Leffingwell*, 8 Allen, (Mass.) 584; *Hopping v. Burnam*, 2 Green, (Iowa) 39; *Poydras v. Laurans*, 6 La. An. 772.

² *Tankard v. Tankard*, 79 N. C. 54, 56; *Edwards v. Thompson*, 71 N. C. 177, 179; *Webber v. Taylor*, 2 Jones Eq. 9; *Taylor v. Kelly*, 3 Jones Eq. 240; *Noyes v. Hall*, 7 Otto, 34, 38; *Cabeen v. Breckenridge*, 48 Ill. 91; *Truesdale v. Ford*, 37 Ill. 210; *Brown v. Gaffney*, 28 Ill. 157;

Dunlap v. Wilson, 32 Ill. 517; *Bradley v. Snyder*, 14 Ill. 263; *Holmes v. Powell*, 8 De G. M. & G. 572, 580; *Doyle v. Stevens*, 4 Mich. 87; *Farmers' L. & T. Co. v. Maltby*, 8 Paige, 361; *Emmons v. Murray*, 16 N. H. 385; *School Dist. v. Taylor*, 19 Kans. 287.

³ *Watkins v. Edwards*, 23 Tex. 443; *Mullins v. Wimberly*, 50 Tex. 457, 464; *Johnson v. Clark*, 18 Kans. 157, 164; *Hull v. Noble*, 40 Me. 459, 480; *Rogers v. Jones*, 8 N. H. 264; *Strickland v. Kirk*, 51 Miss. 795, 797; *Tunison v. Chamblin*, 88 Ill. 378, 390; *Warren v. Richmond*, 53 Ill. 52; *Rogers v. Hussey*, 36 Iowa, 664; 111. Cent. R. R. v. McCullough, 59 Ill. 166; *Russell v. Swezey*, 22 Mich. 235, 239; *Perkins v. Swank*, 43 Miss. 349, 361; *Loughridge v. Bowland*, 52 Miss. 548, 553, 554; *O'Rourke v. O'Connor*, 39 Cal. 442, 446; *Pell v. McElroy*, 36 Cal. 268; *Dutton v. Warschauer*, 21 Cal. 609; *Brown v. Volkening*, 64 N. Y. 76, 82, 83; *Van Kueren v. Cent. R. R.*, 38 N. J. L. (9 Vroom) 165, 167; *Moss v. Atkinson*, 44 Cal. 3, 17; *Killey v. Wilson*, 33 Cal. 690; *Smith v. Gibson*, 15 Minn. 89, 99; *Bogue v. Williams*, 48 Ill. 371.

a condition, that he would be prevented from denying that he knows that the property is in the possession of a third person claiming title thereto, when he has failed to make any inquiry at all into the possession of the premises.

It has also been held to be doubtful under the authorities, whether the retention of the possession by the grantor is constructive notice of the existence in him of some claim against the property. In England, if the deed of conveyance acknowledges the receipt of the consideration, then his retention of the possession will not be sufficient to charge the subsequent purchaser with constructive notice of any other claim that he might have against the property,¹ and this position of the English courts is supported by the adjudications of some of the American courts.² According to the decisions of other American courts, the grantor's possession, like any other possession, would charge the purchaser with constructive notice of the claim under which he held possession.³ But if the grantor's retention of possession is confined only to a part of the original property, and the conveyance conveys only the other part, so that he does not in fact retain possession of the part which he has conveyed, unquestionably the purchaser is not charged with constructive notice; for in fact the grantor does not in that case have possession of the part of the property which he has conveyed, and which the grantee is about to sell.⁴

§ 92. **Extent and effect of the notice.**—It is important to know how far and to what extent will the possession of the premises by some one other than the vendor charge the purchaser with constructive notice of his claim against the property. For example, if the party in possession had entered into possession in the character of a tenant, either of the vendor or of some third party, two questions can arise as to the extent and the effect of the notice arising from his possession: *First*, whether in the case where he holds possession as tenant of some one other than the vendor, his possession is constructive notice to the purchaser, not only of his own title or claim to the prop-

¹ *White v. Wakefield*, 7 Sim. 401; *Rice v. Rice*, 2 Drew. 1; *Muir v. Jolly*, 26 Beav. 143.

² *N. Y. Life Ins. Co. v. Cutler*, 3 Sandf. Ch. 176, 179; *Woods v. Farmer*, 7 Watts, 382; *Jacques v. Weeks*, 7 Watts, 261, 272, 287; *Bloomer v. Henderson*, 8 Mich. 395, 404, 405; *Scott v. Gallagher*, 14 Serg. & R. 333, 334; *Newhall v. Pierce*, 5 Pick. 450; *Van Keuren v. Cent. R. R.*, 38 N. J. L. (9 Vroom) 165, 167; *Dawson v. Danbury B'k*, 15 Mich. 489; *Cook v. Travis*, 20 N. Y. 400; *Reed v. Gannon*, 50 N. Y. 345, 350.

³ *Wright v. Bates*, 13 Vt. 341, 350; *Grimstone v. Carter*, 3 Paige, 421, 439; Ill. Cent. R. R. v. *McCullough*, 59 Ill. 166; *Metropolitan B'k v. Godfrey*, 23 Ill. 579, 607; *Pell v. McElroy*, 36 Cal. 263, 278; *Hopkins v. Garrard*, 7 B. Mon. 312; *Webster v. Maddox*, 6 Me. 256; *McKecknie v. Hoskins*, 23 Me. 230; *Jacques v. Weeks*, 7 Watts, 261; *White v. White*, 89 Ill. 460; *Ford v. Mar-*

call, 107 Ill. 136; *Van Keuren v. Central R. Co.*, 38 N. J. L. 167; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 133; *Tuttle v. Churchman*, 74 Ind. 311; *Crassen v. Swoveland*, 22 Ind. 427; *Sprague v. White*, 73 Iowa, 670; *Burt v. Baldwin*, 8 Neb. 487; *Cook v. Travis*, 20 N. Y. 400; *Scott v. Gallagher*, 14 S. & R. (Pa.) 333; s. c., 16 Am. Dec. 508; *Newhall v. Pierce*, 5 Pick. (Mass.) 449; *Hennessey v. Andrews*, 6 Cush. (Mass.) 170; *Humphrey v. Hurd*, 29 Mich. 44; *Woods v. Farmer*, 7 Watts, (Pa.) 382; s. c., 32 Am. Dec. 772; *Hoffman v. Blume*, 64 Tex. 334; *Abbott v. Gregory*, 39 Mich. 68; *Bloomer v. Henderson*, 8 Mich. 395; s. c., 77 Am. Dec. 453; *Eylar v. Eylar*, 60 Tex. 315; *Matesky v. Feldman*, 75 Wis. 103.

⁴ *Boggs v. Anderson*, 50 Me. 161; *McLaughlin v. Shepherd*, 32 Me. 143; s. c., 52 Am. Dec. 646; *Bower v. Earl*, 18 Mich. 367.

erty, but likewise of the claims to the property of his lessor; and in respect to that proposition the authorities are at variance. According to the English and some of the American cases the possession by the tenant will not charge a purchaser with constructive notice of the landlord's title.¹ But the greater number of American cases hold that the tenant's possession charges the purchaser with constructive notice of the lessor's title to the property under which he himself holds possession, as well as of his own claim to such property.² The second question which might arise under this heading is, whether the lessee's possession is constructive notice of his right to possession as a lessee, and also of his right to possession under some other title? The case would arise, when one has entered into possession as lessor, and has subsequently acquired by purchase some other title to the land which he desires to assert against the subsequent purchaser. According to the English cases it is held without qualification, that the party in possession can assert against a subsequent purchaser constructive notice, not only of his right to the property as lessee, but also of his claim under any other title which he might have acquired and holds against the property.³ The American cases are divided on this question; some of them hold that the possession which one acquires under one's claim of title will be constructive notice not only of that claim of title, but likewise of every other claim which he might have subsequently acquired, unless there be something in the circumstances of the case which would actually mislead the purchaser in his inquiry after the full extent of the claim of the party in possession.⁴ On the other hand, other cases reach the conclusion, that, where the possession is acquired under one claim of

¹ *Hanbury v. Litchfield*, 2 My. & K. 629, 633; *Jones v. Smith*, 1 Hare, 43, 63, *per* Wigram, V. C.; *Mann*, 2 Sumn. 486, 557; *Jacques v. Weeks*, 7 Watts, 261, 272; *Beatie v. Butler*, 21 Mo. 313; *Veazie v. Parker*, 23 Mo. 170.

² *Kerr v. Day*, 14 Pa. St. 112; *Cunningham v. Pattee*, 99 Mass. 248, 252; *O'Rourke v. O'Connor*, 39 Cal. 442, 446; *Edwards v. Thompson*, 71 N. C. 177, 179; *Pittman v. Gaty*, 5 Gilm. 186; *The Bank v. Flagg*, 3 Barb. Ch. 316; *Thompson v. Pioche*, 44 Cal. 508, 516; *Sergeant v. Ingersoll*, 3 Harris, (15 Pa. St.) 343, 348; *Dickey v. Lyon*, 19 Iowa, 544; *Nelson v. Wade*, 21 Iowa, 49; *Morrison v. March*, 4 Minn. 422; *The Bank v. Godfrey*, 23 Ill. 579, 607; *Wright v. Wood*, 11 Harris, (23 Pa. St.), 120, 130; *Hood v. Fahnestock*, 1 Barr. 470; *Sailor v. Hertzog*, 4 Whart. 259; *see also*, *Munn v. Burges*, 70 Ill. 604; *Suiter v. Turner*, 10 Iowa, 517; *Fassett v. Smith*, 23 N. Y. 252; *Hanly v. Morse*, 52 Me. 287; *Conlee v. McDowell*, 15 Neb. 184; *Purcell v. Enright*, 31 N. J. Eq. 74; *Jacques v. Weeks*, 7 Watts (Pa.) 261; *Lewis v. Bradford*, 10 Watts, (Pa.) 67; *Dutton v. Warschauer*, 21 Cal. 269; s. c., Am. Dec. 765; *Landers v. Bolton*, 26 Cal. 419; *Boggs v. Varner*, 6 W. & S. (Pa.) 469;

Pittman v. Gaty, 10 Ill. 186; *Haworth v. Taylor*, 108 Ill. 275; *United States v. Sliney*, 21 Fed. Rep. 894; *Edwards v. Wray*, 12 Fed. Rep.; *Franz v. Orton*, 75 Ill. 100; *Whittaker v. Miller*, 83 Ill. 381; *Smith v. Jackson*, 76 Ill. 254; *Dickey v. Lynn*, 19 Iowa, 544; *Nelson v. Wade*, 21 Iowa, 49.

³ *Barnhart v. Greenshields*, 9 Moore, P. C. 33, 34; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Powell v. Dillon*, 2 Ball & B. 416; *Hanbury v. Litchfield*, 2 My. & K. 629, 633, *per* Lord Cottenham.

⁴ *McKecknie v. Hoskins*, 23 Me. 230; *Rogers v. Jones*, 8 N. H. 264; *Daubenspeck v. Platt*, 22 Cal.; *see Woods v. Farmer*, 7 Watts, 382; *Matthews v. Demeritt*, 22 Me. 312; *Smith v. Miller*, 63 Tex. 72; *Bailey v. Richardson*, 15 Eng. L. & Eq. 218; *Cunningham v. Pattee*, 99 Mass. 248; *Kerr v. Day*, 14 Pa. St. 112; s. c., 53 Am. Dec. 526; *Daniels v. Davison*, 16 Ves. (Eng.) 253; 17 Ves. (Eng.) 433; *Coari v. Olsen*, 91 Ill. 273; *Russell v. Moore*, 3 Metc. (Ky.) 436; *Marsh v. Nelson*, 101 Pa. St. 51; *Fery v. Pfeiffer*, 18 Wis. 510; *Wickes v. Lake*, 25 Wis. 71.

title, it does not constitute constructive notice of any other right or title subsequently acquired, unless the circumstances of the case are such as to draw the purchaser's attention to the existence of this other title or claim to the property, and thus impose upon him the duty of inquiring into its existence.¹ But however much the American cases may differ in this respect to the question of the constructive notice in other cases; they generally agree that, when the possession is acquired by the third person under a recorded deed, the possession was acquired as constructive notice only of the title under which the possession was originally obtained, and not of any other title subsequently acquired which has not been recorded.²

§ 93. **Nature and time of possession.**—It is further required, in order that possession of the property might charge a purchaser with constructive notice of the title to the property or the party in possession, that this possession must be actual, open and notorious in character; that is, the possession must be of such a nature that the party inquiring into the possession may at once become apprised of the fact that someone is occupying the land. While it is held by some of the English cases that a lessee's constructive possession is sufficient to charge a purchaser with inquiry,³ it is unquestionably the American doctrine that the possession must be an actual occupation of the land.⁴ Whether the possession is sufficient in character to raise the charge of constructive notice, is a question for the jury.⁵

It is not always possible to establish an actual and open occupation of the land by the same kind of evidence, for each case must be

¹ *Leach v. Ansbacker*, 55 Pa. St. 85; *Flagg v. Mann*, 2 Sumn. (U.S.) 486; *Barnhart v. Green-shields*, 28 Eng. L. & Eq. 77; *Dickey v. Lyon*, 19 Iowa, 547; *Veazie v. Parker*, 23 Me. 170; *Beatie v. Butler*, 21 Mo. 313; s. c., 64 Am. Dec. 234; *Williams v. Sprigg*, 6 Ohio St. 585; *Mathews v. Demeritt*, 22 Me. 312, 313; *Dawson v. Danbury Bank*, 15 Mich. 489; *McMechan v. Griffing*, 3 Pick. 154; *Kendall v. Lawrence*, 22 Pick. 542; *Bush v. Golden*, 17 Conn. 594, 602.

² *Corpman v. Baccastow*, 84 Pa. St. 363; *Cras-sen v. Swoveland*, 22 Ind. 427; *Daubenspeck v. Platt*, 22 Cal. 330; *Great Falls Co. v. Worster*, 15 N. H. 412; *Smith v. Yule*, 31 Cal. 180; *Plumer v. Robertson*, 6 Serg. & R. 184, *per* Tilghman, C. J.; *Taylor v. Kelly*, 3 Jones Eq. (N. Car.) 240; *Staples v. Fenton*, 5 Hun. (N. Y.) 172; *Bell v. Twilight*, 22 N. H. 500; s. c., 45 Am. Dec. 367; *Smith v. Yule*, 31 Cal. 180; s. c., 89 Am. Dec. 167; *McNeil v. Polk*, 57 Cal. 323; *Williams v. Sprigg*, 6 Ohio St. 585; *Plumer v. Robertson*, 6 S. R. (Pa.) 179; *Woods v. Farmer*, 7 Watts, (Pa.) 382; s. c., 82 Am. Dec. 772; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Townsend v. Little*, 109 U. S. 504; compare *Randall v. Silverthorn*, 4 Pa. St. 173.

³ *Wilson v. Hart*, L. R. 1 Ch. 463, 467; 2 H. & M. 551; *Clements v. Welles*, L. R. 1 Eq. 200; 35 Beav. 513; *Holmes v. Powell*, 8 De G. M. & G. 572, 581, *per* Tyrne, L. J.

⁴ *Morrison v. Kelly*, 22 Ill. 610; s. c., 14 Am. Dec. 169; *Kendall v. Lawrence*, 22 Pick. (Mass.) 542; *McKee v. Wilcox*, 11 Mich. 358; *Bell v. Twilight*, 18 N. H. 159; s. c., 45 Am. Dec. 367; *Brown v. Volkening*, 64 N. Y. 82; *Pope v. Allen*, 90 N. Y. 298; *Webster v. Van Steen-bergh*, 46 Barb. (N. Y.) 214; *Patten v. Moore*, 32 N. H. 382; *McCall v. Yard*, 11 N. J. Eq. 58; *Holmes v. Stout*, 4 N. J. Eq. 419; 10 N. J. Eq. 492; *Harwick v. Thompson*, 9 Ala. 409; *Havens v. Dale*, 18 Cal. 359; *Smith v. Yule*, 31 Cal. 180; s. c., 89 Am. Dec. 180; *Lestrade v. Barth*, 19 Cal. 675; *Coleman v. Barklew*, 27 N. J. L. 359; *Meehan v. Williams*, 48 Pa. St. 238; *Wright v. Wood*, 23 Pa. St. 120; *Dutton v. Warschauer*, 21 Cal. 627; s. c., 82 Am. Dec. 776; *Fair v. Stevenot*, 29 Cal. 486; *Bogue v. Williams*, 48 Ill. 371; *Truesdale v. Ford*, 37 Ill. 210; *Beaubien v. Hindman*, 38 Kan. 471; *Billington v. Welsh*, 5 Binn. (Pa.) 129; s. c., 6 Am. Dec. 406; *Butler v. Stevens*, 26 Me. 484; *Hewes v. Wiswell*, 8 Me. 98; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Martin v. Jackson*, 27 Pa. St. 504; s. c., Am. Dec. 439; *Blackenship v. Douglas*, 26 Tex. 225; s. c., 82 Am. Dec. 608; *Townsend v. Little*, 109 U. S. 404; *Wickes v. Lake*, 25 Wis. 71; *Ely v. Wilcox*, 20 Wis. 523; s. c., 91 Am. Dec. 436; *Satterwhite v. Rosser*, 61 Tex. 166.

⁵ *Ponton v. Ballard*, 24 Tex. 619.

determined by its particular facts and circumstances. Every tract of land is not capable of the same use and occupation, and only the general rule that there must be actual and continuous occupation can be laid down. Among the facts and circumstances which are held to constitute sufficient evidence of an actual, open and permanent occupation of the land sufficient to charge a purchaser with notice, are fencing, cultivating the land, making improvements thereon, cutting trees, closing up the doors and leaving furniture in the house, and flowing lands with water from an adjoining stream.¹ On the other hand, a mere temporary occupation or use of the land, such as occasional cutting of wood or erection of a dam or quarry of rock, will not be sufficient evidence of a permanent occupation of the land.² Not only must the possession have been actual, open and notorious, but it must continue up to the time when the purchase was made. An actual occupation which had been abandoned when the sale was made, would not charge the purchaser with constructive notice of any adverse claim to the land.³ Finally, the possession must be exclusive; that is, the party who claims title thereto must have exclusive possession of the property, in order that such possession might charge a purchaser with constructive notice. If the possession is one held jointly with the vendor and, therefore, of such a nature as not to excite the suspicion of the purchaser of some outstanding claim against the property, there will be no constructive notice.⁴

§ 94. **Whether presumption of notice from possession is conclusive.**—It has been doubted under the authorities, whether the constructive notice arising from the possession of the property by the claimant to such property is conclusive upon the subsequent purchaser, or whether he can show due diligence in making inquiry into the cause and character of the claim under which the possession is claimed, and thus purge himself from the charge of constructive notice. Unquestion-

¹ *Wrede v. Cloud*, 52 Iowa, 371; *Nolan v. Grant*, 51 Iowa, 519; *Krider v. Lafferty*, 1 Whart. (Pa.) 303; *Lyman v. Russell*, 45 Ill. 281; *Bright v. Buckman*, 39 Fed. Rep. 243.

² *Sandford v. Weeks*, 38 Kan. 319; *Boynnton v. Rees*, 8 Pick. (Mass.) 329; s. c., 19 Am. Dec. 326; *Billington v. Welsh*, 5 Binn. (Pa.) 129; s. c., 6 Am. Dec. 406; *Dickey v. Lyon*, 19 Iowa, 544; *Meehan v. Williams*, 48 Pa. St. 238; *Coleman v. Barklew*, 27 N. J. L. 357; *Williams v. Sprigg*, 6 Ohio St. 585; *Masterson v. West End, &c. R. Co.*, 72 Mo. 342; 4 Am. & Eng. R. Cas. 439.

³ *Hewes v. Wiswell*, 8 Me. 94; *Boggs v. Varner*, 6 W. & S. (Pa.) 469; *Meehan v. Williams*, 48 Pa. St. 238; *Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471; *Jones v. Smith*, 1 Hare, 43, 62; *Miles v. Langley*, 1 Russ. & My. 39; 2 *Id.* 626; *Meehan v. Williams*, 12 Wright, 230; *Boggs v. Varner*, 6 Watts & S. 474; *Wright v. Wood*, 11 Harris, (23 Pa. St.) 120, 130, 131.

⁴ *Bell v. Twillight*, 18 N. H. 159; s. c., 45 Am. Dec. 387; *Billington v. Welsh*, 5 Binn. (Pa.) 129; s. c., 6 Am. Dec. 406; *McCarthy v. Nicrosi*, 72

Ala. 332; s. c., 47 Am. Rep. 418; *Butler v. Stevens*, 26 Me. 484; *Bower v. Earl*, 18 Mich. 367; compare *McLaughlin v. Shepherd*, 32 Me. 143; s. c., 52 Am. Dec. 646; *Boggs v. Anderson*, 50 Me. 161; *Coleman v. Barklew*, 3 Dutcher, 357, 359; *Brown v. Volkening*, 64 N. Y. 76, 82, 83; *Hatch v. Bigelow*, 39 Ill. 136; *Krider v. Lafferty*, 1 Whart. 303; *Truesdale v. Ford*, 37 Ill. 210; *Dunlap v. Wilson*, 32 Ill. 517; *Bradley v. Snyder*, 14 Ill. 263; *Tankard v. Tankard*, 79 N. C. 54, 56; *Noyes v. Hall*, 97 U. S. 34, 38; *Cabeen v. Breckenridge*, 48 Ill. 91; *Edwards v. Thompson*, 71 N. C. 177, 179; *Webber v. Taylor*, 2 Jones Eq. 9; *Taylor v. Kelly*, 3 Jones Eq. 240; *Butler v. Stevens*, 26 Me. 484; *Troy City B'k v. Wilcox*, 24 Wis. 671; *Bogue v. Williams*, 48 Ill. 371; *Patten v. Moore*, 32 N. H. 382; *Martin v. Jackson*, 3 Casey, 504, 506; *Mehan v. Williams*, 12 Wright, 258; *McMeehan v. Griffing*, 3 Pick. 149; *Holmes v. Stout*, 3 Green's Ch. 492; 2 Stockt. Ch. 419; *Williams v. Spriggs*, 6 Ohio St. 585, 594; *Ely v. Wilcox*, 20 Wis. 523, 531; *Wickes v. Lake*, 25 *Id.* 71.

ably, in all the cases where the question is raised and settled by an adjudication of the court, it has been held that the presumption of notice arising from the possession is only *prima facie*, and may be rebutted by facts indicating an unsuccessful but diligent inquiry into the nature of the claim under which the possession is retained.¹ But in the great majority of cases in which the question is not directly settled, the courts employ language which makes it more or less doubtful whether the presumption of notice is conclusive or may be rebutted. Mr. Pomeroy divides these doubtful cases into three classes. The first class, or group, contains all the cases in which the statement is generally made without qualification—or without any statement or circumstance connected with the case which would in any way explain the purpose and object of the statement—that the presumption of notice is absolute; that is, that the purchaser is charged with an absolute notice of the title of the party in possession.² In the second group are found the cases, in which under the peculiar facts and circumstances, the court decides “that a purchaser or incumbrancer, knowing the fact of possession by a stranger, and being put upon inquiry thereby, has either wholly neglected to make any inquiry, or has failed to prosecute it with due diligence, and is therefore *conclusively* presumed to have obtained full information, and is absolutely charged with notice.”³ In the third group, the courts have merely held “that where a prior grantee is in *rightful* possession under an unrecorded conveyance, and his possession is open, notorious, visible, and exclusive, a subsequent purchaser or incumbrancer, even though his deed or mortgage is put upon record, becomes charged with an absolute notice.” It is, however, plain from those cases, that whatever presumption might arise from the language of the courts, that the court intended to declare that the presumption of notice was conclusive: it constitutes only a dictum of the court or only binding and intended to be binding under

¹ Thompson v. Pioche, 44 Cal. 508, 516; Rogers v. Jones, 8 N. H. 264; Penny v. Watts, 1 Macn. & G. 150; Ware v. Lord Egmont, 4 De G. M. & G. 460; Roberts v. Croft, 2 De G. & J. 1; Flagg v. Mann, 2 Sumn. 486, 554; Kerr v. Day, 2 Harris, (14 Pa. St.) 112; Williamson v. Brown, 15 N. Y. 354, 360, 362; Leach v. Ansbacher, 55 Pa. St. (5 P. F. Sm.) 85; Riley v. Quigley, 50 Ill. 304; s. c., 99 Am. Dec. 516.

² Russell v. Sweezy, 22 Mich. 235, 239; Sears v. Munson, 23 Iowa, 380; Phillips v. Costley, 40 Ala. 486; McKenzie v. Perrill, 15 Ohio St. 162; Rogers v. Jones, 8 N. H. 264; Gull v. Noble, 40 Me. 459, 480; Johnson v. Clarke, 18 Kans. 157, 164; School Dist. v. Taylor, 19 Kans. 287; Perkins v. Swank, 43 Miss. 349; Glidewell v. Spough, 26 Ind. 319; Warren v. Richmond, 53 Ill. 52; Tankard v. Tankard, 79 N. C. 54, 56; Edward v. Thompson, 71 N. C. 177; Noyes v. Hall, 97 U. S. 38, 39; Reeves v. Ayers, 38 Ill. 418; Keys v. Test, 33 Ill. 316; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Diehl v. Page, 3 N. J. Eq. (2 Green Ch.) 143;

Cabeen v. Breckenridge 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Dunlap v. Wilson, 32 Ill. 517; Strickland v. Kirk, 51 Miss. 795, 797; Baldwin v. Johnson, Saxton, 441; Woods v. Farmer, 7 Watts, 382; Sailor v. Hertzog, 4 Whart. 259; Loughridge v. Bowland, 52 Miss. 546, 553; Moss v. Atkinson, 44 Cal. 17; Killey v. Wilson, 33 Cal. 690; Ringold v. Bryan, 3 Md. Ch. 488; Baynard v. Norris, 5 Gill, 468; Webber v. Taylor, 2 Jones Eq. 9. See 2 Pom. Eq. Jur. § 623.

³ Kent v. Plummer, 7 Greenl. 464; Jacques v. Weeks, 7 Watts, 272; Kerr v. Day, 2 Harris, 112; Hardy v. Summers, 10 Gill & J. 316; Gouverneur v. Lynch, 2 Paige, 300; Grimstone v. Carter, 3 Paige, 421; Brice v. Brice, 5 Barb. 533; Tuttle v. Jackson, 6 Wend. 213; Macom v. Sheppard, 2 Humph. 335; Morton v. Robards, 4 Dana, 258; Brush v. Halloway, 2 J. J. Marsh. 180; Hanley v. Morse, 32 Me. 287; McLaughlin v. Shepherd, Me. 143; Webster v. Maddox, 6 Greenl. 256; Burt v. Cassety, 12 Ala. 739; Scroggins v. Dougal, 8 Ala. 382.

the peculiar facts and circumstances of the case; and that they did not intend to hold that a subsequent purchaser cannot prove by a diligent but unsuccessful inquiry into the claims of title under which the possession is held, that the constructive notice was not sufficient to give him the desired information concerning the outstanding claim of title.

§ 95. **Lis pendens as constructive notice of rights.**—It has been a doubtful question, under the authorities, whether the pendency of a suit over a claim to property constitutes constructive notice to purchasers during the pendency of the suit of the claim of the parties which are to be adjudicated by the court, or whether the effect of notice is given to the case merely out of consideration of expedience. It is probable that the constructive notice, arising out of the *lis pendens*, is the legal consequence of motives of expedience; in other words, the consideration that if the party to a suit in which questions of title to property are raised, could during the pendency of the suit transfer his rights in and to the property in question to a purchaser for value, who could take such property free from the effect of the judgment which the court might render in the pending suit, there would be no end to litigation, and the very same questions would have to be raised and discussed, in contention over the property with the purchaser *pendente lite*. This consideration of expediency unquestionably prompted the adoption of the rule, that a purchaser of property during the pendency of a suit, in which questions as to the title of such property are raised and settled, will take the property subject to whatever decree or judgment the court might render in the pending suit. The doctrine of *lis pendens* applies to legal as well as to equitable actions. But inasmuch as one's legal rights to property are settled in respect to the order of priority by the sole consideration of priority in point of time, in the absence of the application of the recording laws, the special value of the doctrine of *lis pendens* is in its application not to legal but to equitable actions.¹

¹ Center v. The Bank, 22 Ala. 743, 757; Green v. Slayter, 4 Johns. Ch. 38; Choudron v. Magee, 8 Ala. 570; Newland on Cont. 506; Allen v. Mandaville, 26 Miss. 397, 399; Murray v. Ballou, 1 Johns. Ch. 566, 576; 2 Sugden on Vendors, (7th Am. ed.) 544; Allen v. Poole, 54 Miss. 323, 333, by Simrall, C. J.; Miller v. Sherry, 2 Wall. 237; Murray v. Lylburn, 2 Johns. Ch. 441; Murray v. Finster, 2 Johns. Ch. 155; Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294; Turner v. Babb, 60 Mo. 342; Borrowscale v. Tuttle, 5 Allen, 377; Haven v. Adams, 8 Allen, 363, 367, per Chapman, J.; Beekman v. Montgomery, 1 McCarter, 106; McPherson v. Housel, 2 Beasley, 299; O'Reilly v. Nicholson, 45 Mo. 160; Blanchard v. Ware, 43 Iowa, 530, 531; 37 Mo. 305, 307; Holman v. Patterson's Heirs, 29 Ark. 357; Hersey v. Turbett, 3 Casey, (27 Pa. St.) 418; Bouden v. Lanahan, 29 Md. 200; Inloes' Lessee v. Harvey, 11 Md. 519; Tongue v. Morton, 6

Har. & J. 21; Brundage v. Briggs, 25 Ohio St. 652; Seabrook v. Brady, 47 Ga. 650; Douglas v. McCrackin, 52 Ga. 596; Tharpe v. Dunlap, 4 Heisk. 674, 686; Edwards v. Blacksmith, 35 Ga. 213; Brandon v. Cabiness, 10 Ala. 155; Salisbury v. Morss, 7 Lans. 359, 365, 366; Cook v. Mancius, 5 Johns. Ch. 89, 93; Hoole v. Atty-Gen. 22 Ala. 190; Ashley v. Cunningham, 16 Ark. 168; Whiting v. Beebe, 7 Eng. 421, 564; Sedgwick v. Cleveland, 7 Paige, 287; Van Hook v. Throckmorton, 8 Paige, 33; White v. Carpenter, 2 Paige, 217, 252; Gosson v. Donaldson, 13 B. Mon. 230; Owings v. Myers, 2 Bibb, 278; Roberts v. Fleming, 53 Ill. 196, 198; Hayden v. Bucklin, 9 Paige, 512, 514; Jackson v. Losee, 4 Sandf. Ch. 381; Jackson v. Andrews, 7 Wend. 152, 156; Jackson v. Warner, 32 Ill. 331; Gilman v. Hamilton, 16 Ill. 225; Kern v. Hazlerigg, 11 Ind. 443; Parks v. Jackson, 11 Wend. 442; 451, 457; Hopkins v. McLarne, 4 Cow. 687; Griffith v. Griffith, 1 Hoff.

The *lis pendens* begins on the service of the subpoena or other process of the court, the idea being that the suit is not really pending until the court has acquired jurisdiction of the case.¹ Having once attached, the *lis pendens* continues as a notice throughout the entire time of the pendency of the suit and until final judgment has been rendered.² But even when the judgment has been rendered, it does not always necessarily terminate the *lis pendens*. An appeal of the unsuccessful party from the judgment of the trial court would keep alive the *lis pendens*; and it also continues after the rendition of the judgment for a reasonable time during which an appeal might be taken.³ Of course, the suit must have been instituted in good faith. There is no notice of *lis pendens* in the case of a fictitious suit, or where the suit is not presented with all reasonable diligence and without unnecessary delay.⁴ But if a suit should be abated by the death of some party to the action, there will be no loss of the *lis pendens*, provided the action so abated is revived without unnecessary delay, by making parties to the suit those persons who have, by the death of the original party, become entitled to his rights in the cause of action.⁵ A *lis pendens* is constructive notice in respect to all the contents of the pleadings; and the notice is charged upon the purchaser *pendente lite* of any part of the property, which is described by the pleadings as covered by the cause of action.⁶ But in order that a purchaser may be charged with constructive notice of *lis pendens*, the pleadings in the cause must describe the property to be affected by the judgment with such definiteness, that the purchaser on reading the pleadings may learn the fact that the property he is about to purchase is included in the cause of action. If there should be so indefinite and incorrect a description of the property as that one could not readily ascertain what property constituted the subject of litigation, the notice of *lis pendens* would not arise so as to affect the subsequent purchaser.⁷

Ch. 153; Leitch v. Wells, 48 Barb. 637; 48 N. Y. 585; Truitt v. Truitt, 38 Ind. 16; Green v. White, 7 Blackf. 242; McGregor v. McGregor, 21 Iowa, 441; Knowles v. Rablin, 20 Iowa, 101; Chapman v. West, 17 Barb. 125; Patterson v. Brown, 32 Barb. 81; Mitchell v. Smith, 53 Barb. 413; Loomis v. Riley, 24 Ill. 307; Cooley v. Brayton, 16 Ill. 10; Culpepper v. Aston, 2 Ch. Cas. 115, 221; Ayrault v. Murphy, 54 N. Y. 203; Harrington v. Slade, 22 Barb. 161; Pratt v. Hoag, 5 Duer, 631; Norton v. Birge, 35 Conn. 250; Tredway v. McDonald, 51 Iowa, 663.

¹ See King v. Bell, 28 Conn. 593; Norton v. Burge, 35 Conn. 250, 280; Dresser v. Wood, 15 Kans. 344; Allen v. Poole, 54 Miss. 323, 333; Allen v. Mandaville, 26 Miss. 397, 399; Center v. Bank, 22 Ala. 743; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Haughwout v. Murphy, 21 N. J. Eq. (6 C. E. Green) 118; Weeks v. Tomes, 16 Hun, 349; Murray v. Ballou, 1 Johns. Ch. 566, 576; Hayden v. Bucklin, 9 Paige, 512; Leitch v. Wells, 48 N. Y. 585.

² Page v. Waring, 76 N. Y. 463; Winborn v.

Gorrell, 3 Ired. Eq. 117; Jackson v. Warren, 32 Ill. 331; and see Lee Co. v. Rogers, 7 Wall. 181; *Ibid*; Turner v. Crebill, 1 Ohio, 372.

³ Debell v. Foxworthy, 9 B. Mon. 228; Gilman v. Hamilton, 16 Ill. 225.

⁴ Petree v. Bell, 2 Bush, 58; Clarkson v. Morgan, 6 B. Mon. 441, 448; Watson v. Wilson, 2 Dana, 406; Murray v. Ballou, 1 Johns. Ch. 566, *per* Ch. Kent; Herrington v. McCollum, 73 Ill. 476; Price v. McDonald, 1 Md. 403, 412; Gibler v. Trimble, 14 Ohio, 323; Trimble v. Boothby, 14 Ohio, 109.

⁵ Herrington v. McCollum, 73 Ill. 476; Watson v. Wilson, 2 Dana, 406; Debell v. Foxworthy, 9 B. Mon. 228; Ashley v. Cunningham, 16 Ark. 168.

⁶ Drake v. Crowell, 40 N. J. L. 58; *Ibid*; see Chapman v. West, 17 N. Y. 125; Allen v. Poole, 54 Miss. 323, 333; Center v. The Bank, 22 Ala. 743, 757.

⁷ Griffith v. Griffith, 9 Paige, 315, 317; 1 Hoff. Ch. 153; Low v. Pratt, 53 Ill. 438; Lewis v. Madisons, 1 Munf. 303; Allen v. Poole, 54 Miss.

§ 96. **To what kind of suits does notice *lis pendens* apply.**—It may be stated as a general proposition, that the doctrine of notice by *lis pendens* applies to all equitable actions in which questions of title to, or claims against, real property are raised. As long as the action would fall within this general description, the notice of *lis pendens* would apply, however varied or unusual the character of the suit might be. The more familiar examples, to which the rule of *lis pendens* applies, are, actions for the foreclosure of mortgages in the form of vendor's liens; for the administration of trusts, and of course for all actions in which the title of the property is disputed.¹ As a general rule, the doctrine of *lis pendens* does not apply to suits on claims against, or titles to, personal property. The purchase of personal property, pending a suit, does not charge the purchaser ordinarily with notice of the question raised in the suit itself. There is, however, a special exception to this general rule, in the causes of action brought to enforce the performance of a trust over personal property, where the property is not negotiable in character.² It has been held that suits concerning the settlement of the affairs of a partnership would afford an opportunity for the application of the doctrine of *lis pendens*.³ It is definitely settled that the notice of *lis pendens* does not apply to suits concerning claims against, or titles to, negotiable instruments, whatever may be the character of the suit.⁴ Under the general rule, that the doctrine of *lis pendens* does not apply to a negotiable instrument, it has been held that suits over certificates of stock will not raise the notice of *lis pendens*.⁵

323, 333; *Miller v. Sherry*, 2 Wall. 237; *Green v. Slayter*, 4 Johns. Ch. 38; see *Brown v. Goodwin*, 75 N. Y. 409; *Jones v. McNarrin*, 68 Me. 334; *Jaffray v. Brown*, 17 Hun, 575.

¹ *Blanchard v. Ware*, 43 Iowa, 530, 531; 37 Iowa, 305, 307; *Real Estate Sav. Inst. v. Collo-nious*, 63 Mo. 290, 294; *Choudron v. Magee*, 8 Ala. 570; *Allen v. Poole*, 54 Miss. 323, 333.

² *Bolling v. Carter*, 9 Ala. 921; *Shelton v. Johnson*, 4 Sneed, 672; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Leitch v. Wells*, 48 Barb. 637; 48 N. Y. 585; *Scudder v. Van Amburgh*, 4 Edw. Ch. 29; *Diamond v. The Lawrence Co. B'k*, 1 Wright, 353. Says Chancellor Kent in *Murray v. Lylburn*, *supra*: "The object of that suit was to take the whole subject of the trust out of W.'s hands, together with all the papers and securities relating thereto. If W. had held a number of mortgages and other securities in trust, when the suit was commenced, it would not be pretended that he might safely defeat the object of the suit and the justice of the court, by selling these securities. If he possessed cash, as proceeds of the trust estate, or negotiable papers not due, or perhaps movable personal property, such as horses, cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealings would require

a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce, and they formed one of the specific subjects of the suits against W. If the trustee, pending the suit, changed the land into personal security, I see no good reason why the *cestui que trust* should not be at liberty to affirm the sale, and take the security; and whoever afterwards purchased it, was chargeable with notice of the suit."

³ *Hoxie v. Carr*, 1 Sumner, 173; *Dresser v. Wood*, 15 Kans. 344.

⁴ *Corning v. White*, 2 Paige, 557; *Farnham v. Campbell*, 10 Paige, 598; *Miller v. Sherry*, 2 Wall. 237; *U. S. Bank v. Burke*, 4 Blackf. 141; *Norton v. Birge*, 35 Conn. 250; *Murray v. Lylburn*, 2 Johns. Ch. 441, *per* Ch. Kent; *Leitch v. Wells*, 48 N. Y. 585; *Stone v. Elliott*, 11 Ohio St. 252, 260; see *McDermott v. Strong*, 4 Johns. Ch. 687; *Hadden v. Spader*, 20 Johns. 554; *Weed v. Pierce*, 9 Cow. 722; *Edmeston v. Lyde*, 1 Paige, 637; *Winston v. Westfeldt*, 22 Ala. 760; *Kieffer v. Ehler*, 6 Harris, (18 Pa. St.) 388, 391; *Hibernian B'k v. Everman*, 52 Miss. 500; *Mayberry v. Morris*, 52 Ala. 113; *Watson v. Wilson*, 2 Dana, 406; *Blake v. Bigelow*, 5 Ga. 437; *McCutchen v. Miller*, 31 Miss. 65.

⁵ *Lietch v. Wells*, 48 Barb. 637; *s. c.*, 48 N. Y. 585.

§ 97. **What persons are affected by the notice.**—Whenever all the requisites in respect to the notice of *lis pendens*, which have already been explained, are present in a case; the constructive notice of *lis pendens* will extend to all persons who derive title to the property from a party to the suit or his privy, during the pendency of the suit. When one purchases the same land from someone who is not a party to the suit, or a privy to a party, he is not charged with constructive notice, even though the purchase is made during the pendency of the suit.¹ On the other hand, where one has acquired, prior to the institution of the suit, a right to the property by a contract which has not been completely executed when the action is brought, he may proceed to a completion of the transaction after the institution of the suit, without being charged with the constructive notice of *lis pendens*.² It has also been doubtful whether one must be a purchaser *pendente lite* from the defendant in the suit, in order to be charged with constructive notice of *lis pendens*, or whether he would be equally charged with this notice, if he should purchase the interests of the plaintiff instead of those of the defendant. It has, however, been held that the doctrine of constructive notice will be applied to the purchaser *pendente lite* whether he purchases the plaintiff's or the defendant's interest.³ If he should purchase the interest of one defendant, he would not be charged with constructive notice *pendente lite* of the interest of any other defendant in and to the same property. He is only charged with notice of the interest of the other defendants where he has actual knowledge of the pendency of the suit.⁴

§ 98. **A statutory notice of lis pendens.**—The equitable notice of *lis pendens* has always operated as a very severe hardship upon subsequent purchasers, and for that reason it has never received any very hearty approval from the courts. The disposition of the courts is to confine the equitable doctrine to the most limited application possible, and not to permit its application to be extended beyond this narrow limit. In order that the beneficial part of the doctrine may be retained, and yet be relieved of the elements of hardship towards subsequent purchasers, statutes have been passed in England, and in many or most of the states in this country, providing that in order that the notice of *lis pendens* may be charged upon the purchaser *pendente lite*, a notice of the pendency of the suit must be filed in the recorder's office, or in some other public office, where all deeds and instruments of conveyance are required

¹ Fuller v. Scribner, 76 N. Y. 190; Brundage v. Biggs, 25 Ohio St. 652, 656; Miller v. Sherry, 2 Wall, 237; Stuyvesant v. Hone, 1 Sandf. Ch. 419; Stuyvesant v. Hall, 2 Barb. Ch. 151; Scarlet v. Gorham, 28 Ill. 319; Parsons v. Hoyt, 24 Iowa, 154; Herrington v. Herrington, 27 Mo. 560; Parks v. Jackson, 11 Wend. 442; French v. The Loyal Co., 5 Leigh, 627; Clarkson v. Morgan, 6 B. Mon. 441.

² Clarkson v. Morgan, 6 B. Mon. 441; Trimble

v. Boothby, 14 Ohio, 109; Gibler v. Trimble, Ohio, 323; Stuyvesant v. Hall, 2 Barb. Ch. 151; Parks v. Jackson, 11 Wend. 442; Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252; Stuyvesant v. Hone, 1 Sandf. Ch. 419.

³ Garth v. Ward, 2 Atk. 174; Bellamy v. Sabine, 1 De G. & J. 566, 580, *per* Lord Cranworth.

⁴ Bellamy v. Sabine, 1 De G. & J. 566.

to be recorded, in order to charge subsequent purchasers with notice of them. The investigator of title to property would, in that case, have no difficulty in ascertaining the pendency of a suit affecting the title to the property which his client is about to purchase. The statutes in America may be divided into two classes: one in which the statutory notice of *lis pendens* is made to apply only to suits concerning real property; and such is found to be the provision in the statutes of New York, California, Connecticut, Illinois, Iowa, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, West Virginia and Wisconsin. In the other class of statutes, the provision of the statutory notice is made to apply to all suits in which the original notice of *lis pendens* could be charged upon the purchaser; applying, therefore, not only to actions concerning real property, but likewise to all the actions concerning personal property to which the doctrine of *lis pendens* was held by the courts of equity in England, and in this country, to apply. In some of these statutes the statutory notice is confined to the actions concerning personal property, which are expressly enumerated in these statutes. In this second class of statutes are to be found the statutes of Kansas, Maine, Massachusetts, New Hampshire and Vermont. Subject to the modification expressly provided by the statutes, the general principles of the equitable doctrine of *lis pendens* would apply equally to the statutory notice.¹

§ 99. **Notice by judgment.**—It will be borne in mind that the rendition of the judgment in the cause of action puts an end to the constructive notice of *lis pendens*; and independently of all statutory changes, the judgment or decree in the cause of action did not of itself charge the purchaser with any notice of the existence of the title settled by such judgment, except, of course, to the purchaser *pendente lite*. There would be no notice arising from the judgment to one who purchases the property after the rendition of the judgment, assuming also that such purchaser has not been charged with constructive notice of the effect of the judgment, by virtue of the consequent change in the possession of the premises, or for other like reasons.² In England, provision is now made for the due registration of judgments, and the judgment creditor acquires a lien upon the property which he can enforce against the subsequent purchaser.³ Similar statutes have been passed in many of the American states, whereby the docketing of the

¹ Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Stuyvesant v. Hone, 1 Sandf. Ch. 419; Todd v. Outlaw, 79 N. C. 235; Majors v. Cowell, 51 Cal. 478; Dresser v. Wood, 15 Kans. 344; White v. Perry, 14 W. Va. 66; Mayberry v. Morris, 62 Ala. 113; Tredway v. McDonald, 51 Iowa, 663; Mills v. Bliss, 55 N. Y. 139; Sheridan v. Andrews, 49 N. Y. 478; Brown v. Goodwin, 75 N. Y. 409; Mitchell v. Smith, 53 N. Y. 413; Jones v. McNarrin, 68 Me. 334; Weeks v. Tomes, 16 Hun, 349; Jaffray v. Brown, 17 Hun,

575; Drake v. Crowell, 40 N. J. L. 58; Ayrault v. Murphy, 54 N. Y. 202; Fuller v. Scribner, 76 N. Y. 190; Page v. Waring, 76 N. Y. 463.

² Lee v. Green, 6 De G. M. & G. 155; Lane v. Jackson, 20 Beav. 535; Worsley v. Earl of Scarborough, 3 Atk. 392; Gray Coat Hospital v. Westminster, &c. Comm'rs, 1 De G. & J. 531; Freer v. Hesse, 4 De. G. M. & G. 495.

³ Hickson v. Collis, 1 Jo. & Lat. 94, 113, *per* Lord St. Leonards; Shaw v. Naele, 6 H. L. Cas. 581, reversing S. C., 20 Beav. 157.

judgment serves to charge the subsequent purchaser with notice of such judgment.¹

§ 100. **Notice as between principal and agent.**—**General statement and the scope and application of the doctrine.**—The general rule is definitely established by the cases, that where notice is given to an agent of the existence of some prior or paramount claim or right, while such agent, in the name of and for the principal, is carrying on or transacting the business in respect to which the notice applies, such notice to the agent will be imputed to the principal; and he will be charged with constructive notice of the facts and circumstances which have thus been brought to the notice of the agent. There are two different theories prevalent in respect to the reason of the rule: one is simply a determination, that this application of the doctrine of constructive notice, to bind the principal with the knowledge of the agent, is required by the exigencies of business, and by the impossibility of conducting business affairs on any other principle. But there is probably a more satisfactory reason for the rule in the presumption that the information acquired by the agent has been actually communicated to the principal. It is manifestly the duty of the agent to so communicate all such information to the principal; and it is but reasonable to presume, in the absence of proof to the contrary, that the agent has performed his duty. But whichever reason be accepted as the satisfactory one, the particular results of the rule remain the same.² The doctrine of constructive notice applies to all kinds of agencies, whatever may be the peculiar nature of such agency or the scope or character of the powers of the agent. Thus it applies to all trustees, act-

¹ *Richeson v. Richeson*, 2 Gratt. 497; *Bayley v. Greenleaf*, 7 Wheat. 46, 51; *Bartley, J.*, in *White v. Denman*, 1 Ohio St. 110, 112; *Ells v. Tousley*, 1 Paige, 280; *In re Howe*, 1 Paige, 125; *White v. Carpenter*, 2 Paige, 217, 266; *Everett v. Stone*, 3 Story, 446, 455; *Briggs v. French*, 2 Sumn. 251; *Bank v. Campbell*, 2 Rich. Eq. 179; *Watkins v. Wassell*, 15 Ark. 73, 94, 95; *Cover v. Black*, 1 Barr. 493; *Shryock v. Waggoner*, 4 Casey, 430; *Gouverneur v. Titus*, 6 Paige, 347; *Kiersted v. Avery*, 4 Paige, 9; *Arnold v. Patrick*, 6 Paige, 310; *Morris v. Mowatt*, 2 Paige, 586, 590; *Hampson v. Edelen*, 2 Har. & Johns. 64; *Hackett v. Callender*, 32 Vt. 97, 108, 109; *Hart v. Farm. & Mech. B'k*, 33 Vt. 252; *Brown v. Pierce*, 7 Wall. 205; *Baker v. Morton*, 12 Vt. 150; *Buchan v. Sumner*, 2 Barb. Ch. 165, 207; *Hoagland v. Latourette*, 1 Green's Ch. 254; *Dunlap v. Burnett*, 5 Sm. & Mar. 702; *Money v. Dorsey*, 7 Id. 15; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Morton v. Robards*, 4 Dana, 258; *Greenleaf v. Edes*, 2 Minn. 264; *Orth v. Jennings*, 8 Blackf. 420; *Hampton v. Levy*, 1 McCord Ch. 107, 111; *Galway v. Malchow*, 7 Neb. 285; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Wheeler v. Kirtland*, 24 N. J. Eq. (9 C. E. Green) 552; *Valentine v. Havener*, 20 Mo. 133; *Apperson v. Burgett*, 33

Ark. 328; *Kelley v. Mills*, 41 Miss. 287; *Righter v. Forrester*, 1 Bush, (Ky.) 278; *Knell v. Build'g Ass'n*, 34 Md. 67; *Jackson v. Dubois*, 4 Johns. 216; *Sappington v. Oeschli*, 49 Mo. 244; *Potter v. McDowell*, 43 Mo. 93; *Stillwell v. McDonald*, 39 Mo. 282; *Schmidt v. Hoyt* 1 Edw. Ch. 652; *Thomas v. Kelsey*, 30 Barb. 268; *Wilder v. Butterfield*, 50 How. Pr. 385; *Welton v. Tizzard*, 15 Iowa, 495; *Patterson v. Linder*, 14 Iowa, 414; *Bell v. Evans*, 10 Iowa, 353; *Norton v. Williams*, 9 Iowa, 528; *In re Howe*, 1 Paige, 125; *Schroeder v. Gurney*, 73 N. Y. 430; *Hoy v. Allen*, 27 Iowa, 208; *Churchill v. Morse*, 25 Iowa, 229; *Evans v. McGlasson*, 18 Iowa, 150; *Moyer v. Hinman*, 13 N. Y. 180; 17 Barb. 137; *Wilcoxson v. Miller*, 49 Cal. 193; *Pixley v. Hugins*, 15 Cal. 127; *First Nat. B'k v. Hayzlett*, 40 Iowa, 659; *Rose v. Munie*, 4 Cal. 173; *Hunter v. Watson*, 12 Cal. 363; *Plant v. Smythe*, 45 Cal. 161.

² *Westervelt v. Haff*, 2 Sandf. Ch. 98; *Jackson v. Leek*, 19 Wend. 339; *Hovey v. Blanchard*, 13 N. H. 145; *Le Neve, Ambler*, 476; 2 Eq. Lead. Cas. 109, 133 (4th Am. ed.); *Jones v. Bamford*, 21 Iowa, 217; *Myers v. Ross*, 3 Head, 59; *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Russell v. Sweezy*, 22

ing on behalf of their beneficiaries; ¹ to directors, merchants, cashiers, presidents, and other officers of corporations; ² to the agent of a married woman; ³ to all actual agencies whether the agency be express or implied; ⁴ to one of two or more joint agencies. ⁵ It also applies where the same agent is acting for both parties in the same transaction. ⁶ But the information which the agent acquires confidentially from one party, will not be imputed to the other party; except when the agent is not under an obligation to keep to himself the information thus acquired. ⁷ It has been held that in order that the doctrine of constructive notice to the principal may arise upon information given to the agent, he must be an actual agent or attorney in fact in respect to the particular business in which the notice applies, and that the attorney-at-law or solicitor is brought within the provision of the rule only when he is the actual agent of the party in the particular transaction. ⁸ Finally, the agent must have the authority to represent and to bind the principal by his acts in the transaction of the business to which the notice applies. The agent who is employed to do a mere ministerial act, is not such an agent as to whom the doctrine of constructive notice to the principal would apply. ⁹

Mich. 235; *National Security Bank v. Cushman*, 121 Mass. 490; *Smith v. Denton*, 42 Iowa, 48; *First National Bank of Milford v. Town of Milford*, 36 Conn. 93; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479; *Farrington v. Woodward*, 82 Pa. St. 259; *Ward v. Warren*, 82 N. Y. 265; *Allen v. Poole*, 54 Miss. 323; *Suit v. Woodhall*, 113 Mass. 391; *Owens v. Roberts*, 36 Wis. 258; *Distilled Spirits*, 11 Wall. 356; *Astor v. Wells*, 4 Wheat. 466; *Griffith v. Griffith*, 9 Paige, 315; 1 Hoff. Ch. 153.

¹ *Willes v. Greenhill*, 4 De G. F. & J. 147, 150; *Myers v. Ross*, 3 Head, 59.

² *Fulton Bank v. Canal Co.*, 4 Paige, 127; *Bank of U. S. v. Davis*, 2 Hill, 451; *New Hope Bridge Co. v. Phoenix Banks*, 3 N. Y. 156; *Washington Bank v. Lewis*, 22 Pick. 24; *National Security Bank v. Cushman*, 121 Mass. 490; *First Nat. Bank, &c. v. Town of Milford*, 36 Conn. 93; *Ex parte Larking*, L. R. 4 Ch. D. 566; *Smith v. Water Comm'rs*, 38 Conn. 208; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479; *Branch Bank v. Steele*, 10 Ala. 915; *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286; *North River Bank v. Aymar*, 3 Hill, 262.

³ *Duke v. Balme*, 16 Minn. 306; see *Pringle v. Dunn*, 37 Wis. 449; *Clark v. Fuller*, 39 Conn. 238; *Willes v. Greenhill*, 4 De G. F. & J. 147, 150.

⁴ *Snyder v. Sponable*, 1 Hill, 567; 7 *Id.* 427; *Watson v. Wells*, 5 Conn. 468; *Farrington v. Woodward*, 82 Pa. St. 259; *Flagg v. Mann*, 2 Sumn. 486, 534.

⁵ *Bank of U. S. v. Davis*, 2 Hill, 451, 464; *Willes v. Greenhill*, 4 De G. F. & J. 147, 150.

⁶ *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286; *First Nat. Bank, &c. v. Town of Milford*, 36 Conn. 93; *Lozey v. Simpson*, 3 Stockt. Ch. 246; *LeNeve v. LeNeve*, Ambl. 436; 2 Eq. Lead. Cas. 109 (4th Am. ed.)

⁷ *Perry v. Holl*, 2 De G. F. & J. 38, 53, *per Lord*

Chan. Campbell; *Fulton Bank v. N. Y. &c. Canal Co.*, 4 Paige, 127; *In re European Bank*, L. R. 5 Ch. 358; *Banco de Lima v. Anglo-Peruvian Bank*, L. R. 8 Ch. D. 160, 175.

⁸ See *Saffron, &c. Soc. v. Rayner*, L. R. 14 Ch. D. 406, 409, 415. In this case, L. J. James says: "I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveying, or conducting an action, but as an official solicitor; and that because the solicitor has been in the habit of acting for him, or has been employed to do something for him, such solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, and in the matter in which he is so employed. Beyond that the solicitorship does not extend. I am prepared, therefore, to say, that before a notice of this kind can have the slightest validity, it must be given, if given to a solicitor, to a solicitor who is actually, either expressly or impliedly, authorized as agent to receive such notice."

⁹ *Anketel v. Converse*, 17 Ohio St. 11; *Hopcock v. Johnson*, 14 Wis. 303; *Wyllie v. Pollen*, 3 De G. J. & S. 596, 601; *Grant v. Cole*, 8 Ala. 519; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141, 152; *Brown v. Bankers, &c. Tel. Co.*, 30 Md. 39; *Roach v. Karr*, 18 Kans. 529; *Weisser v. Denison*, 10 N. Y. 68; *Spadone v. Manvel*, 2 Daly, 263; *Tucker v. Tilton*, 55 N. H. 223.

It has been held that this doctrine of constructive notice to the principal arises not only in the case of actual notice to the agent, but also where the agent himself is only charged with constructive notice, as in the case of the constructive notice of registration, of possession, by recitals in deeds, by *lis pendens*, or by any other circumstances which are sufficient to put a reasonably prudent man upon his inquiry; in other words, that the principal is charged with constructive notice of the constructive notice with which the agent is charged.¹ It seems, however, that there is no occasion for imputing to the principal the constructive notice of the agent, for the same facts and circumstances would likewise charge the principal with constructive notice, independently of any notice to the agent whether actual or constructive; it is the principal and not the agent who is charged with the constructive notice of registration, *lis pendens*, and the like.

§ 101. **Essential requisites of the constructive notice to principal.**—The general rule is, subject to limitations to be mentioned hereafter, that in order that the principal may be charged with constructive notice of the information received by the agent, that the agent must receive such information while he was in the actual employment of the principal, and actually engaged in discharging his duties as such agent.² A very common application of this limitation is to be found in the statement of the law, that information received by directors and officers of corporations will be imputed to the corporation, only when such information is received by them while discharging the duties of such office.³ It is also a provision of the general rule in this connection, that the principal will not be charged with constructive notice of information received by the agent, where such agent does not receive the information in the same transaction in which the doctrine of constructive notice is made to apply. No constructive notice will, as a general rule, be raised by information acquired by the agent in some prior or independent transaction.⁴

¹ Bank of U. S. v. Davis, 2 Hill, 451, 461; see Kennedy v. Green, 3 My. & K. 699, 719, *per* Lord Brougham.

² Pringle v. Dunne, 37 Wis. 449; Distilled Spirits, 11 Wall. 356; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; May v. Borel, 12 Cal. 91; Saffron, &c. Soc. v. Rayner, L. R. 14 Ch. D. 406; *In re* Peruvian Ry. Co., L. R. 2 Ch. 617, 626; Spadone v. Manvel, 2 Daly, 263; N. Y. Cent. Ins. Co. v. Nat. Protec. Ins. Co., 20 Barb. 468; 14 N. Y. 85; Fry v. Shehee, 55 Ga. 208; Wilde v. Gibson, 1 H. L. Cas. 605, 624; Pepper v. George, 51 Ala. 190; Roach v. Karr, 18 Kans. 529; Weisser v. Denison, 10 N. Y. 68; Howard Ins. Co. v. Halsey, 8 N. Y. 271; Smith v. Denton, 42 Iowa, 48; Jones v. Bamford, 21 Iowa, 217; Clark v. Fuller, 39 Conn. 238; Houseman v. Girard, &c. Ass'n, 81 Pa. St. 256; G. W. Ry. Co. v. Wheeler, 20 Mich. 419; Russell v. Swezey, 22 Mich. 235; Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213.

³ Farmers' Bank v. Payne, 25 Conn. 444; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Gen. Ins. Co. v. U. S. Ins. Co., 10 Md. 517; Winchester v. B. & S. R. R., 4 Md. 231; Fulton Bank v. N. Y. & Sharon C. Co., 4 Paige, 127; Seneca Co. Bank v. Neass, 5 Denio, 329, 337; Miller v. Ill. Cent. R. R., 24 Barb. 312; North River Bank v. Aymar, 3 Hill, 262; Brown v. Bankers', &c. Tel. Co., 30 Md. 39; G. W. Ry. Co. v. Wheeler, 20 Mich. 419; President, &c., v. Cornen, 37 N. Y. 320; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54, 61; Atlantic, &c. Bank v. Savery, 22 N. Y. 291, 307; National Bank v. Norton, 1 Hill, 572; Bank of U. S. v. Davis, 2 Hill, 451.

⁴ Houseman v. Girard, &c. Ass'n, 81 Pa. St. 256, 261; Finch v. Shaw, 19 Beav. 500; 5 H. L. Cas. 905; Holden v. N. Y. & Erie Bank, 72 N. Y. 286; Howard Ins. Co. v. Halsey, 8 N. Y. 271; Weiser v. Denison, 10 N. Y. 68; Pringle v. Dunn, 37 Wis. 449; McCormick v. Wheeler, 36 Ill. 114; Bracken v. Miller, 4 Watts & S. 102;

This general statement, however, must be taken subject to the qualification, that the principal would be charged with constructive notice, where the information received by the agent from some prior transaction was so precise and definite, or was received so short a time before the entrance upon the second transaction, as that it would be reasonable to presume that the agent while performing the business of his principal in the latter transaction had before his mind, or was conscious of, the information he had received in the former transaction. In other words, where the fact is established by convincing circumstantial evidence that the agent while transacting the business of his principal, actually knows of the existence of the outstanding claim, the principal will be charged with constructive notice, whether the agent received the information in the present transaction or in some prior one, and whether the principal was a part of the prior transaction or not; for in this case, it is not a question of notice, but a question of knowledge; but the evidence offered to establish the agent's *knowledge* of the outstanding claim, at the time he was performing his duty to his principal, must be clear and undoubted.¹ Some light may be thrown on this question by the position of the New York Court of Appeals, in holding that the continuity of the agency is a circumstance from which the fact of present knowledge of the outstanding claim may be inferred, where the information is received in a prior transaction. "Notice must have come to the agent, it is said, in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is short-lived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those trans-

Bierce v. Red Bluff Hotel Co., 31 Cal. 160; North River Bank v. Aymar, 3 Hill, 262; Russell v. Swezey, 22 Mich. 235; Hood v. Fahnestock, 8 Watts, 489; Lawrence v. Tucker, 7 Greenl. 195; Smith v. Denton, 42 Iowa, 48; Blumenthal v. Brainerd, 38 Vt. 402, 410; Roach v. Kerr, 18 Kans. 529; Allen v. Poole, 54 Miss. 323. But see *contra*, Hart v. Farm. & Mech. Bank, 33 Vt. 252; Abell v. Howe, 43 Vt. 403.

¹ "In England, the doctrine seems now to be established, that if the agent at the time of affecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he

acquires the knowledge, when he effects the purchase, no question can arise as to his having it at the time; if he acquired previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time, and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect; but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present, seems to be the only restriction required by the English rule as now understood." Bradley, Judge in the case of *Distilled Spirits*, 11 Wall. 356.

actions in which that agent is engaged, in which that knowledge is material.”¹ But in this connection, it must be borne in mind, that where the agent is not at liberty to disclose the information that he received in the prior transaction, the doctrine of constructive notice could not apply.² Finally, in order that the principal may be bound with constructive notice of the information acquired by the agent, it must be material to the transaction; and for that reason it is obligatory upon the agent to communicate it to the principal. If the information is immaterial, it cannot affect the rights of the principal, and the principal, therefore, would not be charged with any constructive notice.³

§ 102. **Presumption of notice to principal not conclusive.**—As has been stated already, the doctrine of constructive notice applies where the agent is under an obligation to communicate the information received to his principal. The principal is bound with notice of all the facts within the knowledge of the agent, even though the agent should fail to communicate such facts to the principal. That is the nature of the constructive notice which is imputed to the principal, and the general rule is, that the principal is conclusively presumed to have knowledge of all the information received by the agent, under the circumstances set forth in the previous paragraphs. Hence all further proof of his having notice is dispensed with, and, except in two extraordinary cases, which will be mentioned hereafter, he is not permitted to relieve himself of liability by the proof of any facts tending to show his own good faith and want of knowledge.⁴ But where the agent is acting for both parties to the transaction, and he withholds from one of these parties, at the instigation of the other party, material information concerning the transaction, the act of the agent would be a manifest fraud upon the party from whom the information was withheld; and the other party is likewise charged with fraud by his collusion with the agent. In such a case the party defrauded is not charged with constructive notice of the information received by the agent but undisclosed to him.⁵ The other case is where an agent

¹ Folger, J., in *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286, 292; see, also, *Tegg v. Tenn. Nat. Bank*, 9 Heisk. 479; *Porter v. Bank of Rutland*, 19 Vt. 410; *Bank of U. S. v. Davis*, 2 Hill, 451; *Fulton Bank v. N. Y. & Sharon C. Co.*, 4 Paige, 127.

² *Bank of U. S. v. Davis*, 2 Hill, 451; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479; *Fulton Bank v. N. Y. & Sharon C. Co.*, 4 Paige, 127; *Porter v. Bank of Rutland*, 19 Vt. 410. “The general rule that the principal is bound by the agent’s knowledge, is based on the principle of law, that it is the agent’s duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent’s duty to communicate such knowledge, but it would be unlawful for him to do so—as for example, when it has been acquired confidentially as attorney

for a former client, in a prior transaction—the reason of the rule ceases; and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound to the agent’s secret and confidential information.” *Bradley, J.*, in the *Distilled Spirits*, 11 Wall. 356.

³ *Fry v. Shehee*, 55 Ga. 208; *May v. Borel*, 12 Cal. 91; *Jones v. Bamford*, 21 Iowa, 217; *Pringle v. Dunn*, 37 Wis. 449; *The Distilled Spirits*, 11 Wall. 356, *per* *Bradley, J.*; *Roach v. Kerr*, 18 Kans. 529; *Rolland v. Hart*, L. R. 6 Ch. 678, 681, 682.

⁴ *Espin v. Pemberton*, 3 De G. & J. 547; *Owens v. Roberts*, 36 Wis. 258; *Suit v. Woodhall*, 113 Mass. 391; *Williamson v. Brown*, 15 N. Y. 354; *Boursot v. Savage*, L. R. 2 Eq. 134, 142.

⁵ *Hewitt v. Loosemore*, 9 Hare, 449, 455, *per* *Turner, V. C.*; *Sharpe v. Foy*, L. R. 4 Ch. 35, 40, 41.

commits an independent fraud upon his principal while in the employment of such principal, and in the perpetration of the fraud he has received the information. In that case the ordinary presumption of the communication of the information to the principal would fail, and if no other presumption was indulged in at all, it would be presumed that no communication was made at all; in this case the principal is not affected with constructive notice.¹ But it is not every fraud of the agent which would prevent the application of the doctrine of constructive notice; it is only when the fraud could only be made successful, or when its success was facilitated, by the concealment from the principal of the information in question.²

¹ *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286, and *First Nat. Bank, &c. v. Town of New Milford*, 36 Conn. 93; but see *Barnes v. Trenton Gas Co.*, 27 N. J. Eq. (12 C. E. Green) 33; *Thompson v. Cartwright*, 33 Beav. 178; *McCormick v. Wheeler*, 36 Ill. 114; *Winchester v. Susquehanna R. R.*, 4 Md. 231; *Hope Fire Ins. Co. v. Cambreling*, 1 Hun, 493; *Cave v. Cave*, L. R. 15 Ch. D. 639, 643; *In re European Bank*, L. R. 5

Ch. 358, 361, 362; *Rolland v. Hart*, L. R. 6 Ch. 678, 682; *Waldy v. Gray*, L. R. 20 Eq. 238, 251.

² *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286; see *Hope Fire Ins. Co. v. Cambreling*, 1 Hun, 493; *Winchester v. Susquehanna R. R.*, 4 Md. 231; *McCormick v. Wheeler*, 36 Ill. 114; *Bank of New Milford v. Town of New Milford*, 36 Conn. 93; *Davis v. Bank of U. S.*, 2 Hill, 451; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479.

CHAPTER VI.

THE DOCTRINE OF EQUITABLE ESTOPPEL.

	SECTION		SECTION
Equitable estoppel defined	106	Ignorance of the truth by the other party	111
Essentials of an equitable estoppel <i>in pais</i>	107	The party estopped must have intended to influence the conduct of others	112
What conduct necessary to constitute an estoppel	108	The representation or concealment must have influenced the conduct of another	113
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§ 106. **Equitable estoppel defined.**—The doctrine of estoppel is not peculiar to the law of equity; but in fact, in some particulars, it originated in courts of law as a legal principle, and as a legal principle it is of very ancient origin. As a doctrine of the common law, estoppel is defined by Lord Coke as follows: “An estoppel is where a man is concluded by his own act or acceptance to say the truth;” and he represents the estoppel in law to be of three kinds: estoppels of record, by deed, and *in pais*. The estoppels of record and by deed are strictly illustrations of estoppels in law, and can in no sense be construed as a part of the equitable doctrine of estoppel. All cases to which the equitable doctrine of estoppel is applied are estoppels *in pais*. There are, however, legal estoppels *in pais*, and Coke describes them as consisting of estoppels arising “by livery, by entry, by acceptance of rent, by partition, and by acceptance of estate.” The equitable estoppel, as we now know it, is a comparatively modern doctrine, and is essentially distinguished even from the legal estoppels *in pais*. The legal estoppel consists of the iron-cast rule, excluding the proof of the truth in the case without discrimination, in order to attain a certain object, whether the exclusion of the truth would work an injustice or not in the particular case. The equitable estoppel is only permitted to exclude the proof of the truth, where it would be as a matter of fact, in the particular case, an act of injustice to one who has relied upon the misrepresentation of the other. The equitable estoppel rests upon the question of good conscience, an honest and a due consideration of the right of the particular individual to be protected from harm, which he has suffered in the reliance upon the misrepresentation of another.¹ We are, therefore, permitted to

¹ Horn v. Cole, 51 N. H. 287, 289, opinion of Perley, C. J.: “The equitable estoppel and legal estoppel *in pais* agree indeed in this, that they both preclude one from showing the truth in the individual case. The grounds,

however, on which they do it, are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigor-

define equitable estoppel as being a rule of law, which precludes one from asserting rights to property or contract, or otherwise, where he has by his conduct led another person in good faith to believe that those rights were either non-existent or different in character from what they really were; and that this person to whom the misrepresentation was made has been induced, by such misrepresentation, to part with something of value, and would be damaged if the party making the misrepresentation were permitted to prove and assert his real rights.¹ The equitable doctrine of estoppel had its origin in equity, but it is now applied by both courts of law and of equity; and many of the cases which are cited in support of the equitable doctrine are taken from the courts of law, as well as from the courts of equity, or courts having equitable jurisdiction. While, as a general rule, the doctrine of estoppel *in pais* is enforced in courts of law, as well as in courts of equity, and the owner of property may thereby be estopped from asserting his legal title to the land,² yet it has been generally held that the equitable estoppel *in pais*, will not be available as a defense in the common law action of ejectment.³ But where the estoppel arises in any other legal action but that of ejectment, the estoppel *in pais* will be enforced so as to affect the legal title to the land.⁴ But whether the equitable estoppel is available in an action at law or not, it can always be employed in an equitable action for the enforcement of equitable rights to such property against the legal title of the party estopped.⁵

§ 107. **Essentials of an equitable estoppel in pais.**—The following are the essential requisities to the establishment of the equitable estoppel *in pais*: *First*, there must be some conduct of the party having the right or claim to be estopped which amounts to a representation or concealment of material facts. *Second*, the representation must be made by one who knows it to be false, or has no reasonable ground for believing it to be true. *Third*, the falsity of the

ously enforcing a certain and unvarying maxim of the law. Legal estoppels exclude evidence of the truth, and the equity of the particular case, to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth." See, also, *Stevens v. Dennett*, 51 N. H. 324.

¹ *Swan v. North Br. & Co. Co.*, 2 H. & C. 175, 181, *per* Blackburn, J.

² *Wilber v. Goodrich*, 34 Mich. 84; *Sherrill v. Sherrill*, 73 N. C. 8; *Mayer v. Ramsey*, 46 Tex. 371; *Vicksburg, & Co. R. R. v. Ragsdale*, 54 Miss. 200; *Sulphine v. Dunbar*, 55 Miss. 255; *Willmott v. Barber*, L. R. 15 Ch. D. 36, 106; *Hayes v. Livingston*, 34 Mich. 384.

³ *West v. Tilghman*, 9 Ired. (N. Car.) 163; *De-*

laplaine v. Hitchcock, 6 Hill. (N. Y.) 14; *Hamlin v. Hamlin*, 19 Me. 141; *Hayes v. Livingston*, 34 Mich. 384; s. c., 22 Am. Rep. 533; *De Mill v. Moffatt*, 49 Mich. 125; *Wimmer v. Ficklin*, 14 Bush. (Ky.) 183; *Stockyards v. Wiggins Ferry Co.*, 102 Ill. 514; *Nix v. Collins*, 65 Ga. 219; *Townsend Bank v. Todd*, 47 Conn. 190; *Thompson v. Campbell*, 57 Ala. 183; *Doe d. McPherson v. Walters*, 16 Ala. 714.

⁴ *Finnegan v. Carraher*, 47 N. Y. 493; *McAufferty v. Conover*, 7 Ohio St. 99; *Beaupland v. McKean*, 28 Pa. St. 124; *Davis v. Davis*, 26 Cal. 23; *Brown v. Wheeler*, 17 Conn. 345; *Pool v. Lewis*, 41 Ga. 162; *Hale v. Skinner*, 117 Mass. 474; *Bigelow v. Foss*, 59 Me. 162; *Stevens v. Dennett*, 51 N. H. 324; *Spars v. Walker*, 1 Head. (Tenn.) 166; *Halloran v. Whitcomb*, 43 Vt. 306; *Marlmer v. Milwaukee, & Co. Rd.*, 26 Wis. 84; *Kirk v. Hamilton*, 102 U. S. 68.

⁵ *Favill v. Roberts*, 3 Lans. 14; s. c., 50 N. Y. 222; *Goodman v. Winter*, 64 Ala. 410; *Society, & Co. v. Lehigh Valley Rd.*, 32 N. J. Eq. 329; *Williams v. Jersey, Craig & P.* 91.

representation must be unknown to the party claiming the benefit of the estoppel at the time when the representation was made and when it was acted upon. *Fourth*, the representation must have been made with the intention of influencing the conduct of the person or persons to whom the representation was made, or it must be made with the expectation that somebody would be influenced thereby. *Fifth*, the representation must be relied upon and acted upon by the party who claims the benefit of the estoppel. *Sixth*, such party in acting upon the representation must have parted with value, so that damage would result to him if the party making the misrepresentation were now allowed to prove and establish the truth.¹

§ 108. **What conduct necessary to constitute an estoppel.**— In order that an estoppel may arise *in pais*, the party who is to be estopped must have made a material misrepresentation of facts; or he must have concealed, or maintained silence as to, material facts or circumstances, where it was his duty to make them known.³ Where one is under no positive duty to speak, and has no reasonable opportunity to do so, his silence will then not constitute such conduct as to raise an estoppel.⁴ So, for example, the promisor is not estopped to deny his liability where an offer of reward is made without his authority, although he knew of the offer by publication and did not

¹ Freeman v. Cooke, 2 Exch. 654, Parke, B.; Continental B'k v. B'k of the Comm'th, 50 N. Y. 575, 581, 582, Folger, J.; Gaylord v. Van Loan, 15 Wend. 308; Blair v. Wait, 69 N. Y. 113, 116; Waring v. Somborn, 82 N. Y. 604; Hurd v. Kelly, 78 N. Y. 588, 597; Malloney v. Horan, 49 N. Y. 111, 115; Man. & Trad. B'k v. Hazard, 30 N. Y. 326, 230, per Johnson, J.; Barnard v. Campbell, 55 N. Y. 456, 462, 463; Jewett v. Miller, 10 N. Y. 402, 406; Sharpley v. Abbott, 42 N. Y. 443, 448; St. John v. Roberts, 31 N. Y. 441; Brown v. Bowen, 30 N. Y. 519, 541; Lawrence v. Brown, 5 N. Y. 394, 401; Frost v. Saratoga Mut. Ins. Co., 5 Denio, 154, 158; Welland Canal Co. v. Hathaway, 8 Wend. 480, 483; Storrs v. Barker, 6 Johns. Ch. 166; Slim v. Croucher, 1 De G. F. & J. 518; Dezell v. Odell, 3 Hill, 215; McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 1 Ind. 65; Hartshorn v. Potroff, 89 Ill. 509; Talcott v. Brackett, 5 Ill. App. 60; Michigan, &c. Co. v. Parsell, 38 Mich. 475, 480; see, also, Horn v. Cole, 51 N. H. 287, 289, per Perley, C. J.; Morgan v. Railroad Co., 96 U. S. 716; Holmes v. Crowell, 73 N. C. 613, 627; Anderson v. Armstead, 69 Ill. 452, 454; Voorhees v. Olmstead, 3 Hun, 744; Clark v. Coolidge, 8 Kans. 189, 195; Kuhl v. Mayor, &c. 23 N. J. Eq. (3 C. E. Green) 84, 85; Rice v. Bunce, 49 Mo. 231, 234; Heane v. Rogers, 9 B. & C. 577; Wallis v. Truesdell, 6 Pick. 455; Bidwell v. Pittsburg, 85 Pa. St. 412, 417, per Meurer, J.; Stevens v. Dennett, 51 N. H. 324, 330, Foster, J.

² Tilton v. Nelson, 27 Barb. 595; Horn v. Cole, 51 N. H. 287, 290; Stevens v. Dennett, 51 N. H. 324; Zechtmann v. Roberts, 109 Mass. 53; Continental B'k v. B'k of Comm'th, 50 N. Y. 575;

Barnard v. Campbell, 55 N. Y. 456; Board of Trustees, &c. v. Serrett, 31 La. An. 719; Jeffries v. Clark, 53 Kans. 448; Hartshorn v. Potroff, 89 Ill. 509; Talcott v. Brackett, 5 Ill. App. 60; Southard v. Sutton, 68 Me. 575; Reed v. Crapo, 127 Mass. 39; Taylor v. Brown, 31 N. J. Eq. 163 (not estopped); Connhian v. Thompson, 111 Mass. 270 (not estopped); McKenzie v. Steele, 18 Ohio St. 38, 41 (not estopped); Eaton v. New Eng. Tel. Co., 68 Me. 523; Peters v. Jones, 35 Iowa, 512; Thomas v. Pullis, 56 Mo. 211; Rice v. Graffman, 56 Mo. 434, 435; People v. Brown, 67 Ill. 435; Dezell v. Odell, 3 Hill, 215; Oakland P. Co. v. Rier, 52 Cal. 270; Dresbach v. Minnis, 45 Cal. 223; Comstock v. Smith, 26 Mich. 306.

³ Young v. Vough, 23 N. J. Eq. (8 C. E. Green) 325; Weber v. Weatherby, 34 Md. 656; Silloway v. Neptune Ins. Co., 12 Gray, 73; Gregg v. Von Phul, 1 Wall. 274; Railroad Co. v. Dubois, 12 Wall. 47; Society, &c. v. Lehigh Valley R. R., 32 N. J. Eq. 329; Viele v. Judson, 82 N. Y. 32, 39; Hamlin v. Sears, 82 N. Y. 327; Rubber Co. v. Goodyear, 9 Wall. 788; Niven v. Belknap, 2 Johns. 573; Hall v. Fisher, 9 Barb. 17, 31; Hope v. Lawrence, 50 Barb. 258; Ives v. North Canaan, 33 Conn. 402; Taylor v. Ely, 26 Pa. St. 250; Guthrie v. Quinn, 43 Ala. 561; Abrams v. Seale, 44 Ala. 297; Chapman v. Chapman, 59 Pa. St. 214; Lawrence v. Luhr, 65 Pa. St. 236; Hill v. Epley, 32 Pa. St. 331, 334.

⁴ Viele v. Judson, 82 N. Y. 32; Dffenbach v. Vogeler, 61 Md. 370; Bull v. Rowe, 13 S. Car. 355; see, also, Mills v. N. J. Cent. Rd., 41 N. J. Eq. 1; Bramble v. Kingsbury, 39 Ark. 131; Terre Haute Rd. v. Rodel, 89 Ind. 128.

object to it.¹ So, also, is the owner of real estate not estopped to deny the subdivision of his property into blocks by his knowledge that a map describing such subdivision has been circulated through the country.² But there is an estoppel where one sees another enter upon land and make improvements thereon without warning him of his own title to such land.³ Examples of misrepresentation are too numerous and various in character to permit of an exhaustive statement. A person may be estopped to claim title to land by any conduct of his in reference thereto, which induces anyone to rely upon this apparently valid title.⁴ The doctrine of estoppel by actual misrepresentation also is applied wherever the owner of property represents another to be the owner, or clothes such person with the evidence of ownership, so as to induce others to believe that this other person is the owner of the property.⁵

But in all cases of representation the statement of a fact must be plain and certain,⁶ and must, as a general rule, relate to past or present facts. If the reference is to future facts, it either would be merely an expression of opinion, or would constitute a contract, and would then be governed by rules applicable to contracts.⁷ The estoppel cannot arise from mere statement of law or opinion;⁸ so, also, representations as to the value of an article will not work an estoppel, unless the party who relies upon such representation has peculiar grounds for reposing confidence in the party making the representation.⁹

§ 109. **How far fraud is necessary to estoppel in pais.**—According to some of the authorities, a fraudulent intent is deemed to be

¹ *Hugill v. Kinney*, 9 Oreg. 250; s. c., 42 Am. Rep. 801.

² *Sullivan v. Davis*, 29 Kans. 28.

³ *State v. Wertzel*, 62 Wis. 184; *Strosser v. Fort Wayne*, 100 Ind. 443.

⁴ *Railroad v. Ragsdale*, 54 Miss. 200; *Wells v. Pierce*, 27 N. H. 303; *De Herques v. Marti*, 85 N. Y. 609; *Wundell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344; *Yates v. Hurd*, 8 Col. 343; *Pitcher v. Dove*, 99 Ind. 175; *Copeland v. Copeland*, 28 Me. 524; *Money v. Ricketts*, 62 Miss. 209; *Pelding v. Du Bose*, 63 Tex. 631; *Dickerson v. Colgrove*, 100 U. S. 578; *Greene v. Smith*, 57 Vt. 268.

⁵ *Seabright v. Moore*, 33 Mich. 92; *Chapman v. Pingree*, 67 Me. 198; *Rice v. Bunce*, 49 Mo. 231; s. c., 8 Am. Rep. 129; *Hawkins v. Methodist Church*, 23 Minn. 256; *Powers v. Harris*, 98 Ala. 410; *Jowers v. Phelps*, 33 Ark. 465; *Winton v. Hart*, 39 Conn. 16; *Pool v. Lewis*, 41 Ga. 162; s. c., 5 Am. Rep. 526; *Roberts v. Davis*, 72 Ga. 819; *Montague v. Well*, 30 La. Ann. 50; *Horn v. Cole*, 51 N. H. 287; s. c., 12 Am. Rep. 111; *Howland v. Woodruff*, 60 N. Y. 73; *Redman v. Graham*, 80 N. Car. 231; *Osborn v. Elder*, 65 Ga. 360; *Miles v. Lefi*, 60 Ia. 168; *Stewart v. Mumford*, 91 Ill. 58; *Bobbitt v. Shryer*, 70 Ind. 513;

Alexander v. Ellison, 79 Ky. 148; *Burton's Appeal*, 93 Pa. St. 214; *Dunlap v. Gooding*, 22 S. Car. 548; *Kirk v. Hamilton*, 102 U. S. 68.

⁶ *Davenport Rd. v. Davenport Gas Co.*, 43 Ia. 301; *Townsend v. Todd*, 47 Conn. 190; *Bennett v. Dean*, 41 Mich. 472; *Moors v. Albro*, 129 Mass. 9; *Roach v. Brannon*, 57 Miss. 490; *Grinnan v. Dean*, 62 Tex. 218; *Lawrence Univ. v. Smith*, 32 Wis. 587; *Tillotson v. Mitchell*, 111 Ill. 518; *Lash v. Rendell*, 72 Ind. 475.

⁷ *White v. Ashton*, 51 N. Y. 280; *White v. Walker*, 31 Ill. 422, 437; *Langdon v. Doud*, 10 Allen, 433; 6 Allen, 423; see *Allen v. Rundle*, 50 Conn. 9; *Jackson v. Allen*, 120 Mass. 64; *Turnipseed v. Hudson*, 50 Miss. 429; *Allen v. Hodge*, 51 Vt. 436; compare *Simonton v. Liverpool Co.*, 51 Ga. 78.

⁸ *Insurance Co. v. Mowry*, 96 U. S. 544; see *Shields v. Smith*, 37 Ark. 47; *Kimball v. Ætna Ins. Co.* 9 Allen, (Mass.) 540; *Brightman v. Hicks*, 108 Mass. 246; *Langen v. Sankey*, 55 Ia. 52; but see *Whitwell v. Winslow*, 134 Mass. 343; *Chatfield v. Simonson*, 92 N. Y. 209; *Birdsey v. Butterfield*, 34 Wis. 52; *Hammerslough v. Kansas City Assoc.*, 79 Mo. 81; *McGirr v. Sell*, 60 Ind. 249; *Phelps v. Ill. Cent. Rd.*, 94 Ill. 548.

⁹ *Big. on Estop.* (4th ed.) 555; *Graves v. Lake Shore Rd.*, 137 Mass. 33.

necessary or essential to the estoppel *in pais*. At least, the language of these cases supports the doctrine that there must be actual fraud in the inception of the transaction, or the circumstances must be such as that it would be a fraud for the party making these statements to undertake to assert his rights in contradiction of such misstatement.¹ It has also been claimed in cases, in which the proposition is laid down that actual or constructive fraud is necessary to the operation of an estoppel, that they relate to cases of estoppel arising in denial of the legal title to land, and was not intended to apply to all cases of estoppel indiscriminately.² But whether that limitation placed upon the position taken by these courts is just or not, the majority of the courts maintain, as a general proposition, that fraud or a fraudulent intent is not necessary; that is, an actual intent to deceive is not necessary, and that an honest mistake as to facts stated may nevertheless support the claim of estoppel, provided the party so making the misrepresentation has no reasonable ground for believing them to be true.³

§ 110. **Knowledge of the truth by the party estopped.**—Somewhat similar to the last question, and it constitutes in fact a part of the same question, is, how far the party estopped must have knowledge of the truth in respect to which a misrepresentation has been made; or, how far he must know what he says to be false in order to be estopped. Inasmuch as the majority of the courts have not required proof of an actual intent to deceive, it is not surprising when it is learned that they likewise do not require that the party estopped should have knowledge of the truth of his misrepresentation. The general statement which can be taken as a reliable expression of the law is, that he must either know that what he says is false, or he must have a reasonable ground for believing the statement to be true.⁴ If he has reasonable grounds for believing the statement to be

¹ *Brant v. Virginia Coal Co.*, 93 U. S., 326, 335, *per* Judge Field, J.: "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. Thus it is said by the Supreme Court of Pennsylvania, that the primary ground for this doctrine is that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others had acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he sets up."

² See 2 Pomeroy Eq. Jur., sect. 807.

³ *Slim v. Croucher*, 1 De G. F. & J. 518, 525, 528; *Spencer v. Carr*, 45 N. Y. 406; *Sulphine v. Dunbar*, 55 Miss. 255; *Southard v. Sutton*, 68 Mo. 575; *Kirkpatrick v. Brown*, 59 Ga. 450; *Trenton Banking Co. v. Sherman*, 24 Alb. L. J.

390; *Boggs v. Merced M. Co.*, 14 Cal. 279, 367, 368; *Brant v. Va. Coal Co.*, 93 U. S. 326, 335; *Stewart v. Mix*, 30 La. An. (Part. 2) 1036; *Lippmins v. McCranie*, *Id.* 1251; *Lamar Co. v. Clements*, 49 Tex. 347; *Bloomstein v. Clees*, 3 Tenn. Ch. 433; *Hart v. Giles*, 67 Mo. 175; *Godfrey v. Thornton*, 46 Wis. 677; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Storrs v. Barker*, 6 *Id.* 166; *Gregg v. Von Phul*, 1 Wall. 274, *per* Davis, J.; *Breeding v. Stamper*, 18 B. Mon. 175; *Hill v. Epley*, 31 Pa. St. 331, 334; *Hayes v. Livingston*, 34 Mich. 384; *Kelly v. Hendricks*, 57 Ala. 193; *Wimmer v. Ficklin*, 14 Bush, 193.

⁴ *Reed v. McCourt*, 41 N. Y. 435; *Raynor v. Timerson*, 51 Barb. 517; *Strong v. Ellsworth*, 26 Vt. 366; *Thrall v. Lathrop*, 30 Vt. 307; *Holmes v. Crowell*, 73 N. C. 613; *Stevens v. Dennett*, 51 N. H. 324, 333; *Smith v. Hutchinson*, 61 Mo. 83; *Clark v. Coolidge*, 8 Kans. 189; *Whitaker v. Williams*, 20 Conn. 98; *Liverpool Wharf v. Prescott*, 7 Allen, 494; 4 Allen, 22; *Second Nat. B'k v. Walbridge*, 19 Ohio St. 419; *Adams v. Brown*, 16 Ohio St. 75; *Lafferty v. Moore*, 33 N. Y. 658; *Kincaid v. Dormey*, 51 Mo.

true, as a general proposition, there will be no estoppel.¹ There can be no question that the rule, as just stated, admits of no qualification, where it applies to cases of affirmative misrepresentation.² But where the estoppel arises out of concealment of material facts, or from acquiescence in the assumption of control over the property by the third person, in such cases an actual knowledge of the truth as to the title and claim to the property must be shown.³ But even in the case of mere acquiescence or concealment of the facts, the requirement of actual knowledge will not always be insisted upon as a necessary condition of the claim of estoppel; in other words, an estoppel will arise where there is a concealment of facts or acquiescence in the assertion of title by another, when the ignorance of the party claimed to be estopped was occasioned by his culpable negligence.⁴ A peculiar rule is obtained by a special application of the principles herein set forth to the case of representation in respect to a boundary line to land. Where the representation refers to the boundary line between two estates, the courts seem to have generally agreed upon the following rule: Where the true line was a matter of uncertainty and dispute, and it could not, after a diligent search, be ascertained, if the parties agree upon a line, which shall constitute the boundary line, both will thereafter be estopped from denying that the line agreed upon was the true line, although the dispute arose from an honest mistake of one or both of the parties.⁵ But if the representation was made under an honest mistake of the facts in a case, where there was no actual uncertainty as to the true line, the party making the representation would not thereafter be precluded from setting up the true line.⁶ But if the party making the representation as to boundary knew it to be false and the other relied upon such representation, an estoppel would arise.⁷

552; *Rutherford v. Tracy*, 48 Mo. 335; *Dorlarque v. Cress*, 71 Ill. 380, 382; *Graves v. Blondell*, 70 Me. 190,

¹ *Lee v. Templeton*, 73 Ind. 315; *Watters v. Connelly*, 59 Iowa, 217; *Proctor v. Putnam Machine Co.*, 137 Mass. 159; *Turner v. Furguson*, 58 Tex. 9; *Wright's Appeal*, 99 Pa. St. 425; *Fay v. Tower*, 58 Wis. 286; *Clinton v. Haddam*, 50 Conn. 84; *Davis v. Bagley*, 40 Ga. 181; s. c., 2 Am. Rep. 570; *Gray v. Agnew*, 95 Ill. 315; *Frederrick v. Missouri Riv., &c. Rd.*, 82 Mo. 402; *Van Ness v. Hadsell*, 54 Mich. 560; *Bull v. Rowe*, 13 S. Car. 355.

² *Pulsford v. Richards*, 17 Beav. 87; *Irving Nat. B'k v. Alley*, 79 N. Y. 536, 540; *Lefever v. Lefever*, 30 N. Y. 27; *Mut. Life Ins. Co. v. Norris*, 31 N. J. Eq. 583, 585, 586; *Horn v. Cole*, 51 N. H. 287, *per* Perley, C. J.

³ *Hays v. Reger*, 102 Ind. 524; *Bringard v. Stellwagen*, 41 Mich. 54.

⁴ *Stone v. Gr. West. Oil Co.*, 41 Ill. 85; *Adams v. Brown*, 16 Ohio St. 75; *Calhoun v. Richardson*, 30 Conn. 210; *Preston v. Mann*, 25 Conn. 118; *Smith v. Newton*, 38 Ill. 230; *Swezey v.*

Collins, 40 Iowa, 540; *Rice v. Bunce*, 49 Mo. 231, 234.

⁵ *Adams v. Rockwell*, 16 Wend. 285; *Dibble v. Rogers*, 13 Wend. 536; *Jackson v. Ogden*, 7 Johns. 238; *Orr v. Hadley*, 36 N. H. 575; *Terry v. Chandler*, 16 N. Y. 355; *Lindsay v. Springer*, 4 Har. 547; *Chew v. Morton*, 10 Watts, 321; *Knowles v. Toothaker*, 58 Me. 174; *Russell v. Maloney*, 39 Vt. 583; *Houston v. Sneed*, 15 Tex. 307; *Joyce v. Williams*, 26 Mich. 332; *Blair v. Smith*, 16 Mo. 279; *Sneed v. Osborn*, 25 Cal. 624; *Reed v. Farr*, 35 N. Y. 117.

⁶ *Proprietors, &c. v. Prescott*, 7 Allen, 494; *Thayer v. Bacon*, 3 Allen, 163; *Baldwin v. Brown*, 16 N. Y. 359; *Coon v. Smith*, 29 N. Y. 392; *Vosburgh v. Teator*, 32 N. Y. 561; *Russell v. Maloney*, 39 Vt. 580; see *Brudick v. Heinley*, 23 Iowa, 515.

⁷ *Davenport v. Tarpin*, 43 Cal. 598; *Lemmon v. Hartbrook*, 80 Mo. 13; *Kirchner v. Miller*, 39 N. J. Eq. 355; *Reed v. McCourt*, 35 N. Y. 113; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Hass v. Plantz*, 56 Wis. 105; *Raynor v. Timerson*, 51 Barb. 517; *Evans v. Miller*, 58 Miss. 120; *Pitcher v. Dove*, 99 Md. 175.

§ 111. **Ignorance of the truth by the other party.**—In order that an estoppel may arise, the party who claims the benefit of the estoppel must show that he was ignorant of the truth in respect to the subject-matter of the representation, not only when the representation was made, but also when he relied and acted upon the misrepresentation. If at the time when he acted, such party had knowledge of the truth, or had information by which he might, with reasonable diligence, have acquired such knowledge, so that it would have been negligence on his part to have entered into the transaction in ignorance of the facts which he could have ascertained, there could be no claim of estoppel in the case, because he cannot, under these circumstances, claim to be misled by the misrepresentation or the concealment of the party to be estopped.¹ On this general principle, it has been held that no one is ever estopped from showing the invalidity of a statute upon which a party claims to rely.² It has, on the same general principle, been held that where the means of disproving the misrepresentation or concealment of the party making such statement can be obtained by an investigation of the records, there will be no estoppel.³ But if this doctrine is to be accepted as at all reliable, it must be applied to cases of concealment, and has no application at all, or if at all, subject to the strictest limitations, to cases of affirmative misstatement. In other words, as a general proposition, if the party who is to be estopped has made a positive misrepresentation as to his title and interest in and to the property, the fact that the falsity of such misstatement could be ascertained by an examination of the records, will not interfere with the raising of the estoppel. While a purchaser cannot claim the protection of estoppel against a concealment of facts which he could have ascertained by an investigation of the record, yet he has a right to rely with confidence upon affirmative statements as to the title that might be made to him under circumstances which would invite confidence.⁴

§ 112. **The party estopped must have intended to influence the conduct of others.**—The general proposition is laid down, that in order to constitute an estoppel, the representation or concealment of

¹ *Wallis v. Truesdell*, 6 Pick. 455; *Carter v. Champion*, 8 Conn. 548, 554; *Rapalee v. Stewart*, 27 N. Y. 310; *Hill v. Epley*, 7 Casey, 331; *Davenport v. Turpin*, 52 Cal. 270; *Brant v. Virginia Coal Co.*, 3 Otto, 326; *Holmes v. Crowell*, 73 N. C. 613; *Fisher v. Mossman*, 11 Ohio St. 42; *Bales v. Perry*, 51 Mo. 449; *Wythe v. City of Salem*, 4 Sawyer, 88; *Plummer v. Mold*, 22 Minn. 15; *Clark v. Coolidge*, 8 Kans. 189; *Bigeow v. Topliff*, 35 Vt. 273; *Odlin v. Gove* 41 N. H. 465; *Stevens v. Dennett*, 51 N. H. 324, 333; *Rice v. Bunce*, 49 Mo. 231, 234; *Mut. Life Ins. Co. v. Norris*, 31 N. J. Eq. 583.

² *Shapley v. Abbott*, 42 N. Y. 443; s. c., 1 Am. Rep. 548; *Turnipseed v. Hudson*, 50 Miss. 429; s. c., 1 Am. Rep. 15; *Tibble v. Anderson*, 63 Ga. 41; *Rosebrough v. Ansley*, 35 Ohio St. 107; compare *Payne v. Burnham*, 62 N. Y. 69; *Mason v.*

Anthony, 3 Keys, (N. Y.) 609; *Wilson v. Western Land Co.*, 77 N. Car., 445; see, also, *McKnight v. Pittsburg*, 91 Pa. St. 273; *Brightman v. Hicks*, 108 Mass. 246; *Langen v. Sankey*, 55 Ia. 52; *Insurance Co. v. Mowry*, 96 U. S. 544; see *Shields v. Smith*, 37 Ark. 47; *Kimball v. Aetna Ins. Co.*, 9 Allen, (Mass.) 540.

³ *Fisher v. Mossman*, 11 Ohio St. 42; *Goundie v. Northampton W. Co.*, 7 Barr. 233; *Knouff v. Thompson*, 4 Harris, 357; *Hill v. Epley*, 7 Casey, 331.

⁴ *Storrs v. Barker*, 6 Johns. Ch. 166; *Davis v. Handy*, 37 N. H. 65; *Hill v. Epley*, 7 Casey, 331; *Proctor v. Keith*, 12 B. Mon. 252; *Colbert v. Daniel*, 33 Ala. 314, 316; *Evans v. Forstall*, 58 Miss. 30; *Peery v. Hall*, 75 Mo. 503; *David v. Park*, 103 Mass. 501; *Kiefer v. Rogers*, 19 Minn. 32.

facts must have been done with the intention of influencing either some particular person or some persons in general; in other words, that there must be an intention to affect or influence the actions of those who relied upon the statement.¹ This statement of the law, however, requires some qualifications. It is not always necessary that there be an actual intention to exert an influence upon another. It is sufficient if there be a reasonable expectation that somebody will be influenced by such misrepresentation. The actual intention to influence is not necessary; but the reasonable expectation that somebody will be influenced is necessary.² An illustration of the proposition that the actual intent to influence the acts of others is not necessary, is to be found in connection with the law, that the owner of property is estopped from denying the title of the purchaser from one, to whom he has given complete evidence of ownership in the formal transfer to him of the *indicia* of title. Such is the case in respect to the assignments of certificates of stock and other securities.³

§ 113. **The representation or concealment must have influenced the conduct of another.**—The final requirement in respect to estoppel is, that the party who was intended or expected to be influenced by the misrepresentation, must have been actually influenced thereby to his own detriment; or rather, that the party, intended or expected to be influenced, must have relied upon the misrepresentation and have acted upon it, so that he would sustain a loss if the party making the misrepresentation were now permitted to disprove the truth of the statement.⁴ It is not always necessary that the action of the party relying upon the misrepresentation should be affirmative in character; although

¹ Clark v. Coolidge, 8 Kans. 189, 195; Stevens v. Dennett, 51 N. H. 324, 333; McCabe v. Raney, 32 Ind. 309; Turner v. Coffin, 12 Allen, 401; Pierce v. Andrews, 6 Cush. 4; Kuhl v. Mayor, &c., 23 N. J. Eq. (8 C. E. Green), 84, 85; Wilcox v. Howell, 44 N. Y. 398; Simpson v. Pearson, 31 Ind. 1, 5; Eaton v. New Eng. Tel. Co. 68 Me. 63; Southard v. Sutton, 68 Me. 575; Brown v. Bowen, 30 N. Y. 519; Holdane v. Cold Spring, 21 N. Y. 474; Carroll v. Manchester, &c. R. R., 111 Mass. 1.

² Horn v. Cole, 51 N. H. 287, *per* Perley, C. J.; Cornish v. Abington, 4 H. & N. 549, *by* Pollock, C. B.; Anderson v. Armstead, 69 Ill. 452, 454; Rice v. Bruce, 49 Mo. 231, 234, *per* Wagner, J.; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583, 585; Man. & Trad. B'k v. Hazard, 30 N. Y. 226, 230.

³ Barnard v. Campbell, 55 N. Y. 456, 462; Man. & Trad. B'k v. Hazard, 30 N. Y. 226, 230; Anderson v. Armstead, 69 Ill. 452, 454; Hamlin v. Sears, 82 N. Y. 327; McNeill v. Tenth Nat. B'k, 46 N. Y. 325; Moore v. Metropolitan B'k, 45 N. Y. 41; Combes v. Chandler, 33 Ohio St. 175; and see *ante*, § 710, Hentz v. Miller, 94 N. Y. 64; Moore v. Metropolitan B'k, 55 N. Y. 41; Gass v. Hampton, 16 Nev. 185.

⁴ Dorlarque v. Cress, 71 Ill. 380; Anderson v.

Armstead, 69 Ill. 452; Carroll v. Manchester, &c. R. R., 111 Mass. 1; Voorhees v. Olmstead, 3 Hun, 744; Howard v. Hudson, 2 E. & B. 1; Curnen v. The Mayor, 79 N. Y. 511, 514; Waring v. Somborn, 82 N. Y. 604; Grissler v. Powers, 81 N. Y. 57; Horn v. Cole, 51 N. H. 287; Stevens v. Dennett, 51 N. H. 324, 333; Clark v. Coolidge, 8 Kans. 189, 195; Kuhl v. The Mayor, 23 N. J. Eq. 84; Kent v. Quicksilver M. Co., 78 N. Y. 159, 187; Hurd v. Kelly, 78 N. Y. 588, 597; Barnard v. Campbell, 55 N. Y. 456, 462; Malloney v. Horan, 49 N. Y. 111, 115; Rice v. Bunce, 49 Mo. 231, 234; State of Laies, 52 Mo. 396; McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 31 Ind. 1, 5; Jewett v. Miller, 10 N. Y. 402, 406; Man. & Trad. B'k v. Hazard, 30 N. Y. 226, 230; Van Deusen v. Sweet, 51 N. Y. 378; McKenzie v. Steele, 18 Ohio St. 38, 41; Eaton v. N. E. Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Me. 575; Eitel v. Bracken, 38 N. Y. Super. Ct. 7; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583; Graves v. Blondell, 70 Me. 190; Bitting's Appeal, 5 Harris, 211; Cole v. Bolard, 10 Harris, 431; Newman v. Edwards, 10 Casey, 32; Forsyth v. Day, 46 Me. 176, 197; Cummings v. Webster, 43 Me. 192; Holden v. Torrey, 31 Vt. 690; Truan v. Keiffer, 31 Ala. 136; Railroad Co. v. Dubois, 12 Wall. 47; East v. Dolihite, 72 N. C. 562.

more rare, yet, it is possible that the estoppel may arise from the misrepresentation, where such misrepresentation induced another, to his loss, to refrain from doing what he otherwise would have done.¹

§ 114. **Operation and extent of estoppel—as to persons.**—The estoppel extends in its operation to the value and scope of the thing represented or rights referred to; and it is intended to place the party who is to be benefited by the estoppel in the same position as he would have been in if the statement had been true.² But the estoppel will not apply to mere strangers; it can only operate upon and be claimed by parties to the transaction, in which the misrepresentation or concealment was made and their privies, whether by blood, by estate, or by contract.³ And no one can claim the benefit of an estoppel who is not free from the taint of bad faith and fraud in the assertion of his rights.⁴ It also is a question of some moment, how far the disability of marriage or infancy will affect the obligation of an estoppel. In respect to married women, the question whether the doctrine of estoppel will apply or not, depends in a large measure upon the condition of the law in respect to the rights and powers of married women. Where the common law disability prevails, a great many of the cases maintain that since a married woman cannot be directly bound by her contracts, even when they are tainted with fraud, she could not be indirectly bound by means of an estoppel; and that she will only be estopped by her misrepresentation, where she undertakes affirmatively to enforce a right which is inconsistent with the truth of her representation, and upon the truth of which the other party has relied.⁵ But even where the common law disability still obtains, the courts are not altogether unanimous in respect to the limitations just stated of the application to married women of the doctrine of estoppel. In these courts, the estoppel is sustained against her, whether she undertakes to enforce an alleged right or defend herself against the enforcement of a claim by another.⁶ This conflict of authority is, of course, completely disposed of in those states like New York, in which a married woman is

¹ *Continental B'k v. Bank of Comm'th*, 50 N. Y. 575, and cases cited by Folger, J.; *Voorhees v. Omstead*, 3 Hun, 744.

² *Philadelphia v. Williamson*, 10 Phila. 176; *Grisler v. Powers*, 81 N. Y. 57, *per* Andrews, J.; *Tilton v. Nelson*, 27 Barb. 595; *Pickett v. Merch. Nat. B'k*, 32 Ark. 346; *Murray v. Jones*, 50 Ga. 109; *Campbell v. Nichols*, 33 N. J. L. (4 Vroom) 81.

³ *Wright v. Hazen*, 24 Vt. 143; *Parker v. Crittenden*, 37 Conn. 148; *McCravey v. Remson*, 19 Ala. 430; *Simpson v. Pearson*, 31 Ind. 1, *per* Elliott, C. J.; *Eaton v. N. E. Tel. Co.*, 68 Me. 63; *Southard v. Sutton*, 68 Me. 575; *Kinnear v. Mackey*, 85 Ill. 96; *Murray v. Sells*, 53 Ga. 257; *Peters v. Jones*, 35 Iowa, 512; *Thistle v. Buford*, 50 Mo. 278; *Gould v. West*, 32 Tex. 338.

⁴ *Thorne v. Mosher*, 20 N. J. Eq. (5 C. E.

Green) 257; *Royce v. Watrous*, 73 N. Y. 597; *Wilcox v. Howell*, 44 N. Y. 398; *Moore v. Bowman*, 47 N. H. 494.

⁵ *Keen v. Hartman*, 12 Wright 497; *Rumfelt v. Clemens*, 10 Wright, 455; *Glidden v. Strupler*, 52 Pa. St. (2 P. F. Sm.) 400; *Williams v. Baker*, 71 Pa. St. (21 P. F. Sm.) 476; *Kane Co. v. Herrington*, 50 Ill. 232; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Bemis v. Call*, 10 Allen, 512; *Merriam v. Boston R. R.*, 117 Mass. 241; *Lowell v. Daniels*, 2 Gray, 161.

⁶ *Carpenter v. Carpenter*, 25 N. J. Eq. (10 C. E. Green) 194; *Drake v. Glover*, 30 Ala. 382; *Connolly v. Branstler*, 3 Bush, 702; *Couch v. Sutton*, 1 Grant's Cas. 114; *McCullough v. Willson*, 9 Harris, 436; *Bigelow v. Foss*, 59 Me. 162; *Frazier v. Gelston*, 35 Md. 298; *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. (8 C. E. Green) 477, 483.

by statute entirely relieved of her common law disability.¹ The same question has been raised in respect to the extent to which infants may be bound by estoppel by their misrepresentation; and the general doctrine is laid down, that where the infant undertakes to assert affirmatively his claim to some property, or to interfere with another's possession of it in contradiction of his own statement, he will be estopped to the same extent as an adult would be. But if the question of estoppel is claimed to apply to a case where he is defending himself against the assertion of some right in an action brought against him by another, then he will not be estopped by this misrepresentation.²

§ 115. **Quasi-estoppel in the case of acquiescence.**—Somewhat similar to the ordinary equitable doctrine of estoppel is the quasi-estoppel which arises from the failure of one to assert his rights in, or in respect to property, while he sees another proceeding to make extensive improvements upon the land in reliance upon the supposed perfection of his title. It will be borne in mind, that in the particular case under inquiry, there is no intention to influence, nor is there any misrepresentation of material facts, nor, in the strictest sense of the term, a concealment of such facts. There is simply a failure to assert one's claim, which induces a sense of security on the part of another in the title he is supposed to have to the property, which would, of course, be dissipated, if the party having the outstanding claim should give notice of such claim. The common cases are those in respect to easements; where one has an easement over the land of another, and the party to whom the land belongs undertakes to make improvements in the shape of buildings on the land, which are erected in locations which will practically destroy or take away the easement by making its enjoyment impossible. If the party claiming the easement sees the buildings in course of construction and does not give notice of his claim of title; or does not secure an injunction against the construction of the building while it is in the course of construction, he cannot, after the completion of the building, or after the building has been for some time in course of construction, claim the right to enforce his easement and secure a demolition of such building. He is said in that case to be estopped from asserting his right to such easement in any equitable action, although he may still proceed to use his legal remedies in the enforcement of such rights.³ This is, how-

¹ *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Upshaw v. Gibson*, 53 Miss. 341; *McBeth v. Trabue*, 69 Mo. 642; *McCaas v. Woolf*, 42 Ala. 389; *Bodine v. Killeen*, 53 N. Y. 93; *Treman v. Allen*, 15 Hun, 4; *Hockett v. Bailey*, 86 Ill. 74; *Dingens v. Clancey*, 67 Barb. 566; *Fryer v. Rishell*, 84 Pa. St. 521; *Towles v. Fisher*, 77 N. C. 437; *Godfrey v. Thornton*, 46 Wis. 677.

² *Dorlarque v. Cress*, 71 Ill. 380; *McBeth v. Trabue*, 69 Mo. 642; *Montgomery v. Gordon*, 51 Ala. 377; *Upshaw v. Gibson*, 53 Miss. 341; *Handy v. Noonan*, 51 Miss. 166; *Padfield v. Pierce*, 73

Ill. 500; *Wilkinson v. Filby*, 24 Wis. 441; *Tantum v. Coleman*, 26 N. J. Eq. (11 C. E. Green) 128; *Drake v. Wise*, 36 Iowa, 476; *Willie v. Brooks*, 45 Miss. 542.

³ *Tash v. Adams*, 10 Cush. 252; *Briggs v. Smith*, 5 R. I. 213; *Grey v. Ohio, &c. R. R.*, 1 Grant's Cas. 412; *Little v. Price*, 1 Md. Ch. 182; *Burden v. Stein*, 27 Ala. 104; *Pillow v. Thompson*, 20 Tex. 206; *Borland v. Thornton*, 12 Cal. 440; *Phelps v. Peabody*, 7 Cal. 50; *Wilson v. Cobb*, 28 N. J. Eq. 177; *Bassett v. Salisbury Man. Co.* 17 N. H. 426, 439; *Odlin v. Gove*,

ever, not the only case of acquiescence; and the same doctrine may be found to apply to all sorts of cases of contracts and conveyances of legal titles, where a party maintains silence when in conscience he ought to speak. He will in these cases be debarred from asserting his title after someone has acted upon the apparent absence of any outstanding claims. The common example of such cases of acquiescence is, where one standing by sees his own property being sold as the property of another, and permitting the purchaser to buy it without disclosing to him his own claim against the property.¹ It has also been applied to cases, where a corporation inserts in its circular false statements in respect to the shares of stock which are offered for sale.² So, also, are the stockholders of corporations estopped from objecting to the acts of the corporation which are *ultra vires*, where they know of these acts and do not prevent their commission.³ It has likewise been held that the estoppel by acquiescence arises where the mortgagor, or other debtor, by keeping silence permits an assignee of such debt to assume that there is no defense to the action, under circumstances like those explained in the foregoing examples, which would impose upon the mortgagor, or other debtor, the conscionable duty of disclosing such defense.⁴

41 N. H. 465; *Peabody v. Flint*, 6 Allen, 52, 57; *Fuller v. Melrose*, 1 Allen, 166.

¹ *Hart v. Giles*, 67 Mo. 175; *Hayes v. Livingston*, 34 Mich. 384; *Ford v. Loomis*, 33 Mich. 121; *Mich. &c. Co. v. Parcell*, 38 Mich. 475, 480, *per* Cooley, J.; *Vicksburg, &c. R. R. v. Ragsdale*, 54 Miss. 200; *Broyles v. Nowlen*, 59 Tenn. (Baxt.) 191; *Millingar v. Sorg*, 61 Pa. St. (11 P. F. Sm.) 471; *Raritan Water P. Co. v. Veghte*, 21 N. J. Eq. (6 C. E. Green) 463; *Brooks v. Curtis*, 4 Lans. 283; *Blackwood v. Jones*, 4 Jones' Eq. 54; *Donovan v. Fireman's Ins. Co.*,

30 Md. 155; *Evansville v. Pfisterer*, 34 Ind. 36; *Schaefer v. Gildea*, 3 Col. 15; *Martin v. Righter*, 2 Stockt. Ch. 510; *Cumberland V. R. R. v. Mc-Lanahan*, 59 Pa. St. (9 P. F. Sm.) 23.

² *Ins. Co. v. Eggleston*, 96 U. S., 572; *Curnen v. Mayor, &c.*, 79 N. Y. 511, 514; *Continental Bank v. B'k of the Comm'th*, 50 N. Y. 575.

³ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 187, 188; and cases cited; *Zabriske v. Cleveland R. R.*, 23 How. (U. S.) 381, 395, 398; *Parks v. Evansville R. R.*, 23 Ind. 567.

⁴ *Lee v. Kirkpatrick*, 1 McCarter, 264; *Grissler v. Powers*, 81 N. Y. 57.

CHAPTER VII.

THE EQUITABLE DOCTRINE OF MERGER.

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§ 117. **Legal merger.**—The rule of the common law is well settled, that wherever two estates in the same land come into the possession of the same person without any intervening interest between such estates, and they are acquired by such person in the same character, there will be a merger of the smaller estate in the greater. Thus, where a life-tenant, or tenant for years, acquires a reversion, or the reversioner acquires the life-estate or leasehold, there will be a merger of the life-estate or leasehold in the greater estate of the reversioner, so that the ultimate interest of such an owner would be an estate in fee and not a particular estate *plus* the reversion. This rule was enforced by the common law rigidly and under all circumstances, whether it worked a hardship or wrong or not. Where two estates for years are acquired by the same person successively, the first estate is said to merge into the last estate, even though the latter was one of shorter duration.² So, also, will there be a merger where the interests of the mortgagor and mortgagee come into the possession of the same party.³ Not only did this rule of merger apply where there was an acquisition by the same party of two distinct legal estates in the land; but also where the same person acquired a legal and equitable estate of unequal duration, in which instance the equitable estate is said to merge in the legal estate, the legal estate always being considered the superior.⁴ The only well-settled exception in the common law to the operation of the law of merger was in regard to the estate tail. It could not

¹ Jones v. Davies, 7 H. & N. 507; Lady Pratt v. Sleaf, Cro. Jac. 275; 2 Black. Com. 177; 2 Spence Eq. Jur. 879, 880; White v. Greenish, 11 C. B. N. S. 209, 233; Allen v. Anderson, 44 Ind. 395; Cary v. Warner, 63 Me. 571; see Welsh v. Phillips, 54 Ala. 309.

² Stephens v. Bridges, 6 Madd. 66; see Hughes v. Robotham, Cro. Eliz. 302.

³ Hunt v. Hunt, 14 Pick. 384; Lockwood v. Sturdevant, 6 Conn. 387; James v. Morey, 2 Cow. 246; Barnett v. Denniston, 5 Johns. Ch. 35; Gardner v. Astor, 3 Johns. Ch. 53; Stantons v. Thompson, 49 N. H. 272; White v. Hampton, 13 Iowa, 259; Burhans v. Hutcheson, 25 Kans. 625; 37 Am. Rep. 274; Wilhelmi v. Leonard, Id. 330; Gregory v. Savage, 32 Conn. 264; Edger-

ton v. Young, 43 Ill. 464; Shin v. Fredericks, 56 Ill. 443; Warren v. Warren, 30 Vt. 530; Clary v. Owen, 15 Gray, 525; Bean v. Boothby, 57 Me. 295; Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; Barker v. Flood, 103 Mass. 474; Model Lodging House Ass'n v. City of Boston, 114 Mass. 133; Pratt v. Bank of Bennington, 10 Vt. 293; Champney v. Coope, 32 N. Y. 543; Sherman v. Abbott, 18 Pick. 448; Bailey v. Richardson, 15 E. L. & E. 218; Dickason v. Williams, 129 Mass. 182; 37 Am. Rep. 316; Thomas v. Simmons, 103 Ind. 538; Bredenburg v. Landrum, 10 S. C. 956; Collins v. Stocking, 98 Mo. 290.

⁴ Welsh v. Phillips, 54 Ala. 309; Capel v. Girdler, 9 Ves. 509; Selby v. Alston, 3 Ves. 339; Brydges v. Brydges, 3 Ves. 125a.

merge in the ultimate remainder; and this was the rule whether the *estate tail* was legal or equitable.¹

§ 118. **Equitable doctrine of merger.**—The court of equity, in dealing with the equitable interests which came under its jurisdiction, did not wholly discard the legal doctrine of merger; so that, as a general proposition, where there is a coming together into the possession of one person a legal and an equitable title of equal extent, in equity, as well as in law, there will ordinarily be a merger of the equitable estate in the legal.² But the merger will take place only when the legal and the equitable estate are acquired by the same party in the same character. If, for example, the legal title is transferred to trustees to be held for the party who has the equitable estate; or if one of the interests, whether legal or equitable, is held by one in his own right, and the other title or interest is transferred to another to be held as trustee for him, there will be no merger.³ The only exception to the general rule of a merger being recognized in equity, was, in regard to the case where the result of the merger would be to enable the rule in *Shelley's case* to apply; and in order to prevent the application of this rule, equity would not permit the merger of an equitable in a legal estate.⁴ Where the owner of a legal estate acquires a less or greater equitable estate, the equity courts do not always follow the legal rule of merger. Merger would, in such cases, take place or not, according to the apparent effect upon the rights of the parties and according to the declared intention of such parties. If, in other words, the parties have declared their intention not to have the merger take place, or such intention can be implied from the fact that the merger would result in detriment to one or the other of the parties, then equity will not permit the merger to take place, but will keep the equitable estate alive unaffected by the conveyance; so that, whenever there is a termination of union of the legal and equitable estates, the party thereafter entitled to the equitable estates would acquire his interest, unaffected by the prior union of the legal and equitable estate in the same person. This is not only the rule, where one interest is equitable and the other is legal, but the same principle is applied to all classes of interests, whether legal or equitable, where the smaller interest is acquired by the owner of the greater, or *vice-versa*.⁵

¹ *Merest v. James*, 6 Madd. 118; *Browne v. Blake*, 1 Molloy, 382; 2 Black. Com. 177; *Parker v. Turner*, 1 Vern. 458; *Dunn v. Green*, 3 P. Wms. 9; see 3 Preston on Convey., 240. For a fuller discussion of the legal doctrine of merger, see *Tiedeman Real Prop.*, §§ 49, 63, 61, 197, 321, 451 & 454.

² *James v. Morey*, 2 Cow. 246; *Wykham v. Wkham*, 18 Ves. 418, *per* Lord Eldon; *Brydges v. Brydges*, 3 Ves. 125a; *Selby v. Alston*, 3 Ves. 339.

³ *Belaney v. Belaney*, L. R. 2 Ch. 138; *Tiffin v. Tiffin*, 1 Vern. 1; *Chambers v. Kingham*, L.

R. 10 Ch. D. 743, 745; see *Adams v. Angell*, L. R. 5 Ch. D. 634, 641, 645, and cases cited; *Toulmin v. Steere*, 3 Meriv. 210, 224, *per* Sir William Grant; *Greswold v. Marsham*, 2 Ch. Cas. 170; and *Mocatta v. Murgatrod*, 1 P. Wms. 393.

⁴ *Venables v. Morris*, 7 T. R. 342-438; *Silvester v. Wilson*, 2 T. R. 444; see *Shapland v. Smith*, 1 Bro. Ch. 76; *Lord Say in Seal v. Jones*, 3 Bro. P. C. 113.

⁵ *Welsh v. Phillips*, 54 Ala. 309; *Fowler v. Fay*, 62 Ill. 375; *Worcester B'k v. Cheeney*, 87 Ill. 602; *Brydges v. Brydges*, 3 Ves. 125a; *Chambers v. Kingham*, L. R. 10 Ch. D. 743, 745;

§ 119. **Merger in cases of incumbrances.**—As has already been stated, the legal doctrine is, that when the legal estate comes into possession of the same party who holds a mortgage or other incumbrance upon the land, the mortgage or incumbrance becomes merged into the legal absolute estate, and there can never after be any separation of the two interests. The mortgage or other incumbrance will always merge in the general title to the property, unless there be some intervening interest or lien on the property which would interfere with the application of the doctrine of merger.¹

There are two cases that might arise in respect to merger of incumbrances; one, where there is a transfer of the mortgage or incumbrance to the owner of the fee, or *vice versa*; and secondly, where the mortgage or incumbrance is paid off by one having an interest in the land; a different rule obtains in the two cases. Where it is a mere transfer of the mortgage to the owner of the property, or a transfer of the title of the property to the mortgagee, without any question as to settlement or payment of the mortgage debt, the merger will take place only when the parties have not expressly agreed or intended that the merger shall not take place; in other words, the merger is in most instances only a presumption which may be rebutted by a proof of the intention to the contrary.² The intention to prevent a merger in consequence of the acquisition of the mortgage by the party holding the legal title, or *vice versa*, may either be expressed; or it may be implied from the fact that the merger would result to the detriment of the party, into whose possession have come the two distinct interests. Wherever the parties' best interests are to be subserved by an avoidance of the merger, then equity will

Thorn v. Newman, 3 Sw. 603; Hart v. Chase, 46 Conn. 207; Malloney v. Horan, 49 N. Y. 111; Binse v. Paige, 1 Abb. App. Dec. 138; Adams v. Angell, L. R. 5 Ch. D. 634, 645, and *cassé*; Forbes v. Moffatt, 18 Ves. 384; Sheehan v. Hamilton, 2 Keyes, 304; St. Paul v. Lord Dudley and Ward, 15 Ves. 167, 173; Andrus v. Vreeland, 29 N. J. Eq. 394.

¹ Grice v. Shaw, 10 Hare, 76; Smith v. Phillips, 1 Keen, 694; Baldwin v. Sager, 70 Ill. 503; Robbins v. Swain, 68 Ill. 197; Stantons v. Thompson, 49 N. H. 272; Edgerton v. Young, 43 Ill. 464; Lilly v. Palmer, 51 Ill. 331; Gardner v. Astor, 3 Johns. Ch. 53; Forbes v. Moffatt, 18 Ves. 384; Lord Compton v. Oxenden, 2 Ves. 261, 264; Swinfen v. Swinfen, 29 Beav. 199; Starr v. Ellis, 6 Johns. Ch. 393; James v. Johnson, 6 Id. 417; James v. Morey, 2 Cow. 246, 288, 300, 313; Byam v. Sutton, 19 Beav. 556; Swabey v. Swabey, 15 Sim. 106; Tyler v. Lake, 4 Id. 351, 358; Brown, v. Stead, 5 Id. 535; Gregory v. Savage, 32 Conn. 250, 264; Bassett v. Mason, 18 Id. 131; Wilhelm v. Leonard, 13 Iowa, 330.

² Hinds v. Ballou, 44 N. H. 619; Stantons v. Thompson, 49 N. H. 272; Butler v. Seward, 10

Allen, 466; Mickles v. Townsend, 18 N. Y. 575; Leavitt v. Pratt, 53 Me. 14; Kellogg v. Ames, 41 N. Y. 259; Abbott v. Kasson, 72 Pa. St. 185; Walker v. King, 44 Vt. 601; Wadsworth v. Williams, 100 Mass. 126; Wade v. Baldmier, 40 Mo. 486; Chaplain v. Laytin, 18 Wend. 407; Skillman v. Teeple, 1 N. J. Eq. 232; Dudley v. Bergen, 23 N. J. Eq. 397; Russell v. Mixer, 42 Cal. 475; Baker v. Flood, 103 Mass. 47; Ebert v. Gerding, 116 Ill. 216; Stelzich v. Weidel, 27 Ill. App. 177; Averill v. Taylor, 8 N. Y. 44; Loud v. Lane, 8 Met. 517; Bacon v. Bowdoin, 22 Pick. 401; Burrell v. Earl of Efremon, 7 Beav. 205; Pitt v. Pitt, 29 Beav. 294; Morley v. Morley, 5 De G. M. & G. 610; McCabe v. Bellows, 7 Gray, 148; Gibson v. Crehore, 3 Pick. 475; Houghton v. Hapgood, 13 Pick. 158; Shrewsbury v. Shrewsbury, 1 Ves. 233; Drinkwater v. Combe, 2 S. & S. 340, 345; Carll v. Butman, 7 Me. 102, 105; Spencer v. Waterman, 36 Conn. 342; Foster v. Hilliard, 1 Story, 77; Swaine v. Perine, 5 Johns. Ch. 490; Bell v. Mayor, &c., 10 Paige, 49; Lamson v. Drake, 105 Mass. 567; Davis v. Wetherell, 13 Allen, 63; McCabe v. Swap, 14 Allen, 191; Newhall v. Savings B'k, 101 Mass. 431.

permit them to continue as two distinct and separate interests, instead of causing a merger.¹

In order that a merger may in any case take place, the person must be the owner of the land and of the mortgage at the same time.² The possession of the mortgage and the land by the husband and wife respectively, will not operate as a merger under modern statutes, where the wife's property is declared to be her sole and separate estate.³ The general rule that a court of equity will not allow a merger to take place, if the party had not intended that such a merger should take place, is subject to the single exception that, where the primary obligor of the debt has paid the debt, he cannot claim the right of enforcing the mortgage against the land, even though the mortgage has been formally assigned to him.⁴ The common case, where the intention to prevent a merger is implied, is where there are other incumbrances upon the land between the mortgage which has been assigned and the equity of redemption. In such a case, the merger will not be permitted to take effect; for if such were the general rule, the junior incumbrance

¹ *Mallory v. Hitchcock*, 29 Conn. 127; *Bassett v. Mason*, 18 Conn. 131; *Forbes v. Moffatt*, 18 Ves. 384, *per* Sir Wm. Grant; *Adams v. Angell*, L. R. 5 Ch. D. 634, 645, *per* Sir Geo. Jessel; *Swabey v. Swabey*, 15 Sim. 106; *Lockwood v. Sturdevant*, 6 Conn. 373; *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Purdy v. Huntington*, 42 N. Y. 334; *Grice v. Shaw*, 10 Hare, 76; *Bailey v. Richardson*, 9 Hare, 734, 736; *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244; *Hancock v. Hancock*, 22 N. Y. 568; *Judd v. Seekins*, 63 *Id.* 266; *Sheldon v. Edwards*, 35 *Id.* 279; *Bascom v. Smith*, 34 *Id.* 320; *Simonton v. Gray*, 34 Me. 50; *Given v. Marr*, 27 Me. 212; *Holden v. Pike*, 24 *Id.* 427; *Clark v. Clark*, 56 N. H. 105; *Clift v. White*, 12 N. Y. 519; *Spencer v. Ayrault*, 10 N. Y. 202; *Vanderkemp v. Shelton*, 11 Paige, 28; *Skeel v. Spraker*, 8 *Id.* 132; *Stantons v. Thompson*, 49 N. H. 272; *Hinds v. Ballou*, 44 *Id.* 619; *Moore v. Beasom*, *Id.* 215; *Drew v. Rust*, 36 *Id.* 335; *White v. Knapp*, 8 Paige, 173; *Millsbaugh v. McBride*, 7 *Id.* 509; *James v. Johnson*, 6 Johns. Ch. 417, 423; *Bell v. Woodward*, 34 N. H. 90; *Weld v. Sabin*, 20 *Id.* 533; *Bullard v. Leach*, 27 Vt. 491; *Walker v. Baker*, 26 Vt. 710; *Starr v. Ellis*, 6 Johns. Ch. 393; *Gardner v. Astor*, 3 *Id.* 53; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135, 157; *Angel v. Boner*, 38 Barb. 425; *Slocum v. Catlin*, 22 N. H. 137; *Evans v. Kimball*, 1 Allen, 240, 242; *New Eng. J. Co. v. Merriam*, 2 *Id.* 390; *Savage v. Hall*, 12 Gray, 363; *McGivern v. Wheelock*, 7 Barb. 22; *James v. Morey*, 2 Cow. 246; *Hoplock v. Ramsey*, 28 N. J. Eq. 413; *Mulford v. Peterson*, 35 N. Y. Law 127; *Grover v. Thatcher*, 4 Gray, 526; *Loud v. Lane*, 8 Met. 517, 518, 519; *Brown v. Lapham*, 3 Cush. 551; *Hunt v. Hunt*, 14 Pick. 374; *Duncan v. Smith*, 31 N. J. Law, 325; *Van Wagenen v. Brown*, 26 *Id.* 196; *Hinchman v. Emans*, Saxt. Ch. 100; *Duncan v. Drury*, 9 Pa. St. 332; *Gibson v. Crehore*, 3 Pick. 475; 5 *Id.* 146; *Knowles v.*

Carpenter, 8 R. I. 548; *Bailey v. Richardson*, 9 Hare, 734, 736; *Moore v. Harrisburg B'k*, 8 Watts, 138; *Wallace v. Blair*, 1 Grant's Cas. 75; *Polk v. Reynolds*, 31 Md. 106; *Bell v. Tenny*, 29 Ohio St. 240; *Warren v. Warren*, 30 Vt. 530; *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Hill v. Pixley*, 63 Barb. 200; *Loud v. Lane*, 8 Met. 517; *Jordan v. Forlong*, 19 Ohio St. 89; *Tower v. Divine*, 37 Mich. 443; *Snyder v. Snyder*, 6 Mich. 470; *Richardson v. Hockenhull*, 85 Ill. 124; *Swinfen v. Swinfen*, 29 Beav. 199; *Davis v. Barrett*, 14 Beav. 542; *Baldwin v. Sager*, 70 Ill. 503; *Huebsch v. Scheel*, 81 *Id.* 281; *Robins v. Swain*, 68 *Id.* 197; *Fowler v. Fay*, 62 *Id.* 375; *Smith v. Ostermeyer*, 68 Ind. 432; *Shimer v. Hammond*, 51 Iowa, 401; *Waterloo Bank v. Elmore*, 52 *Id.* 541; *Scott v. Webster*, 44 Wis. 185; *Clark v. Langlin*, 62 Ill. 273; *Lilly v. Palmer*, 51 Ill. 331; *Edgerton v. Young*, 43 *Id.* 464; *Meacham v. Steele*, 93 Ill. 135; *Dunphy v. Riddle*, 86 *Id.* 22; *Worcester Bank v. Cheeney*, 87 *Id.* 602; *Aiken v. Milwaukee, &c. R. R.*, 37 Wis. 469; *Webb v. Meloy*, 32 Wis. 319; *Lyon v. McIlvaine*, 24 Iowa, 9; *Wilhelmi v. Leonard*, 13 Iowa, 330; *Delaware, &c. Co. v. Bonnell*, 46 Conn. 9; *Hart v. Chase*, 46 Conn. 207; *N. J. Ins. Co. v. Meeker*, 40 N. J. L. 18; *Ætna Life Ins. Co. v. Corn*, 89 Ill. 170; *White v. Hampton*, 13 Iowa, 259; *Davis v. Pierce*, 10 Minn. 376; *Christian v. Newberry*, 61 Mo. 446; *Grellet v. Heilsborn*, 4 Nev. 526; *Carter v. Taylor*, 3 Head, 30; *Tucker v. Crowley*, 127 Mass. 400; *Knowles v. Lawton*, 18 Ga. 476; *Atkinson v. Morrissey*, 3 Oreg. 332; *Besser v. Hawthorn*, 3 Oreg. 129.

² *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Purdy v. Huntington*, 42 N. Y. 334.

³ *Power v. Lester*, 33 N. Y. 527; and see *Gillig v. Maas*, 28 N. Y. 191; *Bean v. Boothby*, 57 Me. 295; *Bemis v. Call*, 10 Allen, 512; *Mode, Lodge, H. Ass'n v. Boston*, 114 Mass. 133; *Faulks v. Dimock*, 27 N. J. Eq. (12 C. E. Green) 65.

⁴ See *post*, § 344.

would become the senior incumbrance, and the party receiving the first mortgage would not have received the special benefit he had anticipated from the purchase of the first mortgage. In all such cases, the senior mortgage or incumbrance will have a separate existence and be kept alive, although it has been transferred to, and is now the property of, the owner of the land, where such owner is not the primary obligor of the mortgage debt.¹ Where the intention is to be inferred from the surrounding circumstances of the transaction and of the property, parol evidence is admissible for the purpose of discovering the intention, or for the purpose of showing that a merger must take place.² But the express intention of the parties can never be proven by parol evidence.³ The intention must be gathered from the terms and provisions of the instrument of assignment. Thus, the intention may be expressed by the form of an assignment, not only in the recitals of the deed of assignment, but also by the fact that the mortgage or other incumbrance has been assigned to some third person as a trustee for the owner of the land.⁴

In order that the intention of the parties may control the question of merger, it must be expressed and exist at the time when the two estates or interests come together in the same person. If, at that time, no intention is expressed or implied to keep the two interests separate and distinct, there will be a merger, although the parties should subsequently form an intention to claim the separate existence of each interest; in other words, the actual intention must exist when the two interests come together, or be implied from circumstances existing at that time.⁵

The intention of the parties, as to the question of merger, where the interests of the mortgagor and mortgagee come together in one person, varies with the character of the transfer. Where the mortgagee takes a conveyance of the land from the mortgagor, or from the grantee of the mortgagor, the presumption of an intention to keep the mortgage alive is very strong. It is generally to the interest of the mortgagee, under these circumstances, to prevent the merger in order not to lose his priority against

¹ *Powell v. Smith*, 30 Mich. 451; *Swinfen v. Swinfen*, 29 Beav. 199, 204; *Davis v. Barrett*, 14 Beav. 542; *Hatch v. Skelton*, 20 *Id.* 453; *Earl of Clarendon v. Barham*, 1 Y. & C. Ch. 688; *Blum. dell v. Stanley*, 3 De G. & Sm. 433; *Wilkes v. Collin*, L. R. 8 Eq. 338; *Hatch v. Skelton*, 20 Beav. 453; *Johnson v. Webster*, 4 De G. M. & G. 474; *Astley v. Milles*, 1 Sim. 298; *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244; *Stantons v. Thompson*, 49 N. H. 272; *Warren v. Warren*, 30 Vt. 530; *Hancock v. Hancock*, 22 N. Y. 568; *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Hill v. Pixley*, 63 Barb. 200; *Loud v. Lane*, 8 Met. 517.

² *Howard v. Howard*, 3 Met. 548; *Wade v. Howard*; 11 Pick. 289; 6 *Id.* 492; *Astley v. Milles*,

1 Sim. 298, 345; *Fiske v. McGregory*, 34 N. H. 414; *Miller v. Fichthorn*, 31 Pa. St. 252, 259; *Frey v. Vanderhoof*, 15 Wis. 397.

³ *McCabe v. Swape*, 14 Allen, 188.

⁴ *Bean v. Boothby*, 57 Me. 295; *Campbell v. Knights*, 24 Me. 332; *Crosby v. Chase*, 17 Me. 389; *Crosby v. Taylor*, 15 Gray, 64; *Bailey v. Richardson*, 9 Hare, 734; *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244; *Spencer v. Ayrault*, 10 N. Y. 202.

⁵ *Gardner v. Astor*, 3 Johns. Ch. 53; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135, 157; *Cole v. Edgerly*, 48 Me. 108; *Given v. Marr*, 27 Me. 212; *Hunt v. Hunt*, 14 Pick. 374, 383; *Aikin v. Milwaukee*, &c. R. R., 37 Wis. 469; *Champney v. Coope*, 34 Barb. 539.

the land as mortgagee over the junior incumbrance.¹ Where, also, the assignment is made by the mortgagee to the mortgagor, or to the grantee of the mortgagor, the question, as to the intention of the parties in respect to merger, will vary with the character of the obligation of such mortgagor or grantee of the mortgagor to pay the debt. The presumption against merger still holds good as to such parties where there is no such obligation to pay off the debt; that is, where the party who owns the land and receives an assignment of the mortgage is not the primary obligor or ultimate debtor.² So, also, will there be no merger where the mortgage has been assigned to one who is only a part owner of the land, whether as life-tenant, lessee, or tenant in common.³ While as a general rule the merger, which otherwise would prevail at common law, is prevented by equity, for the purpose of preventing injury to the interests of the parties to the transaction; on the other hand, if the prevention of merger would work an injury or wrong, or would aid in effecting a fraud, equity would not interpose for the prevention of the merger; and any extraordinary circumstances, which would indicate that the prevention of the merger would have such an evil effect, could be established as a defense against the interference of equity.⁴

§ 120. Cases of merger where the mortgage or incumbrance is paid.—The cases heretofore discussed are where incumbrances and absolute titles to the property come into the possession of the same party without any intention of a settlement of the incumbrance: the question of merger assumes a different phase where the transaction whereby the two interests came into the possession of the same party is not intended in any sense of the term as an assignment of the mortgage; but the purpose of the transaction is to secure a settlement or payment of the incumbrance over the land. In such a case, the court of equity will only interfere for the purpose of preventing an extinguishment of the mortgage, where such extinguishment would result in damage or loss to the party making the payment. Where the mortgagor who is under a primary obligation to pay off the mortgage debt pays the mortgage debt, it will operate as a complete extinguishment of the mortgage, whether the mortgage is satisfied upon the

¹ *Thompson v. Boyd*, 1 Zab. 58; 2 *Id.* 543; *Duncan v. Smith*, 2 Vroom, 325; *Fithin v. Corwin*, 17 Ohio St. 118; *Scott v. Webster*, 44 Wis. 185; *Ætna L. Ins. Co. v. Corn*, 89 Ill. 135; *Stantons v. Thompson*, 49 N. H. 272; *Edgerton v. Young*, 43 Ill. 464; *Freeman v. Paul*, 3 Me. 360; *Walker v. Baker*, 26 Vt. 710; *Knowles v. Lawton*, 18 Ga. 476; *Dunphy v. Riddle*, 86 Ill. 22; *Worcester B'k v. Cheeney*, 87 Ill. 602; *Slocum v. Catlin*, 22 *Id.* 137; *Mallory v. Hitchcock*, 29 Conn. 127; *Mulford v. Peterson*, 35 N. J. Law, 127.

² *Mobile Branch B'k v. Hunt*, 8 Ala. 876; *Loud v. Lane*, 8 Met. 517; *Pitts v. Aldrich*, 11

Allen, 39; *Savage v. Hall*, 12 Gray, 363; *Adams v. Angell*, L. R. 5 Ch. D. 634; *Watts v. Symes*, 1 De G. M. & G. 240.

³ *Clark v. Clark*, 56 N. H. 105; *Titworth v. Stout*, 49 Ill. 78; *Barker v. Flood*, 103 Mass. 474; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. 227, 233; *Drinkwater v. Combe*, 2 & S. S. 340, 345; *Pitt v. Pitt*, 22 Beav. 294; *Burrell v. Earl of Egremont*, 7 *Id.* 205; *Morley v. Morley*, 5 De G. M. & G. 610; *Adams v. Angell*, L. R. 5 Ch. D. 634, 645.

⁴ *McGIVEN v. Wheelock*, 7 Barb. 22; *Hinchman v. Evans*, Saxt. Ch. 100; *Worthington v. Morgan*, 16 Sim. 547; *Hutchins v. Carleton*, 19 N. H. 487.

records or has been formerly transferred to the mortgagor. And this is the case likewise where the mortgage has been assigned to trustees for the mortgagor; there cannot be any prevention of the merger by a transfer to trustees.¹ But this is not the rule where the assignee of the mortgage has assumed the payment of the debt. In that case, payment by the mortgagor will not operate as an extinguishment or merger of the property, but the mortgage will be kept alive to be enforced by him against the land and the assignee.² But, in such a case there will be a merger where the payment is made by the assignee of the mortgagor who has assumed the payment of the debt.³

But where such assignee of the mortgagor merely takes the property subject to the mortgage without the assumption by him of any obligation to pay off that mortgage; if he should be subsequently called upon to pay the mortgage, it would not operate as a merger or an extinguishment of such mortgage, but it would still be kept alive to be enforced by him, against the mortgagor and other parties who are primarily liable for the debt. The same rule applies against the intention to effect a merger or complete extinguishment of a mortgage, where the one paying off the mortgage has only a part interest in the mortgaged property; in such a case, the party paying off the mortgage has a right to enforce such mortgage against the co-owners of the property. His payment of the mortgage operates as an equitable assignment of the same, and it is kept alive in his hands as a separate interest for the purpose of being enforced against the interests of those who hold it subject to that mortgage. The common case falling under this heading is, where a widow is entitled to dower subject to a mortgage and pays off the entire mortgage for the purpose of saving her own interest; in that case, she can enforce this mortgage as an equitable assignee against the other owner of the property.⁴ The same rule is extended to tenants for years and for life, as well as to tenants in common.⁵

¹ *Mickles v. Townsend*, 18 N. Y. 575; *Stoddard v. Rotton*, 5 Bosw. 378; *Butler v. Seward*, 10 Allen, 466; *Mickles v. Dillaye*, 15 Hun. 296; *Eaton v. Simonds*, 14 Pick. 98; *Crafts v. Crafts*, 13 Gray, 360; *Wadsworth v. Williams*, 100 Mass. 126; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Johnson v. Webster*, 4 De G. M. & G. 474; *Otter v. Lord Vaux*, 6 *Id.* 638; *Brown v. Lapham*, 3 Cush. 551, 554; *Wedge v. Moore*, 6 *Id.* 8; *Robinson v. Urquhart*, 1 Beasli. 515; *Comm. v. Chesapeake & Co.*, 32 Md. 501; *Swift v. Kraemer*, 13 Cal. 526; *Kilborn v. Robbins*, 8 Allen, 466, 471; *Strong v. Converse*, 8 *Id.* 557; *Butler v. Seward*, 10 *Id.* 466; *Bemis v. Call*, 10 *Id.* 512.

² *Robinson v. Leavitt*, 7 N. H. 3, 100; *Funk v. McReynold*, 33 Ill. 481, 495; *Baker v. Terrill*, 8 Minn. 195, 199; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Jumel v. Jumel*, 7 Paige, 591; *Cox v. Wheeler*, 7 Paige, 248, 257; *Fletcher v. Chase*, 16 N. H. 38, 42; *Kinnear v. Lowell*, 34 Me. 299; *Halsey v. Reed*, 9 *Id.* 446.

³ *Fitch v. Cothelal*, 2 Sandf. Ch. 29; *Lilly v. Palmer*, 51 Ill. 331; *Frey v. Vanderhoof*, 15

Wis. 397; *Mickles v. Townsend*, 18 N. Y. 575; *Russell v. Pistor*, 7 *Id.* 171; *Kellogg v. Ames*, 41 N. Y. 259.

⁴ *Carl v. Butman*, 7 me. 102, 105; *Spencer v. Waterman*, 36 Conn. 342; *McCabe v. Bellows*, 7 Gray, 148; *Gibson v. Crehore*, 3 Pick. 475; *Houghton v. Hapgood*, 13 *Id.* 158; *Newhall v. Savings B'k*, 10 Mass. 431; *McCabe v. Swape*, 14 Allen, 191; *Davis v. Wetherell*, 13 *Id.* 63; *Foster v. Hilliard*, 1 Story, 77; *Swaine v. Perine*, 5 Johns. Ch. 490; *Bell v. Mayer, & Co.*, 10 Paige, 49; *Lamson v. Drake*, 105 Mass. 567.

⁵ *Averill v. Taylor*, 8 N. Y. 44; *Loud v. Lane*, 8 Met. 517; *Beacon v. Bowdoin*, 22 Pick. 401; *Pitt v. Pitt*, 22 Beav. 294; *Morley v. Morley*, 5 De G. M. & G. 610; *Shrewsbury v. Shrewsbury*, 1 Ves. 233; *Drinkwater v. Combe*, 2 S. & S. 340, 345; *Burrell v. Earl of Egremont*, 7 Beav. 205; *Id.*; *Titsworth v. Stout*, 49 Ill. 77; *Barker v. Ford*, 103 Mass. 474; *Clark v. Clark*, 56 N. H. 105; *Adams v. Angell*, L. R. 5 Ch. D. 634, 645; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. 227, 233.

§ 121. **Law of merger as applied to equitable easements.**—At law, it is impossible for an easement to exist between two estates owned by the same person. If the two parcels had had separate owners, upon the union of them in the one owner, as we have seen, the easement would at least be suspended during the continuance of such union and revive upon their separation. The easement would revive only when the dominant and servient estates were of unequal value in the matter of duration.¹ But notwithstanding the fact that at law there can be no easement in favor of one parcel imposed upon another, both being held by the same owner, yet in equity such a relation may exist. If the owner of two parcels so uses them as to make one servient to the other, as, for example, in the construction of a drain carrying waste water from one estate over the other, in equity an easement will be imposed upon one lot in favor of the other, which, upon the severance of ownership by alienation, assumes the character of a legal easement, if its continuance is essential to the enjoyment of the estate which is sold.² It seems, also, that the servitude must be an open and notorious incumbrance, particularly where the servient estate is conveyed away.³ The same principle has been applied to a case where the owner of two lots conveys them to different grantees, and so divides them that the wall of the house conveyed to one of them falls within the boundary line of the other. It is held to create an equitable easement in favor of the owner of the house.⁴ Especially does an easement arise when the *quasi* dominant estate is granted to another. If the *quasi* servient estate has been conveyed, it is a question of some doubt whether there is reserved to the grantor, by implication, an easement to maintain the drain or other burden upon the granted estate. The authorities, English and American, are at variance on this question. In this country, the better opinion is that the rule would be the same as in the case of the conveyance of the *quasi* dominant estate,⁵ if it was strictly necessary to the enjoyment of the dominant estate, and the existence of the easement is apparent or known to the grantee.

¹ See Tiedeman, Real Prop., § 598.

² Smith v. Blaupied, 62 N. H., 652; Smith v. Smith, 62 N. H. 429; Crosland v. Rogers, (S. C. '90) 10 S. E. 874.

³ Tredwell v. Inslee, 120 N. Y. 458 (24 N. E. 651); Pyer v. Carter, 40 Eng. L. & Eq. 410; Guy v. Brown, 5 Moore, 644; Johnson v. Jordan, 2 Metc. 234; Kenyon v. Nichols, 1 R. I. 411, New Ipswich Factory v. Batchelder, 3 N. H. 190; Brakely v. Sharp, 9 N. J. Eq. 9; s. c., 10 N. J. Eq. 206; Kiffer v. Imhoff, 26 Pa. St. 438; McTavish v. Carroll, 7 Md. 352; Jones v. Jenkins, 34 Md. 1; 6 Am. Rep. 300; Lampman v. Milks, 21 N. Y. 505; Hubbard v. Town, 33 Vt. 295; Geber v. Grubell, 16 Ill. 217; Smith v. Blaupied, 62 N. H. 652; Smith v. Smith, 62 N. H. 429; Crosland v. Rogers, (S. C. '90) 10 S. E. 874.

⁴ Reiners v. Young, 38 Hun, 335; John Han-

cock, &c. Ins. Co. v. Patterson, 103 Ind. 582; (53 Am. Rep. 550.

⁵ Warren v. Blake, 54 Me. 289; Johnson v. Jordan, 2 Metc. 234; Carbrey v. Willis, 7 Allen, 369; Randall v. McLaughlin, 10 Allen, 366; Keats v. Hugo, 115 Mass. 204; 15 Am. Rep. 80; Butterworth v. Crawford, 46 N. Y. 349; 7 Am. Rep. 352; Parsons v. Johnson, 68 N. Y. 62; 23 Am. Rep. 149; Haverstick v. Sipe, 33 Pa. St. 388; McCarty v. Kitchenman, 47 Pa. St. 243; Powell v. Simms, 5 W. Va. 1; 13 Am. Rep. 629; Turner v. Thompson, 58 Ga. 268; 24 Am. Rep. 297; Mullen v. Stricker, 19 Ohio St. 135; 2 Am. Rep. 379; Morrison v. Marquardt, 24 Iowa, 35; but see Jones v. Jenkins, 34 Md. 1; 6 Am. Rep. 300; Hubbard v. Town, 33 Vt. 295; Gerber v. Grubell, 16 Ill. 217; Sloat v. McDougall, 9 N. Y. S. 631; Burr v. Mills, 21 Wend. 290; Treadwell v. Inslee, 120 N. Y. 458.

CHAPTER VIII.

ELECTION.

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§ 123. **The fundamental principles of the doctrine.**—The equitable doctrine of election is not to be confounded with the right of election given by a statute in particular cases; but it is a right and an obligation, depending upon the principles of equity. The rule adopted and enforced by the court of equity under the head of “election,” is as follows: wherever one undertakes by will or grant, to convey property belonging to another, and in the same will or grant, conveys other property of his own to the person whose property he wrongfully attempts to dispose of; the party whose property he does wrongfully dispose of, and to whom benefits are granted by the same instrument, is held to be obliged to elect between repudiating the terms of the instrument and the benefit provided for him therein, or doing whatever is necessary in the way of a transfer of his own property, which was attempted to be conveyed in the instrument in question, to the party who was intended to be benefited thereby. In other words, if A. by his will devises to B. property belonging to C., and in that same will gives to C. property of his own; in such a case, the court presumes, that the testator intended, or assumes it to be the equitable duty of C., in order that C. may avail himself of the benefit intended for him under the will of A., to do whatever is necessary in the way of a transfer to B. of all the property which the will indicates to be given to B., so that the entire will might be carried out. The doctrine of election denies to C. the right to repudiate one part of the will of A., viz.: that part which purports to dispose of property belonging to

C., and at the same time claim the enforcement of that part of the will which provides for the bestowal of profits upon C.¹

This doctrine is not peculiar to the American and English equity jurisprudence; it is to be found in a modified form in the Roman law. In that jurisprudence it was a common provision of a will to devise the testator's property to one person subject to the bestowal of certain benefits upon others named therein. Where the provision for the benefit of others was in the nature of a grant to them of property that was not the testator's, and therefore could not be directly conveyed to such persons by the will, this provision appeared as a condition upon the acceptance of the testament by the general devisee, or heir in the Roman sense, that the testamentary heirs shall procure for the beneficiaries by purchase the property or benefits, which the testator intended they should have. The application of the rule in the Roman law was limited to the cases in which the testator attempted to dispose of property which he knew to be the property of others, and not where he undertook to dispose of property under the erroneous impression that he owned such property. In the latter case, the doctrine of election did not in the Roman law apply. In that case, the devisee was under no obligation to procure the property in question as a condition precedent to the enjoyment of the devise.² It is very probable that this limitation in the Roman law to the application of the doctrine of election, is the cause of the confusion which prevails among the cases, not only as to limitations of the doctrine in American and English law, but likewise as to the fundamental principles upon which the whole doctrine is supported. In the American and English law, the limitation, just explained as existing in the Roman law, is not recognized, the courts holding that the doctrine of election will apply, and will be enforced whether the testator or grantor undertook to convey the property of another with the knowledge of the fact that the property did not belong to him, or ignorant of such fact, and believing that it was his own property. In both cases, the doctrine of election applies.³ Now, in consequence of the limitation imposed upon

¹ The operation of this rule may be shown by the facts of the following case which was one of the earliest cases in which the question of election arose namely, the case titled "anonymous." Gilbert's Eq., p. 15: "A. was seized of two acres, one in fee, t'other in tail; and having two sons, he, by his will, devises the fee-simple acre to his eldest son, who was issue in tail; and he devises the tail acre to his youngest son, and dy'd: the eldest son entered upon the tail acre; whereupon the youngest son brought his bill in this court against his brother, that he might enjoy the tail acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed him something. *Lord Chancellor Cowper*. This devise being designed as a provision for the youngest son, the devise of

the fee acre to the eldest son must be understood to be with a *tacit* condition that he shall suffer the youngest son to enjoy the tail acre quietly, or else that the youngest son shall have an equivalent out of the fee acre, and decreed the same accordingly." See, also, *Hyde v. Baldwin*, 17 Pick. 303, 308, *Shaw C. J.* See, also, *Smith v. Guild*, 34 Me. 443, 447; *Weeks v. Patten*, 18 *Id.* 42; *Hamblett v. Hamblett*, 6 N. H. 333; *Glen v. Fisher*, 6 Johns. Ch. 33; *Fulton v. Moore*, 25 Pa. St. 468; *Cauffman v. Cauffman*, 17 Serg. & R. 16; *Preston v. Jones*, 9 Barr. 456; also, *George v. Bussing*, 15 B. Mon. 558; *Buist v. Daws*, 3 Rich. Eq. 281; *Stump v. Findlay*, 2 Rawle, 168, 174; *McGinnis v. McGinnis*, 1 Kelly, 496, 503.

² *Pomeroy's Eq. Jur.*, Vol. 1, § 463.

³ See *Cooper v. Cooper*, L. R. 6 Ch. 15, 16, 20;

the application of the doctrine of the Roman law to the case in which the testator or grantor attempts to dispose of property which he knew belonged to another, it was presumed that the foundation for the doctrine was the implied intention of the grantor that the beneficiary, whose property he attempted to dispose of, should convey in accordance with his attempted disposition of it; and that has been considered by the majority of the authorities to be the true foundation for the doctrine.¹ This presumption of an intention of the testator is not possible, however, where it can be shown that he undertook to convey property belonging to another under the erroneous impression that the property was his own. This fact of error in respect to the ownership of the property, is inconsistent with the presumption of his intention that the beneficiary, to whom the property belonged, should receive his benefits under the will upon the condition of his making good the attempted disposition of the beneficiary's property; for the testator made the attempted disposition, under the impression that the property was his own. Professor Pomeroy suggests the only reliable foundation in principle for the whole doctrine when he states that "the whole theory and process of election is a practical application of the maxim: He who seeks equity must do equity."² In other words, the obligation to elect is imposed upon a grantee or devisee whenever such a duty is plainly equitable, and whenever the facts of the case make it inequitable for the beneficiary to take the benefits under the grant or will, and at the same time repudiate other provisions of the will which affect him injuriously.

§ 124. **The scope and effect of the doctrine.**—Whenever a case does arise to which the doctrine of election applies, it becomes an important question, what is the scope and effect of the application of the doctrine? To recur to the illustrative example given in the preceding paragraph: if A. undertakes to dispose by will of property belonging to C. in favor of B., and by the same instrument makes bequests to C., the court of equity pronounces it to be inequitable for C. to accept for himself the benefits bestowed by the will, while he refuses to transfer to B. that part of his own property which the testator (A.) undertook to give to B. If C., under the enforcement of this duty of election, should decide to comply with the terms of the will—and ordinarily he would do this whenever the benefits to be derived from the will were more valuable than the property which, under the doctrine of election, he would be obliged to return to B. in carrying out the provision of the will referring thereto—no difficulty is likely to be encountered. But when the testamentary provision in

see *Ingram v. Ingram*, cited in *Kirkham v. Smith*, 1 Ves. Sen. 258, 259; *Theilsson v. Woodford*, 13 Ves. 209, 220; *Whistler v. Webster*, 2 Ves. 367; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Grissell v. Swinboe*, L. R. 7 Eq. 291.

¹ Mr. Swanston to the case of *Dillon v. Parker*,

1 Sw. 359, 394, 401; Lord Alvanley, in *Whistler v. Webster*, 2 Ves. 367, 370; *Noyes v. Mordaunt*, (2 Vern. 581; Eq. Cas. Abr. 273, pl. 3; Gilb. Eq. R. 2); *Streatfield v. Streatfield*, (Cas. temp. Talbot, 176).

² See 1 Pomeroy's *Equity Jurisprudence*, § 465.

behalf of C. is of less value than the property belonging to C., which is by A.'s will transferred to B.; or where C. has an attachment to his own property of a sentimental character which induces him to refuse to part with it as a condition precedent to the reception of the benefits designed for him by A., two difficult questions could arise. In the first case, where the property of C., which A. undertakes to devise to B., is pecuniarily more valuable than the benefit provided for C., C.'s course is plain; namely, he would refuse to accept the provision made for him in A.'s will and keep his own property. It is plain that the court could not justly compel C. to obey or carry out the provision of the will; for apart from the inequitable character of such an order, it is itself inconsistent with the doctrine of election which imposes upon C. the duty of performing the condition attached to the devise in his favor, or refusing to accept the same. If, therefore, the court of equity undertakes to provide for his enjoyment of some benefit under A.'s will, when C. rejects the benefits bestowed upon him by A.'s will and refuses to transfer his own property to B. in accordance with the provision of A.'s will, there is but one course for the court to follow, viz: to take the property which A. had given to C. and turn it over to B. In the exercise of such a power the court would be creating a new species of title. It is plain that B. could not claim title to the property devised to C., either by grant or by devise; in other words, the title which he could claim, whatever it may be called, he did not acquire by transfer from A.; the title originated with the judgment or decree of the court of equity. It is, however, plainly the fact that the decree of a court of equity, under the circumstances just explained, would operate to transfer to B. the property devised by A.'s will to C.¹

In the second case, where the refusal of C. to comply with the terms of the will, and to transfer to B. the property A. designed B. to have, is due not to the fact that the benefits under the will designed for C. are of less value than that part of C.'s property which A. has undertaken to give to B., but because C. has a sentimental attachment to his own property above and beyond its pecuniary value, which induces him to give up the benefits provided for him under A.'s will, rather than to part with his own property: what should in such a case be the judgment of the court in behalf of B. is a doubtful

¹ "I conceive it to be the universal doctrine that the court possesses power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course. Out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if sufficient, it is left in his hands. In the case to which I have referred, Lord Loughborough uses the expression that the court 'lays hold of what is devised, and makes compensation out of that to the disappointed party.' * * * It would be too much

now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir-at-law without any will to guide it; the will destined to the devisee not this estate, but another; he takes by the act of the court (an act truly described as a strong operation); not by descent, not by devise, but by decree; a creature of equity." Opinion of Sir Thomas Plumer, M. R., in *Gretton v. Haward*, 1 Sw. 409, 433, 441.

question. According to some of the older cases, it appears that in this case, as in the case just discussed, where C.'s provision is of less value than the provision for B., C., by his refusal to comply with the terms of the will, in respect to his own property, would forfeit altogether the provision made for him in the will.¹ But inasmuch as the court of equity only interferes in such cases for the purpose of securing to B. the substantial interest which he was designed to have, if the court went beyond providing for B. full compensation in money for the loss of the property which he would have received with C.'s consent to the full operation of the will, it would be doing more than securing for B. the satisfaction of his equitable claims. And such would be the case if the entire provision in favor of C. was declared to be forfeited by C. in favor of B., where the devise to C. was more valuable than the property of C. which the will undertook to give to B. The full consideration of B.'s equitable claim only requires, that B. should get in money the full value of the property which the will designs to go to him; and such is the conclusion of the majority of the courts, such courts holding that when C. refuses to transfer to B. the property A. undertook to dispose of in favor of B., C. will not forfeit his entire interest in the testamentary provision, but he shall take this benefit subject to the payment of money to B. in consequence of the latter's loss of the property designed for him; and if C.'s refusal is absolute, and, in consequence of such absolute refusal to have anything to do with the will, it becomes necessary for the court to sell the property devised by A. to C., whatever surplus remains undisposed of after a full satisfaction of B.'s claim for compensation, such surplus is the property of C. under A.'s will.²

§ 125. **Doctrine applies both to wills and deeds.**—Not only does the doctrine of election apply to cases of conflicting interest arising in the attempted disposition of property by will, which belonged to some other person than the testator, but likewise to all similar cases which arise, or appear in deeds and other instruments of conveyance *inter vivos*.³ The doctrine also applies to contracts of every description which involves the transfer or assignment of property.⁴

§ 126. **Intention to convey another's property essential.**—While it is true that the doctrine applies to cases where the testator undertakes or attempts to convey property belonging to another under

¹ Cowper v. Scott, 3 P. Wms. 124; Villareal v. Lord Galway, 1 Bro. Ch. 202 n; Green v. Green, 2 Meriv. 88; and Lord St. Leonards, in 2 Sugd. on Powers, 145 (7th ed.).

² Spread v. Morgan, 11 H. & L. Cas. 588; Cauffman v. Cauffman, 17 S. & R. 16, 24, 25; Philadelphia v. Davis, 1 Whart. 490, 502; Stump v. Findlay, 2 Rawle, 168, 174; Lewis v. Lewis, 13 Pa. St. 79, 82; Van Dyke's Appeal, 60 Id. (10 P. F. Smith) 481, 490; Sandoe's Appeal, 65 Id. 314; Key v. Griffin, 1 Rich. Eq. 67; Marriott v. Sam Badger,

5 Md. 306; Maskell v. Goodall, 2 Disney, 282; Roe v. Roe, 21 N. J. Eq. (6 C. E. Green) 253; Estate of Delaney, 49 Cal. 77; Tiernan v. Roland, 3 Harris, 430, 451; Wilbank v. Wilbank, 18 Ill. 17.

³ Moore v. Butler, 2 Sch. & Lef. 266; Bacon v. Cosby, 4 De G. & Sm. 261; Anderson v. Abbott, 23 Beav. 457.

⁴ Bigland v. Huddleston, 3 Bro. Ch. 235 n; Bacon v. Cosby, 4 De G. & Sm. 261; Mosby v. Ward, 29 Beav. 407.

the erroneous impression that the property was his own, as well as to cases where he attempts to convey property which he knows at the time to be another's, yet in order that the doctrine may apply at all, he must intend to dispose of that property. It is, however, not necessary that he should intend to deprive another of his property;¹ but it is necessary to show that he intended to dispose of the specific property or interest which is proven to be the property of another. Unless that fact is established, it is impossible for the doctrine of election to apply.² Thus, for example, if he expresses in his will some doubt as to his right to the property referred to, and disclaims an intention to dispose of such property if it should not be his own, and makes some other provision, in that event he has not manifested any absolute intention to dispose of such property, and hence the doctrine of election could not apply.³ So, also, where the description of the property conveyed or transferred by the will, or conveyance, is so general in character that it would be satisfied by the interpretation that the grantor or testator intended to transfer only that property which was the testator's: in such a case the presumption of an intention to convey property that did not belong to the testator would not be sustained, and for that reason, in such cases, the doctrine of election would not apply.⁴

§ 127. **Intention where donor has partial interest in property disposed of.**—Where the donor of property belonging to another has no interest whatsoever in the property which he attempts to dispose of, the intention to dispose of the interest of another is manifest and is a necessary presumption from the attempted disposition of the property itself. But where the donor has a partial interest in that property in common with others, and he undertakes, or makes a general disposition of such property under a general description, the intention to dispose of the interest of others is not so plain. The presumption of law would, in the absence of a positive proof of the intention to dispose of the interest of others, be against the operation of the grant or devise on anything but his own interest; and the presumption would prevail until it was shown as a matter of fact that he did intend to convey not only his own interest in the property, but likewise the interest of other owners.⁵ But in order that the intention of the

¹ *Cooper v. Cooper*, L. R. 6 Ch. 15, 16, 20; *Coutts v. Ackworth*, L. R. 9 Eq. 519; *Stump v. Findlay*, 2 Rawle, 168, 174; *McGinniss v. McGinniss*, 1 Kelley, 496, 503.

² *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Codrington v. Lindsay*, L. R. 8 Ch. 578; *McElfresh v. Schley*, 2 Gill, 182, 201; *Jones v. Jones*, 8 Gill, 197; *Waters v. Howard*, 1 Md. Ch. 112; *Hall v. Hall*, 1 Bland Ch. 130, 135; *Wilson v. Arny*, 1 Dev. & Bat. Eq. 376, 377; *Penn. Life Ins. Co. v. Stokes*, 61 Pa. St. (11 P. F. Smith) 136; 2 Brews. 580; *Weeks v. Weeks*, 77 N. C. 421; *Havens v. Sackett*, 15 N. Y. 360; *Thompson*

v. Thompson, 2 Strobh. Eq. 48; *O'Reilly v. Nicholson*, 45 Mo. 160.

³ *Bor v. Bor*, 3 Bro. P. C. 167 (Toml. ed.); *Church v. Kemble*, 5 Sim. 525.

⁴ *Maxwell v. Maxwell*, 2 De G. M. & G. 705; 16 Beav. 106; *Johnson v. Telford*, 1 Russ. & My. 244; *Allen v. Anderson*, 5 Hare, 163; *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Lamb v. Lamb*, 5 W. R. 720.

⁵ *Stephens v. Stephens*, 1 De G. & J. 62; *Wilkinson v. Dent*, L. R. 6 Ch. 339; *Grissell v. Swinhoe*, L. R. 7 Eq. 291; *Havens v. Sackett*, 15 N. Y. 365; *Lewis v. Smith* 9 Id. 502; *Adist v.*

donor to dispose of more than his own interest in the property may be established, it must be proven by the terms of the instrument of conveyance. Parol evidence is inadmissible to prove such intention.¹

§ 128. **An independent substantial benefit necessary.**—Not only must there be a manifest intention of one to dispose of property, or of an interest in property, which is not his, in order that the doctrine of election may apply, but there must also be in conjunction with this intention an actual bestowal of substantial benefits by the will or grant upon the person whose property or interest has been illegally disposed of by the same instrument. Where, therefore, the testator or grantor gives property to one to whom he is obliged to give it, and he then proceeds to give to another person the property belonging to the first devisee; in such cases, there being no independent substantial benefit received by such devisee under the will, there is no ground for the application of the doctrine of election, although there was a manifest intention of the testator to give to the other person property belonging to the former.²

§ 129. **Ordinary cases of election where grantor has no interest in property.**—The simplest case of election in which the donor has no interest in the property which he attempts to dispose of, is that in which by words of specific description he undertakes to devise or grant to another property not belonging to him, and by this same instrument confers upon such property-owner bequests or devises of his, the testator's, property. In this case, there is very little room for doubt or uncertainty in respect to the application of the doctrine of election. Given the intention to dispose of another's property and the bestowal by the same instrument of a substantial benefit upon such property-owner, the claim for an election is clearly made out.³

Adist 2, Johns. Ch. 448; Bull v. Church, 5 Hill, 206; Fuller v. Yeates, 8 Paige, 325; Sanford v. Jackson, 10 Id. 266; Vernon v. Vernon, 53 N. Y. 351; Lefevre v. Lefevre, 59 Id. 435; Reed v. Dickerman, 12 Pick. 146; Morrison v. Bowman, 29 Cal. 337, 348; Peck v. Brummagin, 31 Id. 440, 447; De Godey v. Godey, 39 Id. 157, 164; *In re* Buchanan's Estate, 8 Id. 507; Beard v. Knox, 5 Id. 252; Button v. Lies, 21 Id. 91; *In re* Silvery's Estate, 42 Id. 211; Havens v. Sackett, 15 N. Y. 365; Church v. Bull, 2 Denio, 430; Bull v. Church, 5 Hill, 207; Fuller v. Yates, 8 Paige, 325; Sanford v. Jackson, 10 Id. 266; Savage v. Burnham, 17 N. Y. 561, 577; Leonard v. Steele, 4 Barb. 20; Lewis v. Smith, 9 N. Y. 502; Mills v. Mills, 28 Barb. 454; Morrison v. Bowman, 29 Cal. 348; Chapin v. Hill, 1 R. I. 446; Collins v. Carman, 5 Md. 503; Stark v. Hulton, Sext. (N. J.) 216; Higginbotham v. Cornwell, 8 Gatt. 83; Douglas v. Feay, 1 W. Va. 26; Hide v. Baldwin, 17 Pick. 303, 308; Smith v. Guild, 34 Me. 443, 447; Weeks v. Patten, 18 Id. 42; George v. Bussing, 15 B. Mon. 558; Apperson v. Bolton, 29 Ark. 418; Alling v. Chatfield,

42 Conn. 276; Brown v. Brown, 55 N. H. 106; Coy v. Rogers, 77 Pa. St. 160; Youngs v. Pickens, 49 Ind. 23; Metteer v. Wiley, 34 Iowa, 214; Colgate v. Colgate, 8 C. E. Green, (23 N. J. Eq.) 372; Worthen v. Pearson, 33 Ga. 385; Havens v. Sackett, 15 N. Y. 365; Hall v. Hall, 1 Bland Ch. 130, 135; Gable v. Daub, 4 Wright, 217.

¹ Philadelphia v. Davis, 1 Whart. 490; Timberlake v. Parish, 5 Dana, 345; Waters v. Howard, 1 Md. Ch. 112; McElfresh v. Schley, 2 Gill, 182; Jones v. Jones, 8 Id. 197; Pickersgill v. Rogers, 5 Ch. D. 163, 170.

² Box v. Barrett, L. R. 3 Eq. 244; Dashwood v. Peyton, 18 Ves. 41; Blake v. Banbury, 1 Id. 515, 523; Forrester v. Cotton, Amb. 388; 1 Eden, 532, 535; Grissell v. Swinhoe, L. R. 7 Eq. 291; and see Cooper v. Cooper, L. R. 6 Ch. 15.

³ Dillon v. Parker, 1 Sw. 359, 376, 381, 394, and notes by Mr. Swanston; Gretton v. Haward, 1 Sw. 409, 413, 420, 425, 433; Streatfield v. Streatfield, Cas. temp. Talb. 176; 1 Eq. Lead. Cas. 503, 510, 541 (4th Am. ed.); Welby v. Welby, 2 V. & B. 199; Lord Raneliffe v. Parkyns, 6 Dow. 149, 179; Ker v. Wauchope, 1 Bligh, 1, 25.

§ 130. Cases of election arising under powers of appointment.—

These cases do not occur very often in the United States, although it is possible for them to arise. They arise in the attempted exercise of a special or particular power of appointment in favor of someone other than those for whose benefit the power was given. In the same instrument which does wrongfully exercise the power of appointment, the donee of the power grants other independent benefits to the intended beneficiary of the power. For example, if A., having the power to appoint certain property to the children of B. by will, and he should by his will appoint this property to some stranger, and by the same will give to the children of B. property of his own; in such a case, the children of B. would not be permitted to deny the validity of A.'s appointment of the property to the stranger, and at the same time claim the benefit given to them under A.'s will; these children must elect between the two. There would not, however, be a case of election if the children of A. did not acquire title to the property over which the power operated in case of the failure to exercise the power, for in that case it would not be within the power of the children to make good the wrongful exercise of the power by A. The right of election would only apply when the property, in default of a defective appointment, became vested in the objects of the appointment.¹ Here, as elsewhere, it is an indispensable requirement of the application of the doctrine of election, that the testator should give to the objects of the appointment property of his own which they are impliedly intended to receive in the place of the property to which they are entitled under the power. Without such an independent benefit, the right of election could not be claimed.² Where, therefore, the two pieces of property disposed of by the will, did not belong to the testator—both cases being simply an exercise of a power of appointment—and the parties receiving interest under the will do not receive anything more than what they were entitled to receive under the terms of the powers of appointment, the doctrine of election cannot apply. For example, if there are two powers, one of them being exclusive and the other not; and there are several persons who are beneficiaries under both powers; the appointment of the whole fund under the exclusive power to A., who is the object of both, and the appointment of the whole fund under the non-exclusive power to all the objects of that power with the exception of A., who is an object of both powers, A. would not, in that case, be compelled to elect between his enjoyment of the exclusive appointment under the first power, and his claim of a proposed share of the property under the second power. The second appointment would be invalid, on account of the wrongful exclusion of A.; while in the former case the exercise

¹ *Whistler v. Webster*, 2 Ves. 367; *England v. Lavers*, L. R. 3 Eq. 63.

Warde, 2 Ves. 336; *Coutts v. Ackworth*, L. R. 9 Eq. 519.

² *In re Fowler*, 27 Beav. 362; *Bristowe v.*

of the power was valid, because the exclusive appointment was permissible under the terms of the power, and A. is not put to his election.¹ The same principle applies where both powers are exclusive, as where one power is to be exercised by appointment to the children and grandchildren, and the second power by appointment only to children. Where the appointment is made under the former power to children only, and under the latter power the appointment is made to children and grandchildren, who cannot, under the terms of this power, be the object of it, the appointment to grandchildren is void; but notwithstanding such void appointment and the exclusive appointment under the first power, of which grandchildren were possible objects, the doctrine of election does not apply in favor of the grandchildren who are thus excluded from the benefit of both powers.²

Not only must there be in this case of appointment an actual bestowal of an independent benefit, in order that the doctrine of election may apply, but there must likewise be an intention to make an unlawful, or wrongful, exercise of the power. Where, therefore, the donee makes the wrongful appointment conditional upon his power to do so, there is no case for the doctrine of election, because there has been no positive disposition of property belonging to another.³ Where an appointment is made lawfully, the donee can, in the absence of restrictions, impose upon the acceptance of such an appointment whatever conditions he pleases; and he may, therefore, direct that the appointee shall, upon acceptance of an appointment, bestow upon some third party some benefit or property designated. Where that condition is plainly manifested, it can be enforced; but where there is any doubt as to the intention of the donee to impose a positive condition of that kind upon the appointment, the presumption is against the positive character of the condition, and in favor of its being merely a request, that the appointee should confer some benefit upon some third party. If, however, the donee imposes a positive condition upon the enjoyment of the appointment, that the appointee shall give to some stranger the benefit indicated, then, unquestionably, the condition must be performed; but this is not a case for the application of the equitable doctrine of election, but rather one for the enforcement of an express condition.⁴

§ 131. **Cases of election where the testator has attempted to dispose of his property by will which is inoperative.**—In this class of cases a new feature is introduced into the law of election. In most of the cases the doctrine arises where the testator undertakes by his lawful will to convey to another property which is not his own. In this case which we are about to explain, the doctrine arises, if at all,

¹ *In re Aplin*, 13 W. R. 1062.

² *In re Fowler*, 27 Beav. 362.

³ *Church v. Kemble*, 5 Sim. 525.

⁴ *Woolridge v. Woolridge*, 1 Johns. 68; *Carver v. Bowles*, 2 Russ. & My. 301; *Churchill v.*

Churchill, L. R. 5 Eq. 44; *Wollaston v. King*, L. R. 8 Eq. 165; but see *Moriarty v. Martin*, 3 Ir. Ch. R. 26; see *Wallinger v. Wallinger*, L. R. 9 Eq. 301; *King v. King*, 15 Ir. Ch. R. 479; *Boughton v. Boughton*, 2 Ves. Sen. 12.

where the testator makes a will under which he undertook to dispose of all his property, both real and personal, but which is inoperative as to some of the property, and operative as to others, and in consequence of this supposed invalidity of his will, he bestows a benefit upon some of his heirs greater than the interest which such persons would have acquired as heirs under the law of descent, if the ancestor had died intestate, inasmuch as the heirs, to whom valid devises or bequests had been made, could likewise claim their share of inheritance in the property not lawfully disposed of by the will, on the ground that in respect to this property the ancestor had died intestate. That is, if A. should die leaving his sons, B. and C., and he should by his will give to B. all the property of a certain kind, and to C. all the property of another kind; and for some reason the will would be invalid as to the gift of property to B.: B. would not be able to claim any share under the devise to him on account of its invalidity; the ancestor in respect to the property covered by the devise to B. would be declared to have died intestate, and hence this property would be divided among his heirs, just as it would be if he had never made a will at all. The outcome of the transaction would be that A. would receive not only the property designed for him by the will, and in respect to which the will was valid, but he would also share equally with B. in the division of the property which the ancestor had designed to B., but in respect to which the will was invalid.

This inequality furnishes some ground for the application of the doctrine of election. There are four cases in which this question may arise. The first case is where, in consideration of the infancy or coverture of testator, the will is invalid in its attempted disposition of lands or other species of property, but it is valid as to the other dispositions of property. In the case of infant-testators, the infant is held to have the power of disposing by will of his personality before he acquires the power to dispose of his lands.¹ In the other case, that of a married woman, the common law did not permit her to make a will of any of her property, except that which she held as her separate estate.² In both cases, it has been held that, notwithstanding the attempted disposition of property in violation of the law and the consequent inequality or bestowal of benefits under the will among those who had a moral claim upon the consideration of the testator, the doctrine of election would, nevertheless, not apply; in conformity with the general rule, that a testator must have a legal capacity to do the intended act in order that the doctrine may apply.³ In the second case, the testator has the full capacity to dispose of all of the property; but in

¹ *Hearle v. Greenbank*, 3 Atk. 695, 715; *Ves. Sen.* 298; *Brodie v. Barry*, 2 V. & B. 127; *Sheddon v. Goodrich*, 8 Ves. 481; *Snelgrove v. Snelgrove*, 4 Desau. 274; *Melchor v. Burger*, 1 Dev. & Batt. Eq. 634; *Kearney v. Macomb*, 1 C. E. Green,

189; *Tongue v. Nutwell*, 17 Md. 212, 229; *Jones Jones*, 8 Gill, 197.

² *Rich v. Cockell*, 9 Ves. 369; *Blaklock v. Grindle*, L. R. 7 Eq. 215.

³ *Thellusson v. Woodford*, 13 Ves. 223; *Gardiner v. Fell*, 1 J. & W. 22.

consequence of his failure to comply with the rules of law in respect to the execution of the will, his will is invalid so far as the devises of real property are concerned, while the will is valid in respect to the dispositions of personal property.

At common law, the requirements of the execution of a will of personal property were different from those imposed in the execution of a will of real property. Where, therefore, the will was executed in compliance with the requirements of a will of personal property only, and the will undertook to dispose of lands also, the will, so far as the devise of lands, would be invalid, while it would be valid as to the disposition of personal property. The same general principle controls the determination of the question, whether in this case the doctrine of election applies, viz.: that the doctrine will not apply to a case where there has not been a valid exercise of the power of disposition. In this case, the conclusion of the courts is, that unless there be an express condition imposed upon the enjoyment of the bequest of personal property, to the effect that such legatee shall make good the ineffectual disposition of lands by the same will, the doctrine of election does not apply; and such legatee could appropriate the benefits accruing to him under the valid operation of the will, and enforce his claim as heir in the lands of the testator, as to which he must be declared to have died intestate, in consequence of the invalidity of the will in respect to the devise.¹ While the courts generally concede that this conclusion must be taken as an established rule of law, a number of able judges have expressed their conviction that the rule is not sound in principle.² And it seems that, in consequence of this doubt concerning the correctness of the rule, the courts were inclined to recognize the existence of such a condition on very slight evidence of the intention to impose it; and they would pronounce the bequest to be subject to such a condition, whenever in their judgment the whole tenor of the instrument indicated the testator's intention to give the bequest only upon condition that the devise is operative. In such a case, the courts permitted the doctrine of election to apply, even though there was no direct imposition of a condition.³ In this country, at the present time, the same law governs the validity of wills as to real estate which controls the validity of the will as to personal property; and hence the necessity for determining whether the doctrine of election applies to this case is no longer an important one in America. In the third case—which also is obsolete in consequence of a change in the law which permits a will to

¹ *Sheddon v. Goodrich*, 8 Ves. 481; *Gardiner v. Fell*, 1 J. & W. 22; *Thellusson v. Woodford*, 13 Ves. 220, 221; *Wilson v. Wilson*, 1 De G. & Sm. 152; *Kearney v. Macomb*, 1 C. E. Green, 189; *Tongue v. Nutwell*, 17 Md. 212, 219; *Jones v. Jones*, 8 Gill, 197; *Melchord v. Burger*, 1 Dev. & Batt. Eq. 634; *McElfresh v. Schley*, 1 Gill, 181.

² *Lord Eldon*, in *Sheddon v. Goodrich*, 8 Ves. 481, 496; *Sir Wm. Grant*, in *Brodie v. Barry*,

2 V. & B. 127; and *Lord Kenyon*, in *Cary v. Askew*, 1 Cox, 344.

³ *Sheddon v. Goodrich*, 8 Ves. 481, 496, *per Lord Eldon*; *Melchor v. Burger*, 1 Dev. & Batt. Eq. 634; *Snelgrove v. Snelgrove*, 4 Desau. 274, 300; *Jones v. Jones*, 8 Gill, 197; *Kearney v. Macomb*, 1 C. E. Green, 189; *McElfresh v. Schley*, 1 Gill, 181; *Nutt v. Nutt*, 1 Freem. Ch. 128.

be operative under the conditions existing at the time the will goes into effect, instead of operating 'only upon the circumstances existing when the will was executed—the doctrine of election finds a possible application, where a will undertakes to devise property which is acquired by the testator subsequent to its execution. Under the old law, the will could not be made to apply to such subsequently acquired property, on the ground that the testator could not be presumed to have intended to dispose of property which he did not own when he made the will. Now, the law provides that if the description contained in the will be broad enough to include the property acquired subsequent to the execution of the will, the will will be as operative in respect to such property as it is in respect to the property already owned by the testator when he made the will. Under the old law, however, in respect to the devise of after-acquired lands, the will was void. In this case, the courts have held that where a clear intention is manifested by the will to dispose of the after-acquired lands to some stranger, and some additional or independent benefit is granted to the heir, the heir would be compelled to elect between rejecting the benefit under the will, or making good the testator's attempted disposition of the after-acquired lands.¹ But if the words of description in the will were general and did not *necessarily* include or apply to the after acquired property, and therefore this description could be satisfied by confining its operation to property already owned by the testator when he made the will, the doctrine of election would not apply.²

The last, and the only case under this heading to which the doctrine of election would now be held to apply in this country, is in respect to a will which undertakes to dispose of property situated in different states, or countries, whose laws in respect to the formalities of execution of wills are different, and the will in question was executed in conformity to the law of one of these states, and in violation of the provisions of the law of the other state. In such a case, the will would be valid in respect to its disposition of lands situated in the former state, but would be 'invalid in respect to the disposition of lands situated in the latter state. Now, two questions are raised in determining the application of the doctrine of election: in the first place, it must be shown that the testator intended to dispose of both species of property. If the terms of the description are so general in character, that the devise would be satisfied by its application to the property, situated in the country in conformity with whose law of wills this will has been executed, the courts hold that the testator did not intend to convey the property situated in the country, whose law has not been complied with in the execution of the will. But if the terms of the description are not satisfied by their confinement to the property situated in the coun-

¹ Churchman v. Ireland, 1 Russ. & My. 250; 4 Sim. 520; Thellusson v. Woodford, 13 Ves. 209, 211; s. c., *sub nom.* Rendlesham v. Woodford, 1 Dow. 249; McElfresh v. Schley, 2 Gill, 181;

Philadelphia v. Davis, 1 Whart. 490, 503; Hall v. Hall, 2 McCord Ch. 269, 297, 306.

² Johnson v. Telford, 1 Russ. & My. 244; and see Plowden v. Hyde, 2 De G. M. & G. 684, 687.

try or state whose law has been complied with in the execution of the will, then it is a necessary conclusion that the testator intended to dispose of both kinds of property. For example, where one undertakes to dispose in terms of "all my real and personal estate whatsoever, and wheresoever situated," the intention of the testator is clear to dispose of property, no matter where it is situated. The will, therefore, must apply to all the testator's property, whether it is situated in a country in which the will is valid, or invalid.¹ In all such cases of a manifest intention that the will should cover all of the testator's property, wheresoever situated, the courts declare that the doctrine of election applies, and compel the devisee and heir—who acquires in his former character interests which he could not claim in the same property as heir, if the ancestor had died intestate—to elect between the repudiation of this extraordinary benefit, or to make good the attempted or unlawful disposition of the lands which were situated in another state. This conclusion of the courts is sustained as the rule of law, both in England and in this country. The common case for the application of the doctrine in England is, where a will validly executed according to the English law provides for the disposition of lands situated in Scotland, whose peculiar law has not been complied with in the execution of the will.² In America, the common example is the execution of a will by the employment of two witnesses, where the will undertakes to dispose of lands situated in a state whose law requires the attestation of three witnesses. Notwithstanding a contrary ruling in Maryland, in which the court held that the doctrine of election did not apply,³ it must be taken to be the American doctrine, that the doctrine of election does apply in such cases.⁴

¹ *Maxwell v. Maxwell*, 2 De G. M. & G. 705; 16 Beav. 106; *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Lamb v. Lamb*, 5 W. R. 720.

² *Brodie v. Barry*, 2 V. & B. 127; *Orrell v. Orrell*, L. R. 6 Ch. 302; *Dewar v. Maitland*, L. R. 2 Eq. 834; *McCall v. McCall*, Drury, 283, *per* Lord Chancellor Sugden.

³ See *Jones v. Jones*, 8 Gill, 197.

⁴ The case of *Vandyke's Appeal*, 60 Pa. St. 489, is an exceedingly important one, and lays down what must be accepted as the American view. The testator, in this case, gave to his daughters legacies which fairly exhausted all his property situated in Pennsylvania, and then gave to the sons the real estate which was situated in New Jersey; and the will was so executed that it was valid in Pennsylvania, but invalid in respect to the disposition of the lands situated in New Jersey, because in the execution of the will the law of New Jersey was not complied with. The courts decreed that the sons should receive out of the personal estate bequeathed to the daughters, sums equal in value to the shares of the real estate in New Jersey which went to the daughters, in consequence of the invalid disposition of such lands, and which would be vested in the sons

if the devise had been valid according to the laws of New Jersey. In delivering the opinion of the court, Judge Sharswood said: "It may certainly be considered as settled in England, that if a will purporting to devise real estate, but ineffectually, because not attested according to the statute of frauds, gives a legacy to the heir-at-law, he cannot be put to his election. (*Hearle v. Greenbank*, 3 Atk. 605; *Thellusson v. Woodford*, 13 Ves. 209; *Buckeridge v. Ingram*, 2 Id. 652; *Sheddon v. Goodrich*, 8 Id. 482.) These cases have been recognized and followed in this country. (*Melchor v. Burger*, 1 Dev. & Batt. Eq. 634; *McElfresh v. Schley*, 2 Gill, 181; *Jones v. Jones*, 8 Gill, 197; *Kearney v. Maccomb*, 1 C. E. Green, 189.) Yet it is equally well established, that if the testator annexed an express condition to the bequest of the personalty, the duty of election will be enforced. (*Boughton v. Boughton*, 2 Ves. Sen. 12; *Whistler v. Webster*, 2 Ves. 367; *Ker v. Wauchope*, 1 Bligh, 1; *McElfresh v. Schley*, 2 Gill, 181.) That this distinction rests upon no sufficient reason has been admitted by almost every judge before whom the question has arisen. Why an express condition should prevail, and one however clearly implied should not, has

§ 132. **Cases in which the donor has a partial interest in property donated.**—Where one of two joint-owners of property undertakes to convey the property in its entirety to a stranger, and conveys to the part-owner another independent interest or property, the doctrine of election applies, imposing upon such part-owner the duty of electing whether to carry out the provision of the will in respect to the property of which he is part-owner, or of rejecting the benefits he derives under the will. But inasmuch as the donor has a part interest in the property which he undertakes to give away, it is not always clear, from the attempted disposition of that property, that he intended to convey to the stranger anything more than his own interest in the property; and unless the terms of the gift clearly and unmistakably prove the intention to convey more than his own interest in the property—either by an express declaration of such interest, or by implication from the fact that the terms of the gift could not be satisfied by the transfer of his interest only—the presumption is that the gift affects only his own interest, and, therefore, the doctrine of election does not apply in such a case. The part-owner of the property conveyed would then retain his interest in such property, as well as take the benefits provided for him in the will.¹ But if the intention of the

never been and cannot be satisfactorily explained. It is said that a disposition absolutely void is no disposition at all, and being incapable of (taking?) effect as such, it cannot be read to ascertain the intent of the testator. But an express condition annexed to the bequest of the personality does not render the disposition of the realty valid; it would be a repeal of the statute of frauds so to hold. How, then, can it operate any more than an implied condition to open the eyes of the court, so as to enable them to read those parts of the will which relate to the realty; and without a knowledge of what they are, how can the condition be enforced?" He then quotes the language of several eminent judges, in which they strongly dissent from the soundness of this distinction, although admitting that it has become settled law, viz.: of Lord Kenyon, M. R., in *Carey v. Askew*, 1 Cox, 241; and of Sir Wm. Grant, in *Brodie v. Barry*, 2 V. & B. 127; and of Lord Eldon, in *Ker v. Wauchope*, 1 Bligh, 1; and *Sheddon v. Goodrich*, 8 Ves. 482. Proceeding, Judge Sharswood says: "We are equally clear that this is a case of election. The intention of the testator does not rest merely upon the implication arising from his careful division of his property among his children in different classes, but he has indicated it in words by the clause: 'I direct and enjoin on my heirs that no exception be taken to this will, or any part thereof, on any legal or technical account.' It is true, that for want of a bequest over, this provision would be regarded as *in terrorem* only, and would not induce a forfeiture. (*Chew's Appeal*, 9 Wright, 228.) But it has been often said, the equitable doctrine of election is

grounded upon the ascertained intention of the testator, and we can resort to every part of the will to arrive at it. 'The intention of the donor or testator ought doubtless to be the pole star in such cases; and whenever it appears from the instrument itself conferring the benefit, with a certainty that will admit of no doubt, either by express declaration or by words that are susceptible of no other meaning, that it was the intention of the donor or testator that the object of the bounty should not participate in it without giving his assent to everything contained in the instrument, the donees ought not to be permitted to claim the gift, unless they will abide by the intention and wishes of the author.' (*Philadelphia v. Davis*, 1 Whart. 510, *per* Kennedy, J.) This, however, is not the only mode in which the equity of the case can be reached. The doctrine of equitable election rests upon the principle of compensation, and not of forfeiture, which applies only to the non-performance of an express condition. Besides, no decree of this court could authorize the guardians of the minors to execute release of their rights and titles to the New Jersey lands, which would be effectual in that State. The alternative relief prayed for in the bill is that which is most appropriate to the case."

¹ *Church v. Bull*, 2 Denio, 430; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Havens v. Sackett*, 15 N. Y. 385; *In re Silvey's Estate*, 42 Cal. 211; *Burton v. Lies*, 21 *Id.* 91; *Beard v. Knox*, 5 *Id.* 252; *In re Buchanan's Estate*, 8 *Id.* 507; *DeGodey v. Godey*, 39 *Id.* 157, 164; *Morrison v. Bowman*, 29 Cal. 337, 348; *Reed v. Dickerman*, 12 Pick. 146; *Lefevre v. Lefevre*, 59 *Id.* 435;

donor to convey the entire property, the interest of the part-owner as well as his own interest in the same, is clearly established, then such part-owner is put to his election, between parting with his interest in such property or rejecting the testamentary benefits.¹ One example of cases of this description is, where the donor owns a future interest in the property, while the immediate right to it is in another; in such a case the presumption of the courts, in the absence of an express declaration of the intention to the contrary, is against the intention of the donor to transfer by his gift anything more than his own future interest in the property, it matters not what may be the form of the devise, *i. e.*, whether it be a general or specific devise; and hence there is no opportunity for the application of the doctrine of election. But if the context of the will shows unmistakably that the testator intended to convey an immediate right of possession to the estate which could not, therefore, be satisfied by a simple devise of the future interest, then the presumption of the court would be changed to one of an intention to convey the entire estate in the property, including the interest of the immediate tenant. Where that intention is established by the terms of the will, the doctrine of election applies and compels such tenant in possession to elect between the transfer of the estate to the devisee, in accordance with the will, or the rejection of his own benefits under that will.² And the same rule often applies, although the future interest of the testator be only contingent, and it becomes void prior to his death so that at his death there was nothing in the nature of his own interest upon which the will could operate.

Another example is, where a debtor conveys lands whose title is incumbered to a stranger, and by the same will makes a devise or bequest to the creditor who holds and owns the incumbrance on the property. Unless there be something in the will indicating the intention of the testator, that the bequest or devise given to such creditor shall be taken by him in payment of that debt, the devisee takes the property subject to the incumbrance, and the creditor takes his bequest under the will free from the duty of making an election.⁴ And so also have the courts refused to apply the doctrine of election, even where

Vernon v. Vernon, 53 N. Y. 351; Sandford v. Jackson, 10 *Id.* 266; Fuller v. Yates, 8 Paige, 325; Bull v. Church, 5 Hill, 206; Lewis v. Smith, 9 Johns. Ch. 502.

¹ Fuller v. Yeates, 8 Paige, 325; Sandford v. Jackson, 10 *Id.* 266; Vernon v. Vernon, 53 N. Y. 351; Savage v. Burnham, 17 N. Y. 561, 577; Leonard v. Steele, 4 Barb. 20; Lewis v. Smith, 9 N. Y. 502; Mills v. Mills, 28 Barb. 454; Morrison v. Bowman, 29 Cal. 348; Chapin v. Hill, 1 R. I. 446; Collins v. Carman, 5 Md. 503; Stark v. Hunton, Saxt. (N. J.) 216; Higginbotham v. Cornwell, 8 Gratt. 83; Douglas v. Feay, 1 W. Va. 26; Hyde v. Baldwin, 17 Pick. 303, 308; Smith v. Guild, 34 Me. 443, 447; Weeks v. Patten, 18 *Id.* 42; George v. Bussing, 15 B. Mon. 558; Apperson

v. Bolton, 29 Ark. 418; Alling v. Chatfield, 42 Conn. 276; Brown v. Brown, 55 N. H. 106; Cox v. Rogers, 77 Pa. St. 160; Young v. Pickens, 49 Ind. 23; Metteer v. Wiley, 34 Iowa, 214; Colgate v. Colgate, 8 C. E. Green, (23 N. J. Eq.) 372; Worthen v. Pearson, 33 Ga. 385; Bull v. Church, 5 Hill, 207; 2 Denio, 430.

² See, also, Smith v. Smith, 14 Gray, 532; Hyde v. Baldwin, 17 Pick. 308; Smith v. Guild, 34 Me. 445; Hamblett v. Hamblett, 6 N. H. 333; Fulton v. Patten, 18 Me. 42.

³ Havens v. Sackett, 15 N. Y. 365.

⁴ Lord Chief Baron Eyre, in Blake v. Banbury, 1 Ves. 514; Sadlier v. Butler, 1 L. R. Eq. 415, 423; Stephens v. Stephens, 1 De G. & J. 62; 3 Drew, 697.

the bequest to the creditor is expressly for the purpose of paying the debts due to him, as long as there is no express condition of a release of the incumbrance on the other property.¹

§ 133. **Election by widow between her dower and the testamentary provision.**—Where the husband devises or bequeathes property to his wife, it also becomes a question whether he intended that that property should be taken by her in the place of her dower so that she must elect which she will take; or whether she is entitled to claim both the dower-right and the testamentary provision. If he intended that she shall elect between the two provisions, then she will be compelled to do so, and cannot claim both. If, however, the testator intended that she shall take the testamentary provision in addition to her dower-right, then the doctrine of election would not apply. Now, it is manifest that if the will contains an express declaration of an intention to put the widow to her election between the two provisions, that such intention would have to be carried out and the widow would be obliged to elect.² But where the will contains no such express declaration of an intention to put her to an election, and the will does not contain facts or circumstances from which such an intention may be implied, then the presumption of the court is that the testamentary provision was not intended to be *in lieu* of her dower, but was to be additional to such provision in her behalf. Not only is this presumption maintained in her favor generally,³ but it is so strong that the contrary intention must be established beyond all doubt; and where there is a doubt whatever as to such being the testator's intention, such doubt is solved also in her favor. This is not only the case where the devise to others is in general terms, but also when it assumes the form of a specific devise. Not only may an intention to put the widow to her election be shown by the context of the will, but the intention may be proven by some disposition of the property in the will which is inconsistent with her dower-right. The mere intention to put her to an election, unless expressly declared in the will, will not be sufficient for the purpose, unless the enforcement of that implied intention is rendered necessary by the fact that the other provisions of the will could not be carried out, if she were permitted to claim her dower-right in addition to the testamentary provision.³

¹ *Kidney v. Cousmaker*, 12 Ves. 136, 154, *per* Sir Wm. Grant; *Clark v. Guise*, 2 Ves. Sen. 617; *Deg v. Deg*, 2 P. Wms. 412, 418; see *Irwin v. Tabb*, 17 Serg. & R. 419, 423; and *Adlum v. Yard*, 1 Rawle, 163, 171.

² *Boynton v. Boynton*, 1 Bro. Ch. 445; *Nottley v. Palmer*, 2 Drew. 93.

³ "A wife cannot be deprived of her dower by a testamentary disposition in her favor, unless the testator has declared the same to be *in lieu* of dower, either in express words or by necessary implication. To compel a widow to elect between the dower and a testamentary provision where the testator has not in

terms declared his intention on the subject, it is not sufficient that the will renders it doubtful whether he intended that she should have her dower in addition to the provision; but the terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which her dower is claimed." *Church v. Bull*, 2 Denio, 430, *per* Chancellor Walworth; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Adsit v. Adsit*, 2 Johns. Ch. 458; *Smith v. Kinskern*, 4 Id. 9; *Swain v. Perrine*, 5 Id. 482; *Larrabee v. Van Alstyne*, 1 Johns. 307; *Van Orden v. Van Orden*, 10 Id. 30; *Jackson v. Churchill*, 7 Cow. 287; *Wood v.*

§ 134. **From what circumstances intention of election may be implied.**—In the first place, a general devise of property to others in the will, in which the widow receives a testamentary provision, will not support the presumption of an intention to put her to an election; not only where the general devise is made to others for their own personal benefit,¹ but also where the devise of such property is given in trust to sell and to distribute the proceeds of sale among certain beneficiaries.² In both cases there must be something in the transaction which is inconsistent with the widow's claim of dower in the lands so devised in order that she may be put to her election. It is also a general rule that there will be no case for election where the devise to others is specific, instead of being general.³ But it has been held that where the specific devise is to one who has a moral claim for support on the testator, and the amount of the property devised is so limited that such dependent person could not be supported by it, if the widow should assert her claim of dower against it, the courts have held that these facts show an intention to exclude the widow from

Wood, 5 Paige, 597, 601; Fuller v. Yates, 8 Id. 325; Sandford v. Jackson, 10 Id. 266; Havens v. Havens, 1 Sandf. Ch. 325, 330; Bull v. Church, 5 Hill, 206; Sheldon v. Bliss, 8 N. Y. (4 Seld.) 31; Dowson v. Bell, 1 Keen, 761; Harrison v. Harrison, Id. 765; Savage v. Burnham, 17 N. Y. 561, 577; Tobias v. Ketchum, 32 Id. 319, 326; Vernon v. Vernon, 53 Id. 351, 362; Lefevre v. Lefevre, 59 Id. 435; Leonard v. Steele, 4 Barb. 20; Lasher v. Lasher, 13 Barb. 106; Mills v. Mills, 28 Id. 454; Vedder v. Saxton, 46 Id. 188; Evans v. Webb, 1 Yeates, 424; Hamilton v. Buckwalter, 2 Id. 389; Duncan v. Duncan, 2 Id. 302; Webb v. Evans, 1 Binney, 565, 572; Cauffman v. Cauffman, 17 Serg. & R. 16, 25; Preston v. Jones, 9 Pa. St. 456, 460; Herbert v. Wren, 7 Cranch, 370, 378; Mitteer v. Wiley, 34 Iowa, 214; Clark v. Griffith, 4 Clark, (Id.) 405; Pemberton v. Pemberton, 29 Mo. 408, 413; Douglas v. Feay, 1 W. Va. 26; Bailey v. Duncan, 4 Mon. 256, 265, 266; Timberlake v. Parish's Ex'r, 5 Id. 346; Shaw v. Shaw, 2 Dana, 342; Carroll v. Carroll, 20 Tex. 731, 744; Apperson v. Bolton, 29 Ark. 418; Adams v. Adams, 39 Ala. 274; Worthen v. Pearson, 33 Id. 385; Tooke v. Hardeman, 7 Ga. 20; Snelgrove v. Snelgrove, 4 Desau. 274, 294; Brown v. Caldwell, 1 Speer's Eq. 322; Gordon v. Stevens, 2 Hill's Ch. 46; Pickett v. Peay, 3 Brevard, 545; Dixon v. McCue, 14 Gratt. 540; Higginbotham v. Cornwell, 8 Gratt. 83; Ambler v. Norton, 4 Hen. & Mun. 23, 44; Wisely v. Findlay, 3 Rand. 361; Collins v. Carman, 5 Md. 503; Chapin v. Hill, 1 R. I. 446; Hall's Case, 1 Bland Ch. 203; Alling v. Chatfield, 42 Id. 276; Lord v. Lord, 23 Conn. 327, 331; Smith v. Smith, 14 Gray, 532; Kempston's Appeal, 23 Pick. 163; Hide v. Baldwin, 17 Id. 303, 308; Reed v. Dickerman, 12 Pick. 145 149; Hamblett, 6 N. H. 333; Brown v. Brown, 55 N. H. 106; Smith v. Guild, 34 Me. 443; Weeks v. Patten, 18 Id. 42; O'Brien

v. Elliott, 15 Me. 125; Perkins v. Little, 1 Greenl. (Me.) 148; Colgate v. Colgate, 8 C. E. Green, (23 N. J. Eq.) 372; Van Arsdale v. Van Arsdale, 2 Dutch. (26 N. J. L.) 404, 417; Stark v. Hunton, Saxton, (N. J.) 217, 224; Cox v. Rogers, 77 Pa. 160; Fulton v. Moore, 25 Id. 468; Konvalinka v. Schlegel, 29 Hun, 451; Snyder v. Miller, 67 Iowa, 261; *In re Hatch's Est.* (Vt. '90) 18 Atl. 814; Chase v. Alley, 82 Me. 234; Callahan v. Robinson, 30 S. C. 249; Starr v. Starr, 54 Hun, 300; Howard v. Watson, 76 Iowa, 229.

¹ Jackson v. Churchill, 7 Cow. 287; Havens v. Havens, 1 Sandf. Ch. 325, 329; Evans v. Webb, 1 Yeates, 424; Pickett v. Peay, 3 Brevard, 545; Wisely v. Findlay, 3 Rand. 361; Brown v. Coldwell, 1 Speer's Eq. 322, 325; Brown v. Brown, 55 N. H. 106; but see, per contra, Alling v. Chatfield, 42 Conn. 276; Apperson v. Bolton, 29 Ark. 418; Lefevre v. Lefevre, 59 N. Y. 435; Leonard v. Steele, 4 Barb. 20; Bull v. Church, 5 Hill, 307; 2 Denio, 430; Lewis v. Smith, 9 N. Y. (5 Seld.) 502; Mills v. Mills, 26 Barb. 454.

² Savage v. Burnham, 17 N. Y. 561, 577; Herbert v. Wren, 7 Cranch, 370, 379; Morris v. Clark, 2 Stockt. Ch. 51; Vernon v. Vernon, 53 N. Y. 351, 362; Kinsey v. Woodward, 3 Harring. 459; Timberlake v. Parish's Ex'r, 5 Dana, 345; Gordon v. Stevens, 2 Hill's Ch. 46; Hall v. Hall, 8 Rich. 407; Whilden v. Whilden, Riley Ch. 205; Lewis v. Smith, 9 N. Y. (5 Seld.) 502; Wood v. Wood, 5 Paige, 601; Fuller v. Yates, 8 Paige, 325; Bull v. Church, 5 Hill, 207; 2 Denio, 430; Adsit v. Adsit, 2 Johns. Ch. 448; French v. Davies, 2 Ves. 572; Ellis v. Lewis, 3 Hare, 310; Dowson v. Bell, 1 Keen, 761; Gibson v. Gibson, 1 Drew. 42, 57; Bending v. Bending, 3 K. & J. 257.

³ Kennedy v. Nedrow, 1 Dall. 415, 418; Jackson v. Churchill, 7 Cow. 287; Strahan v. Sutton, 3 Ves. 249.

her dower in such property, in consideration of the testator's provision for her.¹

Another opportunity for the application of the doctrine of election is to be found in the case where an annuity or rent-charge is given to the widow, and charged upon lands which are subject to her claim of dower. According to some of the earlier English cases, the distinction is made between annuity which is chargeable on both real and personal property, and the rent-charge which is only chargeable upon real property; these cases holding, that where the provision for the widow is an annuity, the doctrine of election does not apply, but where it is a rent-charge, it does apply.² But this distinction has been repudiated by the English and American authorities, which maintain that, except when peculiar circumstances point unmistakably to the contrary intention, whenever annuity or rent-charge is given to the widow, she takes such provision in addition to her dower-right, and is not put to an election between the two interests.³

Another case to which the right of election might apply is, where lands are devised to the widow for life, with the devise of the rest of the lands to third persons. Two questions are raised, or can be raised, in this connection: one is in respect to the right to dower in the residue of the property which is devised to others; the invariable ruling of the courts being, that she is entitled to dower in the other property, as well as to her life estate.⁴ The second question is, whether she can claim both the express devise for life and her dower-right in the specific property which is given her in the will; or whether, in respect to that specific property, she is obliged to elect between the devise for life and her dower-right. One set of decisions maintain that she can claim both; these decisions holding that there is no inconsistency between the two.⁵ But according to another group of cases, the devise for life is held to be inconsistent with the widow's claim of dower, and she is then obliged to elect between the two.⁶

In all of these cases cited above, in which the courts deny the appli-

¹ See *Herbert v. Wren*, 7 Cranch, 370, 378, *per* Marshall, C. J.; *Alling v. Chatfield*, 42 Conn. 276.

² *Villa Real v. Lord Galway*, 1 Bro. Ch. 292 n; *Ambl.* 682; *Jones v. Collins*, *Ambl.* 730; *Wake v. Wake*, 3 Bro. Ch. 255; *Arnold v. Kempstead*, *Ambl.* 466; 2 *Eden*, 236.

³ *Hall v. Hill*, 1 Conn. & Law. 129; 1 Dr. & War. 103, *per* Sir Ed. Sugden; *Roadley v. Dixon*, 3 Russ. 192, 201, 202, *per* Lord Lyndhurst; *Smith v. Kinskern*, 4 Johns. Ch. 9; *Adist v. Adist*, 2 *Id.* 448; opinion of Chan. Kent; *Lasher v. Lasher*, 13 Barb. 106; *Hatch v. Bassett*, 52 N. Y. 359; *White v. White*, 1 Harr. 202, 211; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, 453, *per* Lord Redsdale.

⁴ *Havens v. Havens*, 1 Sandf. Ch. 325; *Jackson v. Churchill*, 7 Cow. 287; *Sandford v. Jackson*, 10 Paige, 266; *Mills v. Mills*, 28 Barb. 454; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Bull v. Church*, 5 Hill, 207; 2 *Denio*, 430.

⁵ *Sandford v. Jackson*, 10 Paige, 266; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *Mills v. Mills*, 28 Barb. 454; *Mitteer v. Wiley*, 34 Iowa, 214; *Bull v. Church*, 5 Hill, 207; 2 *Denio*, 430. In *Bull v. Church*, the testator devises all of his property, both real and personal, to his wife during widowhood, with remainder to the children. She entered into possession of the property under the will, but when she married and forfeited by such marriage her testamentary interest in the property, the courts held that she could still claim her dower in the same, because her testamentary provision did not exclude her from subsequently claiming the dower.

⁶ *Hamilton v. Buckwa ter*, 2 Yeates, 389, 392; *Stark v. Hunton*, *Sixton*, (N. J.) 217, 224, 225; *Smith v. Bone*, 7 Bush, 367; *Wilson Hayne*, *Cheves' Eq.* 37, 40; *Caston v. Caston*, 2 Rich. Eq. 1; *Cunningham v. Shannon*, 4 *Id.* 135.

cation of the doctrine of election, their decision is based upon the presumption, that the testator did not intend to make his devise to the wife conditional upon her waiver of her dower-right; but if in any particular case the intention to make the testamentary provision a substitute for the dower-right is established, or the intention may be implied from a disposition of such property, inconsistent with the widow's enjoyment of both the testamentary provision and the widow's dower, the widow would be put to her election between the two. But the nature of the devise to others must make the widow's claim of dower in such property inconsistent with the provisions of the will, in order that the doctrine of election may apply; and, as we have seen, ordinarily there is no such inconsistency. It has, however, been held in a very large number of cases, that if the devisee of the property is given the power of management and of leasing the estate without words of qualification, such devise is held to be inconsistent with the widow's claim of dower in the property, and hence she is obliged to elect between her dower-right and the testamentary provision.¹ So, also, it has been held that, where property is devised to the widow and others, with the express direction that the property shall be divided equally between them, such a devise is inconsistent with the widow's claim of dower, and she would be obliged to make her election.²

§ 135. **Statutory changes in this rule.**—In many of the states it is provided by statute that, whenever a testamentary provision is made for the widow, she is presumed to take it as a substitute for her dower, unless it be shown by the express declaration of the testator in the will that she is to enjoy both the provision and the dower-right. Such is found to be the statutory law in a number of the states. In some of them the provision is applied only to cases of devise of real property, leaving bequests of personal property subject to the presumption of law which has heretofore been explained; in other words, if the testamentary provision in her behalf consists of a devise of real estate, she is presumed, under this statute, to take the provision *in lieu* of her dower-right; but if the testamentary provision is a bequest of personal property, the statute does not apply, leaving the presumption, as it is elsewhere, in favor of the widow's right to both the dower and testamentary provision. This is the statutory law of Arkansas, Delaware, Georgia, Missouri and New Jersey.³ In the other class of states, the statutory provision, creating the presumption of an intention to put the

¹ Parker v. Sowerby, 4 De G. M. & G. 321; 1 Drew. 488; Hall v. Hill, 1 Dr. & War, 94; 1 Conn. & Law. 120; Raynard v. Spence, 4 Beav. 103; Lowes v. Lowes, 5 Hare, 501; Grayson v. Deakin, 3 De G. & Sm. 298; Holdich v. Holdich, 2 Y. & C. 22; Birmingham v. Kirwan, 2 Sch. & Lef. 444; Goodfellow v. Goodfellow, 18 Beav. 355.

² Chalmers v. Storil, 2 V. & B. 222; Roberts v. Smith, 1 S. & S. 413; Ellis v. Lewis, 3 Hare, 531.

³ See Chandler v. Woodward, 3 Harring. 428; see Tooke v. Hardeman, 7 Ga. 20; Raines v. Cor-

bin, 24 Id. 185; Worthen v. Pearson, 33 Id. 385; Clayton v. Aikin, 38 Id. 320; Gibbon v. Gibbon, 40 Id. 562; Pumphrey v. Pumphrey, 52 Ark. 198; see Pemberton v. Pemberton, 29 Mo. 408; Brant v. Brant, 40 Id. 266; Cook v. Couch, 100 Mo. 29; see Stark v. Hutton, Saxt. Ch. 216; Morgan v. Morgan, 41 N. J. Eq. 235; Van Arsdale v. Van Arsdale, 17 N. J. L. 404; Thompson v. Egbert, 17 N. J. L. 459; White v. White, 1 Har. 202; English v. English, Id. 504; Morgan v. Titus, 2 Green Ch. 201; Colgate v. Colgate, 8 C. E.

widow to her election, applies not only to cases of devise of real estate, but also to bequests of personal property. This is the statutory rule of law in Alabama, Illinois, Kansas, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Nebraska, North and South Carolina, Ohio, Oregon, Pennsylvania, Tennessee and Wisconsin.¹

Not only do the statutes change the presumption of intention in respect to the duty of election, but they also limit the time in which the widow can make the election; so that she will be obliged to claim her dower within the statutory period of time in order to make the claim at all. In some of these states, the period is one year;² in others of these states, the time is limited to six months;³ in one state, the time is eighteen months;⁴ while in two states, she is compelled to make her election within thirty days after service of a citation issued to her by the court of probate.

§ 136. **Election and devise of community property.**—In California, and a few other western states, the common law dower has been abolished and its place taken by the principle of community property, drawn from the French and Spanish laws. Under the principle of community property, whatever the husband and wife, respectively, own at the time of marriage, remains the separate property of each and free from the attachment thereto of any rights of the other; but all the earnings of the husband, after the marriage, become the common property of husband and wife, each being entitled to an undivided half. During the marriage, the husband has control of the whole property and it is liable for his debts; but upon his death, leaving the widow surviving, she is entitled absolutely to one-half of such property, and the husband cannot by his will interfere with her claim to the same. She has, therefore, the power of disposition by will over only one undivided half of this community property. Where, therefore, he undertakes by will to dispose of the whole of

Green Ch. 201; Adamson v. Ayres, 1 Halst. Ch. 349; Norris v. Clark, 2 Stockt. Ch. 51; Griggs v. Veghte, (N. J. '90) 19 Atl. 887.

¹ Hilliard v. Benford's Heirs, 10 Ala. 977, 990; McGrath v. McGrath, 38 Id. 246; Haynie v. Dickens, 68 Ill. 267; Jenkins v. Smith, 29 Id. 116; Brown v. Pitney, 39 Id. 468; Mowbry v. Mowbry, 64 Id. 383; Gauch v. St. Louis, &c. Ins. Co., 88 Id. 255; Padfield v. Padfield, 78 Id. 17; Sutherland v. Sutherland, 69 Id. 481; Stunz v. Stunz, (Ill. '90), 23 N. E. 407; Allen v. Hannum, 15 Kans. 625; Allen v. Pray, 3 Fairf. (12 Me.) 138, 142; Dow v. Dow, 36 Me. 211; Hastings v. Clifford, 32 Me. 132; Reed v. Dickerman, 12 Pick. 146; see Atherton v. Corliss, 101 Mass. 40, 44; Adams v. Adams, 5 Id. 277; Pratt v. Felton, 4 Cush. 174; Delay v. Vinal, 1 Met. 57; Knighton v. Young, 22 Md. 359; Hilleary v. Hilleary's Lessee, 26 Id. 274; Gough v. Manning, Id. 347, 366; Lynn v. Gephart, 27 Id. 547; Hinckley v. House of Refuge, 40 Id. 461; Pindell v. Pindell, Id. 537. Craven v. Craven, 2 Dever. Eq. 338; Bray v. Lamb, Id. 372; Hair v. Goldsmith, 22 S. C. 566;

Stilley v. Folger, 14 Ohio, 610, 646; Luigart v. Ripley, 19 Ohio St. 24; Jennings v. Jennings, 21 Id. 56; Davis v. Davis, 11 Id. 386; Stockton v. Wooley, 20 Id. 184; Thompson v. Hoop, 6 Id. 480; Bowen v. Bowen, 34 Id. 164; Baxter v. Boyer, Id. 490; Anderson's Appeal, 12 Casey, (36 Pa. St.) 476; Borland v. Nicholls, 2 Jones, (12 Pa. St.) 38; Leinawever v. Stoeper, 1 Watts & Serg. 160; Reed v. Reed, 9 Watts, 263; Melizet's Appeal, 5 Harris, (17 Pa. St.) 449; Cauffman v. Cauffman, 17 S. & R. 16; Heron v. Hoffner, 3 Rawle, 303; Reid v. Campbell, Meigs, 378, 388; Malone v. Majors, 8 Humph. 577, 579; Demoss v. Demoss, 7 Coldw. 256, 258; Waddle v. Terry, 4 Coldw. 51, 54; McClung v. Sneed, 3 Head, 218, 223.

² Alabama, Illinois, Michigan, Minnesota, Nebraska, Ohio, Oregon, Pennsylvania, Tennessee, Wisconsin and Missouri.

³ Maine, Massachusetts, Maryland, Mississippi, North Carolina and New Jersey.

⁴ Arkansas.

⁵ Delaware and Kansas.

this community property, and makes some other provision for the wife as a substitute for her interest in the community property, a case arises for the application of the doctrine of election. The question is here, as in the case of the common law dower, whether the testamentary provision disposing of community property was intended to transfer her undivided interest in such property as well as his own. The right of election applies where the intention to convey the whole property exists, and is inapplicable when the husband intended to dispose only of his own interest in the property. Inasmuch as this is a case of joint ownership of property, one would expect, in determining this question of intention, that the same rule would apply as in the English law in respect to devise by a co-tenant of the whole of the ordinary joint estate.¹ But inasmuch as the community property is a modern substitute for the common law dower, we find, as a fact, that the same circumstances are considered to control the proof of intention of the testator, in respect to the disposition of the community property, which prevail in the determination of the election of the widow between her dower and a testamentary provision.²

§ 137. **Election in the case of statutory provision for widow's share in inheritance of husband's property.**—In many of the states, the Statutes of Descent and Distribution provide for the division of decedent's estate between his children and his wife; making the wife an heir to her husband, and providing that she will inherit either a child's part, or some fixed proportion of the estate, absolutely. The authorities agree that the statutory provision for inheritance does not abolish dower, but is intended to be, and must be taken as, *in lieu* of her dower, and she must elect which of the two interests she will take.³ Inasmuch as the statutory provision is ordinarily more valuable than the dower-right, the natural presumption would be, where there has been a division of the property between the widow and children, that she has elected to take as heir of her husband, instead of the dower-right of the widow. But since the estate which she takes as heir is subject to the claim of creditors, and the dower-interest is superior to such claims,⁴ in the case of an insolvent estate, the dower would be more valuable; and it has been held that under those circumstances only her dower-right would be allotted to her.⁵ The dower-right is, however, not inconsistent with her claim of a share, under the Statute of Distribution, in her husband's personal estate as to which he may die intestate. She may claim such distributive share as well as her

¹ See *ante*, §§ 127, 132.

² *In re Estate of Staus*, Myrick's Prob. R. 5; *In re Estate of Mumford*, *Id.* 133; *In re Estate of Low*, *Id.* 148; *In re Estate of Ricard*, *Id.* 158; *In re Estate of Patton*, *Id.* 243; *Morrison v. Bowman*, 29 Cal. 337; *King v. Lagrange*, 50 Cal. 328; *Beard v. Knox*, 5 Cal. 252, 257; *In re Buchanan's Estate*, 8 *Id.* 507, 510; *In re Estate*

of Frey, 52 *Id.* 658; *Smith v. Smith*, 12 *Id.* 216, 225; *Scott v. Ward*, 13 *Id.* 458, 469, 470; *Payne v. Payne*, 18 *Id.* 292, 301; *Burton v. Lies*, 21 *Id.* 87, 91; *In re Silvery*, 42 *Id.* 210; *Broad v. Murray*, 44 *Id.* 229.

³ *Shoot v. Galbreath*, 128 Ill. 214.

⁴ *Hunkins v. Hunkins*, (N. H. '89) 18 Atl. 655.

⁵ *Cloyd v. Cloyd*, 15 Lea. 204.

dower.¹ It has been held in Missouri, under the statute, that if the widow rejects a testamentary provision, she still has the right to elect between her dower and the distributive share in the estate, although there may be no intestacy.²

§ 138. **Who may elect, persons under disabilities.**—Where the devisee—whose property is disposed of in favor of another by the same will which secures to him a devise of the testator's property, and is therefore put to an election between the rejection of such a devise or the loss of his property—is a person free from all legal disabilities, no question can exist as to his ability to make an election which will be binding upon him. But where, at the time he makes the election, a disability exists, it does become a question, how far the original disability affects his right of election. The original common law disabilities to make binding contracts are those of coverture, infancy and insanity. In respect to the first disability, the authorities generally agree upon the following proposition: If in respect to the devise to a married woman, where she has to make an election, the husband is excluded from all vested interest in the same, the wife can make a valid election which will be binding upon all parties concerned in the estate;³ but if the husband has marital rights in the property of the wife which is affected by the devise to her and the consequent obligation to make her election, no election of hers without the consent of the husband to surrender his interest in her property, in consideration of the receipt of the devise or bequest, will be valid and binding, except so far as such election does not interfere with or cut off the husband's rights therein.⁴ Where the party who is to make the election is an infant, the court denies to such infant, during infancy, the power to make a valid election, and one of two courses will be pursued by the court. Where it is possible, without prejudice to the rights of other parties, to postpone the election until the infant comes of age, this will be done.⁵ But where it is to the disadvantage of the infant, or of other parties who are interested in the matter, to postpone the election, the court of equity, as a guardian of the interest to such infant, will itself make the election for such infant.⁶ The same rule applies where the party who is to make the election is a lunatic; the court assuming power to make an election in behalf of the lunatic, even where the property of the lunatic is in charge of a committee.⁷ If the widow dies during the time pre-

¹ *Vower's Will, in re*, 113 N. Y. 569.

² *Young v. Broadman*, 97 Mo. 181.

³ *Cooper v. Cooper*, L. R. 7 H. L. 53, 67; *Tiernan v. Roland*, 3 Harris, 430, 452; *Robinson v. Buck*, 71 Pa. St. 386; *Robertson v. Stephens*, 1 Ired. Eq. 247, 251; *McQueen v. Jones* Eq. 16; but see *Kreiser's Appeal*, 69 Pa. St. 194; note of Mr. Swanton to *Gretton v. Haward*, 1 Sw. 409, 413.

⁴ See *Wall v. Wall*, 15 Sim. 513, 520; *Whittle v. Henning*, 2 Phil. 731; *Robinson v. Wheelright*, 6 De G. M. & G. 535, 546.

⁵ *Streatfield v. Streatfield*, Cas. temp. Talb. 176; 1 Eq. Lead. Cas. 504 (4th Am. ed.); *Boughton v. Boughton*, 2 Ves. Sen. 12; *Bor v. Bor*, 2 Bro. P. C. 473 (Toml. ed.).

⁶ *McQueen v. McQueen*, 2 Jones Eq. 16; *Addison v. Bowle*, 2 Bland Ch. 606, 623; Mr. Swanton's note to *Gretton v. Haward*, 1 Sw. 409, 413; *Bigland v. Huddleston*, 3 Bro. Ch. 235 n.

⁷ *In re Marriott*, 2 Moll. 516; *Kennedy v. Johnson*, 65 Pa. St. 451; *Young v. Boardman*, 97 Mo. 181.

scribed for making the election, she will be presumed to have elected that provision which was most favorable to her.¹

§ 139. **Time of election.**—Where the statute does not provide any limitation of time, within which the election must be made under the provisions of the will, the party having the right of election may exercise it at any time after the probate of the will, as long as the rights of third parties have not been prejudiced by the delay. Under such circumstances, the right of election has been conceded, notwithstanding the lapse of many years.² But if the delay has induced third parties to acquire rights in the property, in reliance upon the supposed acquiescence of such a person in the dispositions of the will, equity will not permit these rights to be disturbed by the subsequent exercise of the right of election.³ The question whether the delay is reasonable or not, independently of statute, can only be answered by a consideration of the peculiar circumstances of the particular case. But in a number of the states, the statutes provide a period within which the widow must make an election or be presumed to have chosen the testamentary provision.⁴ But where no such statutory provision is made as to the time within which the election must be made, the circumstances of the case must determine the length of time within which the election must be made or be surrendered. No more specific rule can be given for determining this question in any particular case, than that the party to whom the right of election is given is not required to exercise that right, until he has become apprised of all the facts and circumstances which are necessary to an intelligent election between the two provisions. As long, therefore, as he or she has not had sufficient opportunity to learn the relative value of the provisions between which the election is to be made, he cannot be required to make the election.⁵

§ 140. **Mode of election.**—Where the party, who has the right to elect, makes a positive declaration in favor of one of the provisions for his benefit, no question can arise as to the propriety or effectiveness of this mode of election. His positive declaration in favor of one does

¹ *Merrill v. Emery*, 10 Pick. 507.

² *Sopwith v. Maughan*, 30 Beav. 235; *Reynard v. Spence*, 4 Beav. 103; *Butricke v. Brodhurst*, 3 Bro. Ch. 90; *Brice v. Brice*, 2 Moll. 21; *Dillon v. Parker*, 1 Sw. 381, 386.

³ *Tibbitts v. Tibbitts*, 19 Ves. 663; *Dewar v. Maitland*, L. R. 2 Eq. 834.

⁴ In Arkansas, Florida, Kentucky, New York and Rhode Island the time prescribed is one year; in Vermont, eight months; Iowa, six months; and Connecticut, two months. See *Lord v. Lord*, 23 Conn. 327; *Hickey v. Hickey*, 28 *Id.* 261; *Metteer v. Wiley*, 34 Iowa, 215; *Corriel v. Ham*, 2 *Id.* 552; *Sully v. Nebergall*, 30 *Id.* 339; *Clark v. Griffith*, 4 *Id.* 405; *McGuire v. Brown*, 41 *Id.* 650; *Stoddard v. Cutcompt*, 41 *Id.* 329; *Kyne v. Kyne*, 48 *Id.* 21, 24; *In re Davis Estate*, 36 *Id.* 24; *Dawson v. Hayes*, 1 Metc. 461;

Barnett's Adm'r v. Barnett, 1 *Id.* 257, 258, 259; *Worsley's Ex'r v. Worsley*, 16 B. Mon. 470; *Leonard v. Steele*, 4 Barb. 20; *Church v. Bull*, 2 Denio, 430; *Bull v. Church*, 5 Hill, 206; *Hawley v. James*, 5 Paige, 318, 447; see *Lewis v. Smith*, 9 N. Y. 504, 511; *Jackson v. Churchill*, 7 Cow. 287.

⁵ *Kreiser's Appeal*, 69 Pa. St. 194; U. S. v. *Duncan*, 4 McLean, 99; *Hall v. Hall*, 2 McCord Eq. 269, 280; *Snelgrove v. Snelgrove*, 4 Desau. Eq. 274, 300; *Pickney v. Pickney*, 2 Rich. Eq. 219, 237; see Mr. Swanston's note, 1 Sw. 359, 381; *Reaves v. Garrett*, 34 Ala. 563; *Bradford v. Kent*, 7 Wright, 474, 484; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Cox v. Rogers*, 77 Pa. St. 160; *Waterbury v. Netherland*, 6 Heisk. 512; *Dabney v. Bailey*, 42 Ga. 521; *Richart v. Richart*, 30 Iowa, 465.

not admit of any doubt as to the intention to take that provision in the place of the other. But in the absence of a positive declaration in favor of one of the provisions, it is settled that there may be an election by implication; but no very exact rule can be given for determining from what facts and circumstances an election may be implied. The following general rule will, however, serve ordinarily as a guide: Whenever the party having the right of election maintains the same attitude toward both provisions, whether that attitude be one of inaction or of action, as where he refuses the rents and profits of both, or he exercises the rights of a proprietor over both, there are no facts in the case from which an election can be implied.¹ But wherever the party varies his attitude towards the two provisions, assuming towards one an attitude of inaction and towards the other an attitude of action, and the attitude towards the one involves the assumption of proprietorship over such provision or property of an absolute character, such acts are sufficient to support the presumption of an election in favor of that provision for his benefit. Hence, the taking of the rents and profits from one fund or property, or the sale or mortgage of such property, would be circumstances from which the election of that fund of property may be implied, where nothing is done of the same character in respect to the other estate or property.² But in every such case, in order that these acts, on the part of the person having the right of election towards one of the benefits or properties, may operate as an implied election, they must be done when the party doing them and having the right of election has a full knowledge of all the facts concerning the property; he must not only know of his right of election, but likewise all the facts and circumstances of the case, which are necessary to an intelligent exercise of the right.³

§ 141. **Effect of an election.**—Once an election has been made, under facts and circumstances indicating the intention of election, there can be no revocation of such election; and it is binding upon all parties who claim or take property under the party making the election, namely, his heirs and representatives.⁴ Where, however, the election has been made under the influence of some mistake of fact, the party making the election may revoke it and exercise anew the

¹ In *Padbury v. Clark*, *supra*, Lord Cottenham; *Whitridge v. Parkhurst*, 20 Md. 62, 72; *Padbury v. Clark*, 2 Macn. & G. 298, 306, 307; see note to *Dillon v. Parker*, 1 Sw. 359, 381, 382; *Spread v. Morgan*, 11 H. L. Cas. 588.

² *Dewar v. Maitland*, L. R. 2 Eq. 834; *Giddings v. Giddings*, 3 Russ. 241; *Spread v. Morgan*, 11 H. L. Cas. 588; *Padbury v. Clark*, 2 Macn. & G. 298, 306, 307; *Campbell v. Ingilby*, 21 Beav. 582; *Edwards v. Morgan*, McClell, 541; 13 Price, 782; 1 Bligh, n. s., 401.

³ *Pickney v. Pickney*, 2 Rich. Eq. 219, 237; *Reaves v. Garrett*, 34 Ala. 563; *Bradford v. Kent*, 7 Wright, 474, 484; *Macknet v. Macknet*,

29 N. J. Eq. 54; *Cox v. Rogers*, 77 Pa. St. 160; *Waterbury v. Netherland*, 6 Heisk. 512; *Dabney v. Bailey*, 42 Ga. 521; *Richart v. Richart*, 30 Iowa, 465; *Dillon v. Parker*, 1 Sw. 359, 381, and note; 1 Jacob, 505; 1 Cl. & Fin. 303; *Kreiser's Appeal*, 69 Pa. St. 194; *U. S. v. Duncan*, 4 McLean, 99; *Hall v. Hall*, 2 McCord Eq. 269, 280; *Snelgrove v. Snelgrove*, 4 Desau. Eq. 274, 300.

⁴ *Hurley v. McIver*, 119 N. Y. 13; *Worthington v. Wigington*, 20 Beav. 67; *Whitley v. Whitley*, 31 Beav. 173; *Dewar v. Maitland*, L. R. 2 Eq. 834; *Dillon v. Parker*, 1 Sw. 385; *Moore v. Butler*, 2 Sch. & Lef. 268.

right of election.¹ But where the mistake is not one of fact, but one of law, it has been held by some authorities to be irrevocable,² although it, perhaps, may be taken as the opinion of the majority of the cases, that ignorance of one's right to elect is to be considered a mistake of fact, instead of one of law; and, therefore, an implied election under the influence of such ignorance may be revoked, and the right exercised anew.³ Where the election is made subject to an express condition, the election is held to be subject to that condition, so that the breach of the condition will revoke the election and permit the party having the right of election to make a second election.⁴ Where the party, who is to make the election, is only entitled to a life estate, his election would not affect the rights of the remaindermen in the same property.⁵ So, also, where the right of election is given to two or more individuals as a class, each having his proportionate share of the property, as where the right of election is to be exercised by the nearest of kin or heirs, each of those individuals has a separate right of election; and the election by one, in respect to his interest under the will, in nowise affects the interest or right of election of the others.⁶ Whenever an election has been validly and irrevocably made, the effect of it upon the properties to which the right refers, will depend upon the election which has been made. If the election has been in favor of carrying out the provision of the will, the party making the election accepts the full benefit of the testamentary provision in his behalf, but relinquishes his own property, which has, by the same will, been transferred or given to another; but if the election is made against the provisions of the will, then the party making the election retains the title to his own property and loses only so much of the benefit provided for him under the will, as may be necessary to secure for the party to whom this devisee's property has been devised by the will, full compensation for the loss thus occasioned by the election against the provision of the will.⁷ This matter has been already more fully explained in a prior paragraph, and will not, therefore, need fuller explanation in this connection.⁸

¹ *Dabney v. Bailey*, 42 Ga. 521; *Snelgrove v. Snelgrove*, 4 Desau. Eq. 27; *Hall v. Hall*, 2 McCord Ch. 289, 289; *Adist v. Adist*, 2 Johns. Ch. 448, 451; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Dillon v. Parker*, 1 Sw. 359, 381 note; 1 Cl. & Fin. 308.

² In *Waterbury v. Netherland*, 6 Helsk. 512; see, also, *Light v. Light*, 21 Pa. St. 407; *Bradford v. Kents*, 43 Pa. St. 475; *Cox v. Rogers*, 77 Pa. St. 160.

³ *Dabney v. Bailey*, 42 Ga. 521; *Snelgrove v. Snelgrove*, 4 Desau. Eq. 27; *Hall v. Hall*, 2 McCord Ch. 289, 289; *Adist v. Adist*, 2 Johns. Ch. 448, 451; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Dillon v. Parker*, 1 Sw. 359, 381, note; 1 Cl. & Fin. 303; *Pusey v. Desbouverie*, 3 P. Wms. 315.

⁴ *Richart v. Richart*, 30 Iowa, 465.

⁵ *Long v. Long*, 5 Ves. 445; and see *Hutchin-*

son v. Skelton, 2 Macq. 492, 495; *Ward v. Baugh*, 4 Ves. 623.

⁶ *Fytche v. Fytche*, L. R. 7 Eq. 494; *Ward v. Baugh*, 4 Ves. 623.

⁷ *Cauffman v. Cauffman*, 17 Serg. & R. 16, 24, 25; *Philadelphia v. Davis*, 1 Whart. 490, 502; *Stump v. Findlay*, 2 Rawle, 168, 174; *Lewis v. Lewis*, 13 Pa. St. 79, 82; *Vandyke's Appeal*, 60 Pa. St. 490; *Sandoe's Appeal*, 65 Pa. St. 314; *Key v. Griffen*, 1 Rich. Eq. 67; *Marriott v. Sam Badger*, 5 Md. 306; *Maskell v. Goodall*, 2 Disney, 282; *Roe v. Roe*, 21 N. J. Eq. (6 C. E. Green) 253; *Allen v. Hunnum*, 15 Kans. 625; *Estate of Delaney*, 49 Cal. 77; *Tiernan v. Roland*, 3 Harris, 430, 451; *Wilbanks v. Wilbanks*, 18 Ill. 17; *Jennings v. Jennings*, 21 Ohio St. 56.

⁸ § 124.

§ 142. **Equitable jurisdiction in matters of election.**—In most of the states the equity courts have become merged in the ordinary circuit courts of the state; and hence this question in respect to those states needs no answer. But wherever the court of equity still retains its separate autonomy, or a distinction is made by the rules of court between the equitable and legal jurisdiction of the same court, it is important to know when the enforcement of the right of election falls within the legal or equitable jurisdiction. Suffice it to say, in this connection, that whenever modern statutes have superseded the equitable rules here set forth, in respect to the right of election, the right falls within the jurisdiction of the court of law, and ceases to be within the jurisdiction of the court of equity; but in other cases, that is, in the absence of statutory changes in the right of election, the equitable jurisdiction is maintained.¹

¹ *Dillon v. Parker*, 1 Sw. 381, note by Mr. Swanston; *Vandyke's Appeal*, 60 Pa. St. 481, 489, *per Sharswood, J.*

CHAPTER IX.

EQUITABLE DOCTRINES OF SATISFACTION, ADEMPMENT AND PERFORMANCE.

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§ 145. Election distinguished from the subject of this chapter.

—In the preceding chapter,¹ the equitable doctrine of election has been explained; and inasmuch as it bears a close resemblance to the doctrine of satisfaction, the distinction between the two is necessary at the outstart of this discussion. The doctrine of election applies, whenever one undertakes by his will to give to one the property belonging to another, and by the same will gives to this third person property of his own; such third person is held to be obliged to elect between the rejection of the bequest or devise to him, or see to it that the testamentary disposition of his own property is carried out by a transfer of such property to the intended donee. Satisfaction may be defined as the gift of a property with the intention that such property be taken by the donee as a substitute for, or satisfaction of, some claim or provision which had previously existed in favor of the donee. In the case of election, the donee has to part with some specific property which he had and owned independently of any act of the donor. In the case of the satisfaction, the effect of the subsequent gift is to extinguish or satisfy some outstanding claim or right to property of an executory character.² The principle underlying both the doctrines is the same, viz.: that the gift was made with the intention that the acceptance by the donee shall operate as a release by him of some claim or property of his. It is generally a question of fact whether the donor intended by his gift to substitute such gift for, and to make it a satisfaction of, the claim held against him by the donee. Where the donor expressly declares his intention, for or against the applica-

¹ *Ante*, Chapt. VIII.

² *Eq. Lead. Cas.* 754 (4th Am. ed.), approved

in *Lord Chichester v. Coventry*, L. R. 2 H. L. 71, 95; *Goldsmith v. Goldsmith*, 1 Sw. 211.

tion of the doctrine of satisfaction, and in such a manner that the declared intention may be proven by competent evidence, no difficulty is experienced in ascertaining what is the effect of the gift. The difficulty arises when the donor, in making the gift, makes no express declaration of his intention therewith; and the intention and purpose of the gift can only be inferred or presumed by law from the character of such gift, the relation of parties, and other circumstances of the case. In all such cases, if the equitable doctrine of satisfaction is permitted to apply at all, it must rest upon a presumption of law inferred from the peculiar facts of the case; and this presumption will be permitted to control in determining whether this doctrine of satisfaction is to apply or not, unless evidence is admitted proving or establishing a contrary intention on the part of the donor.¹

§ 146. **Admissibility of parol or extrinsic evidence.**—Inasmuch as the whole doctrine of satisfaction rests upon the presumption of the donor's intention, and the presumption controls the judgment of the court, only in the absence of the proof of an express intention of the donor, it is exceedingly important to know under what circumstances, and how, such declared intention of the donor may be established. The intention, which controls the determination of the question, whether the doctrine of satisfaction is to apply or not, is that with which the subsequent gift is made, and not that which he held in respect to the original claim, which is to be satisfied by the subsequent gift, if the doctrine of satisfaction applies; in other words, if the gift is made with the intention that it shall constitute a satisfaction of the prior claim or right, then such intention, if proven, must prevail. Two cases can arise in connection with this question: one is where the gift is made by parol, and *secondly*, where it is made by some written instrument. In the first case, the fact that the gift is made by parol prevents any application of the rule, which excludes all but

¹ Pomeroy, Vol. I, § 523, Lord Romilly, M. R., in *Cooper v. Cooper*, L. R. 8 Ch. 813, 819 n.: "In considering these cases, it is important to notice in the first instance, whether the donor of the benefit which is claimed to be satisfied by subsequent benefits, stands in the place of a parent, or in the place of a stranger. If he stands *in loco parentis*, the presumption of equity being against double portions, the *presumption* of satisfaction arises at once. * * * In the case of a stranger, the presumption against double portions does not arise at all. It is wholly a question of construction, and no evidence is admissible either to sustain or rebut any presumption, for the reason that none arises. In this latter case the question of satisfaction never arises, except upon the express words of the donor; and whether the gifts said to be given in satisfaction are given by a father or stranger, is wholly immaterial; and it is solely a question whether the original benefactor intended that his benefit should be

diminished or satisfied by benefits derived from any other source, and if so, what other source. This may be shown pointedly in a case where the gifts supposed to be a satisfaction of the original gifts are gifts of land. In the case of a parent or person *in loco parentis*, land would be no satisfaction for a covenant to pay in money. The presumption against double portions does not arise in such case. But if the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor. Then the question is, whether the words he has used, fairly interpreted, meant the gift of land as satisfaction of the benefits he has bequeathed or previously conveyed. It is, therefore, of paramount importance to consider in all cases, whether the doctrine of presumption against double portions, or the doctrine of construction of instruments, is that which applies to the case."

written evidence in the establishment of the fact; for, inasmuch as the transaction itself is verbal or parol, the intention with which the transaction is done must itself be a parol fact. Written evidence of the intention of a parol transaction is not ordinary or to be expected; hence the general rule is, that in all such cases of verbal donations, any evidence of any kind is sufficient to establish the intention of the donor.¹ But where the gift is made by some written instrument, particularly when it is made by will, the attempt to prove the intention, with which the gift was made, by any evidence outside of the instrument in which the gift appears, would constitute the violation of the cardinal rule of evidence, that the terms of a written instrument cannot be varied or controlled by parol or extraneous evidence. In the absence of any special ground for claiming an exception to the application of this rule of evidence, one would be inclined to suppose that the rule must apply to the case under inquiry without limitation; for the intention with which the donor made the gift constitutes, under the circumstances of the case, an essential part of the gift, and for that reason the proof of that intention by extraneous evidence would be permitting such extraneous evidence to vary or control, if not the terms of the instrument, at least their legal effect; and hence the later English cases have held, that when the written instrument contains no facts or statements from which the intention of the donor may be presumed or proven, extrinsic evidence of his intention cannot be admitted.² But where the written instrument of donation does not contain any declaration of the donor's intention, but the facts and circumstances of the gift are such that the law presumes therefrom an intention to apply the doctrine of satisfaction to the case, compelling the donor to take the gift in satisfaction or substitution of his prior claim or right, then extrinsic evidence is admissible to rebut this legal presumption.³ In the latter case, the extrinsic evidence is held only to vary or control, not the terms of the written instrument or the interpretation of them, but only to rebut the existence of a legal presumption; and for that reason, the evidence is admissible, and the admission of it is held not to violate the cardinal

¹ Lord Hardwicke, in *Rosewell v. Bennett*, 3 Atk. 77; *Richards v. Humphreys*, 15 Pick. 133; *Allen, J.*, citing *Williams v. Crary*, 4 Wend. 443; see, also, *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Hine v. Hine*, 39 Barb. 507, 512; *Payne v. Parsons*, 14 Pick. 313; *Sims v. Sims*, 2 Stockt. Ch. 158, 162, 163; *Bell v. Coleman*, 5 Madd. 22; *Gill's Estate*, 1 Pars. Eq. 139; *Jones v. Mason*, 5 Rand. 577; *Clendenning v. Clymer*, 17 Ind. 155.

² *Fowler v. Fowler*, 3 P. Wms. 353; *Wallace v. Pomfret*, 11 Ves. 542; *Kirk v. Eddows*, 3 Hare, 509; *Hall v. Hill*, 1 Dr. & War. 94; *Palmer v. Newell*, 20 Beav. 32; *Guy v. Sharp*, 1 My. & K. 589; *Weall v. Rice*, 2 Russ. & My. 251.

³ *Monck v. Lord Monck*, 1 Ball & B. 298; *Hall v. Hill*, 1 Dr. & War. 94; *Timmer v. Bayne*,

7 Ves. 508; *Palmer v. Newell*, 20 Beav. 32; *Powys v. Mansfield*, 3 My. & Cr. 359; *Hartopp v. Hartopp*, 17 Ves. 192; *Guy v. Sharp*, 1 My. & K. 589; *Pole v. Lord Somers*, 6 Ves. 321; *Freemantle v. Bankes*, 5 Ves. 79; *Clendenning v. Clymer*, 17 Ind. 155; *Timberlake v. Parish's Ex'rs*, 5 Dana, 346; *Paine v. Parsons*, 14 Pick. 313; *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 153; *Lawson's Appeal*, 11 Harris, (23 Pa. St.) 85; *Hine v. Hine*, 39 Barb. 507; *Gill's Estate*, 1 Pars. Eq. 139; *Zeigler v. Eckert*, 6 Barr. (6 Pa. St.) 13, 18; *Sims v. Sims*, 2 Stockt. Ch. 152, 153, 158; *Jones v. Mason*, 5 Rand. 577; *Gilliam v. Chancellor*, 43 Miss. 437, 453-456; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9.

rule of evidence just referred to. This distinction, laid down by the later English cases, in respect to the admission of parol or extrinsic evidence to establish the intention of a donor in making a gift by some written instrument, is not universally conceded or recognized by the American cases; some of them recognize it,¹ while others seem to ignore the distinction altogether, permitting the use of parol and extrinsic evidence in both class of cases.² And some of the earlier cases have permitted the admission of parol evidence, whether there is or is not any presumption of satisfaction arising from the gift.³

§ 147. **Satisfaction and ademption distinguished.**—An important distinction is to be recognized between cases of satisfaction and of ademption. Wherever the donee has a positive legal claim against the donor, existing at the time of and prior to the gift, and the gift is made subsequently with the intention to make the gift a satisfaction of such claim, then the case is one of satisfaction, and is called such by the authorities. For the acceptance of the gift in that case constitutes the payment or satisfaction of an absolutely valid claim, and it rests with the donee to determine whether he shall take the gift or enforce his claim; in other words, he is put to his election between the two. But where the prior interest, for which the subsequent gift is substituted, does not constitute a valid irrevocable claim against the donor, but is itself an interest created by the donor by will; in other words, it is a legacy or devise; inasmuch as the revocation of such prior legacy or devise is within the power of the donor, he may revoke it without the consent of the legatee or devisee.⁴ If, therefore, he should subsequently make a gift to this intended legatee, with the express or implied intention that the subsequent gift shall be taken by such legatee in satisfaction of the prior legacy, such intention, coupled with the gift, constitutes in fact a revocation of the prior legacy, and the intention of the donor may be effectuated with or without the consent of the donee. The donee in that case has no right of election between the gifts; the last gift is, by the donor, expressly declared to be a substitute for the former gift, and the consent of the donee is not at all necessary to the effectuation of this intention. In this case, the name of “ademption” is employed, for the reason that the prior legacy is by the subsequent gift and the inten-

¹ See preceding notes.

² *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 153; *Lawson's Appeal*, 11 Harris, (23 Pa. St.) 85; *Gilliam v. Chancellor*, 43 Miss. 437; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, reversing s. c., 3 Duer, 477; *Hine v. Hine*, 39 Barb. 507; *Jones v. Mason*, 5 Rand. 577; *Clendenning v. Clymer*, 17 Ind. 155; *Timberlake v. Parish's Ex'rs*, 5 Dana, 346; *Paine v. Parsons*, 14 Pick. 313; *Gill's Estate*, 1 Pars. Eq. 139; *Zeigler v. Eckert*, 6 Barr. (6 Pa. St.) 13, 18; *Sims v. Sims*, 2 Stockt. Ch. 158, 162, 163.

³ *Earl of Glengall v. Barnard*, 1 Keen, 769 794, *Lord Langdale, M. R.*; *Booker v. Allen*, Russ. & My. 270; *Lloyd v. Harvey*, 2 Russ. & My. 310, 316; *Weall v. Rice*, 2 Russ. & My. 251, 263.

⁴ In New York the doctrine of ademption does not apply to devises of realty. It can only be predicated of legacies of personalty. *Burnham v. Comfort*, 108 N. Y. 535, citing *Langdon v. Astor*, 16 N. Y. 34. But a legacy of personalty may be adeemed by a gift of real estate. *Snell v. Tuttle*, 44 Hun, 324.

tion of the donor adeemed or taken out of the will.¹ The cases for the application of the doctrine of satisfaction and ademption are four in number: *First*, ademption of legacies by portions or advancements; *second*, satisfaction of portions by legacies; *third*, ademption of legacies by subsequent legacies; *fourth*, satisfaction of debts by legacies.

§ 148. **Ademption of legacies by portions and advancements.**—These are cases where a testator has inserted in his will a provision for the benefit of another, and subsequently makes a gift *in presenti* to such person, either with the declared intention of making thereby an ademption or substitution of the legacy, or under circumstances from which such intention may be presumed. Of course, if there is a declared intention, there can be no question as to the effect of the subsequent gift; the intention unquestionable prevails.² The difficulty arises, whenever the subsequent gift is made without any such declaration of intention, and it is desired to determine whether the presumption of such an intention can arise from the facts of the case. This presumption is controlled by a variety of facts, and the more important of them will be presented in the following paragraphs.

§ 149. **Donor in loco parentis.**—Whenever the testator or donor stands *in loco parentis* to the legatee and donee, it is generally held, in the absence of facts indicating a contrary intention, that the donee should take the gift as a substitute for the legacy previously provided for. This presumption rests upon the doctrine that the legacy, as well as the gift *in presenti*, constitute the performance of what is, at least, a moral duty to make provision for the beneficiary; and hence if there are more than one, in respect to whom the donor or testator stands *in loco parentis*, a recognition of the right of one to receive both the legacy and the gift would operate as an injustice to the other parties, who have similar claims for consideration on the donor. While, however, this is the reason for the doctrine, yet it does not follow that the doctrine only applies when the donor stands *in loco parentis* to others; it applies in every case where the parental relation exists between the donor and donee, whether there are others bearing the same relation to the donor or not. In all cases, therefore, of a gift by one standing *in loco parentis* to another, to whom he has previously given a legacy, this gift will be presumed to operate as a satisfaction or ademption of the legacy.³ By a person *in loco parentis* is meant not only the parents, natural or by adoption, but anyone who has manifested his intention to act as a parent towards the donee, in respect to the bestowal of gifts upon him. Any such person stands

¹ *In re Tussaud's Estate*, L. R. 9 Ch. D. 363, 380; *Lady Thynne v. Lord Glengall*, 2 H. L. Cas. 131; *Lord Chichester v. Coventry*, L. R. 2 H. L. 71, 82, 86, 90, 91.

² *Hardingham v. Thomas*, 2 Drew. 353; *Howze v. Mallett*, 4 Jones Eq. 194; *Richards v. Humphreys*, 15 Pick. 133; *Cooper v. Cooper*, L. R. 8 Ch. 813, 819 n, *per* Lord Romilly, M. R.

³ *Lord Chichester v. Coventry*, L. R. 2 H. L. 71, 82, 86, 90, 91; *In re Tussaud's Estate*, L. R. 9 Ch. D. 363, 380; *Wigram, V. C.*, in *Suisse v. Lowther*, 2 Hare, 424, 433, 435; 2 Eq. Lead. Cas. 741, and notes (4th Am. ed.); *Shudall v. Jekyll*, 2 Atk. 518.

in loco parentis, although his conduct towards such a person in other respects does not assume a parental form.¹ But in order that the presumption of satisfaction may arise from the implication, that the donor stands *in loco parentis* to the donee, the intention to assume such a relation must be proven to exist as a fact; it is not to be inferred from any other relation existing between the donor and the donee; for example, the fact that the donor is the grandparent of the donee.² So, also, is there no presumption of an intention to stand *in loco parentis* in the case of a gift of a father to his illegitimate child.³

§ 150. **Subsequent portion or advancement less than the legacy.**—Where the subsequent portion or advancement is made of a smaller amount than the legacy, it is doubtful what would be its effect upon the legacy. According to the earlier English cases, this subsequent provision, when made with the express or presumed intention of satisfaction of the legacy, will constitute a complete satisfaction of the legacy, notwithstanding its amount is smaller than the legacy.⁴ But the earlier English doctrine has been repudiated by the later English authorities and the American cases, wherever the doctrine of satisfaction rests upon the presumption of intention, in the absence of an express declaration of such intention.⁵

§ 151. **Circumstances which affect and do not affect the presumption.**—Wherever the donor stands *in loco parentis* to the donee, in respect to the matter of donation, the presumption is almost conclusive. It has been already shown in the preceding paragraph that the difference in amount does not prevent the application of the doctrine.⁶ It has also been held that it is not even necessary that the provisions should be of the same kind. The difference in the character of the limitation, or of the interest in the two provisions, will not interfere with the presumption that the latter provision is to be taken in satisfaction of the prior legacy.⁷ So, also, if the legacy is of an

¹ *Monck v. Monck*, 1 Ball & B. 298; *Clendenning v. Clymer*, 17 Ind. 175; *Gill's Estate*, 1 Pars. Eq. 139; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, reversing s. c. in 3 Duer, 477; *Ex parte Pye*, 18 Ves. 140, 151; *Booker v. Allen*, 2 Russ. & My. 270; *Campbell v. Campbell*, L. R. 1 Eq. 383; *Powys v. Mansfield*, 3 My. & Cr. 359; 6 Sim. 544.

² See *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; 3 Duer, 477; *Clendenning v. Clymer*, 17 Ind. 155; *De Graaf v. Teerpenning*, 52 How. Pr. 313; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Campbell v. Campbell*, L. R. 1 Eq. 383; *Powell v. Cleaver*, 2 Bro. Ch. 499, 517; *Perry v. Whitehead*, 6 Ves. 546; *Roome v. Roome*, 3 Atk. 183.

³ *Ex parte Pye*, 18 Ves. 140, 152; *Weatherby v. Dixon*, 19 Ves. 406.

⁴ *Ex parte Pye*, 18 Ves. 140, *per* Lord Eldon.

⁵ *Pym v. Lockyer*, 5 My. & Cr. 29; *Miner v. Atherton's Ex'rs*, 11 Casey, 528; *Garrett's Appeal*, 3 Harris, 212; *Hine v. Hine*, 29 Barb. 507; *Richards v. Humphreys*, 15 Pick. 133; *Swoope's*

Appeal, 3 Casey, 58; *Hopwood v. Hopwood*, 7 H. L. Cas. 728; *Nevin v. Drysdale*, L. R. 4 Eq. 517; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, reversing s. c. in 3 Duer, 477; *De Graaf v. Teerpenning*, 52 How. Pr. 313; *Jones v. Mason*, 5 Rand. 577; *Howze v. Mallett*, 4 Jones Eq. 194; *Richards v. Humphreys*, 15 Pick. 133, 136; *Paine v. Parsons*, 14 Pick. 318; *Sims v. Sims*, 2 Stockt. Ch. 158; *Gill's Estate*, 1 Pars. Eq. 139; *Roberts v. Weatherford*, 10 Ala. 72; *Timberlake v. Parish's Ex'rs*, 5 Dana, 346; *Clendenning v. Clymer*, 17 Ind. 155, 159; *Weston v. Johnson*, 48 Ind. 1; *Moore v. Hilton*, 12 Leigh, 1; *Hauberger v. Root*, 5 Barr. 5 (Pa. St.) 108; *Clark v. Jetton*, 5 Sneed, 229; *Dugan v. Hollins*, 4 Md. Ch. 439.

⁶ See § 150.

⁷ *Miner v. Atherton's Ex'rs*, 11 Casey, 528; *Paine v. Parsons*, 14 Pick. 313; *Hartopp v. Hartopp*, 17 Ves. 184, 191; *Powys v. Mansfield*, 3 My. & Cr. 359, 374; *Lord Durham v. Wharton*, 3 Cl. & Fin. 146; 10 Bligh, n. s., 526; 3 My. & K. 472; 5 Sim. 297.

uncertain amount or of a contingent character, it is held that the subsequent gift must nevertheless be presumed to have been made with the intention to constitute a satisfaction of the legacy.¹ But there have been earlier cases in which it was held, that where the legacy was of an uncertain amount, and the subsequent gift definite, such gift would not be presumed to have been given in satisfaction of the prior legacy.² But where a legacy is given to one party with a provision for its transfer to another upon the happening of some contingency, and a subsequent gift is made with the express or presumed intention to satisfy the prior legacy, and the gift is made to the legatee who would have the immediate right to such legacy, such subsequent gift would operate as a satisfaction, not only of the interest of such legatee; but the contingent limitation of such legacy would likewise fall with the ademption of the interest of the immediate legatee.

If the advancement is made before the execution of the will, there is no presumption of ademption of the legacy;³ so, also, the presumption will not be permitted to apply where the donor makes frequent gifts of smaller sums of money to the legatee from time to time; the frequency of the gifts and their smaller amount, together are held to rebut the presumption of the intention to make such gifts constitute a satisfaction of the prior legacy.⁴

Whether the difference in the character of the legacy and of the subsequent portion shall constitute any obstacle to the application of the doctrine of ademption, is answered differently by the different authorities. According to some of the English authorities, such difference in character will have a material effect and prevent the presumption of an intention to adeem the legacy.⁵ But the other English authorities and the American cases, do not permit this difference in character to control the question of intention to make the transaction constitute the satisfaction of the prior legacy.⁶

§ 152. **Gift to husband of legatee.**—Where a father has given a legacy to his daughter, and subsequently makes an advancement of a substantial character to the husband of such daughter, the presumption that he intended such subsequent gift to the husband to operate

¹ *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 131; *Meinertzhagen v. Walters*, L. R. 7 Ch. 770; *Schofield v. Heap*, Beav. 93; *Montefiore v. Guadalla*, 1 De G. F. & J. 93; *Beckton v. Beckton*, 27 Beav. 99.

² *Watson v. Earl of Lincoln*, Ambl. 327; *Clen-denning v. Clymer*, 17 Ind. 155; *Clark v. Jetton*, 5 Sneed, 229.

³ *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; 3 Duer, 477; *Matter of Crawford*, 113 N. Y. 560; *Matter of Townsend*, 5 Dem. 147; *Yundt's Appeal*, 1 Harris, 575; *Musselman's Estate*, 5 Watts, 9; *Kreider v. Boyer*, 10 Watts, 54; *Zeiter v. Zeiter*, 4 Watts, 212; *Upton v. Prince*, Cas. temp. Talb. 71; *Taylor v. Cartwright*, L. R. 14 Eq. 167, 176, *per Wickens*, V. C.

⁴ *Sulsse v. Lowther*, 2 Hare, 424, 434; *Schofield*

v. Heap, 27 Beav. 93; *Watson v. Watson*, 33 Beav. 574; *Nevin v. Drysdale*, L. R. 4 Eq. 517.

⁵ *Lord Cottenham*, in *Pym v. Lockyer*, 5 My. & Cr. 48; *Grave v. Lord Salisbury*, 1 Bro. Ch. 425; *Spinks v. Robins*, 2 Atk. 491, 493; *Compton v. Sale*, 2 P. Wms. 553.

⁶ *Sheffield v. Coventry*, 2 Russ. & My. 317; *Phillips v. Phillips*, 34 Beav. 19; *Miner v. Ather-ton's Ex'rs*, 11 Casey, 528; *Paine v. Parsons*, 14 Plék. 313; *Platt v. Platt*, 3 Sim. 503; *Lord Dur-ham v. Wharton*, 3 Cl. & Fin. 146; 10 Bligh, n. s., 526; 3 My. & K. 472; 5 Sim. 297; *Gill's Estate*, 1 Pars. Eq. 139; *Hamberger v. Root*, 5 Barr. 108; *Swoope's Appeal*, 3 Casey, 58; *Jones v. Mason*, 5 Rand. 577; *Moore v. Hilton*, 12 Leigh, 1; *Dugan v. Hollins*, 4 Md. Ch. 439; *Weston v. Johnson*, 48 Ind. 1.

as a satisfaction *pro tanto* of the legacy to the daughter, is just as strong as where the subsequent gift is made directly to the legatee; for, unless this presumption is recognized, or some other motive for the gift is proven, no other reason for making the gift to the husband can be presumed, than that it was done in consideration of his love for his daughter, or at her own request. For these reasons, such gifts to the husband are presumed to operate as a satisfaction of the legacy to the daughter.¹

§ 153. **Effect of a subsequent codicil.**—Where, from the facts and circumstances of the case, a subsequent portion or advancement is presumed to have been made with the intention of operating as a substitute for the legacy given to this same party, such intention will prevail, and the legacy will be considered as extinguished by such gift, notwithstanding the fact that the will has been confirmed and republished by express reference thereto in a codicil, which is executed subsequent to the gift. The gift is held, under these circumstances, to operate as an ademption of the legacy, and the will, as confirmed by the codicil, will be read as if there had been an actual erasure of the legacy.² But if the codicil should contain an express reference to that particular legacy, of such a character as to indicate the testator's understanding that such legacy is still in force, then such a statement or reference would constitute a fact sufficient to rebut the presumption of the testator's intention to make the gift a satisfaction of the legacy, and the donee in that case could claim the legacy as well as the gift.³

§ 154. **Satisfaction of legacies between strangers.**—Where the testator and donor does not stand *in loco parentis* to the legatee and donee, the fact that a subsequent gift is made to such a legatee is not a circumstance, from which it might be presumed that the gift was intended as a satisfaction of such legacy, even though the legacy was of the same amount as was the gift. The legatee, under those circumstances, takes both gift and legacy free from the presumption that the donor intended the gift to be in satisfaction of the legacy.⁴ But this presumption, like all other presumptions of the same kind, may be rebutted by extrinsic evidence of the donor's intention to make the gift substitutionary instead of accumulative.⁵ There is an exception

¹ *Nevin v. Drysdale*, L. R. 4 Eq. 517; *Linsay v. Platt*, 9 Fla. 150; *Towles v. Roundtree*, 10 *Id.* 299; *Bridges v. Hutchins*, 11 *Ired.* 68; *Barber v. Taylor*, 9 *Dana*, 84; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Paine v. Parsons*, 14 *Pick.* 103; *McClure v. Evans*, 29 *Beav.* 422, 425; *Ravenscroft v. Jones*, 32 *Id.* 669; 4 *De G. J. & S.* 224.

² *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Howze v. Mallett*, 4 *Jones Eq.* 194; *Miner v. Atherton's Ex'rs*, 11 *Casey*, 528, 537; *Powys v. Mansfield*, 3 *My. & Cr.* 359, 376, *per Lord Cottenham*; *Paine v. Parsons*, 14 *Pick.* 313; *Alsop's Appeal*, 9 *Barr.* 374; *Knight-Bruce*, L. J., in *Ravenscroft v.*

Jones, 4 *De G. J. & G.* 224, 228; *Montague v. Montague*, 15 *Beav.* 565, 571.

³ *Hopwood v. Hopwood*, 22 *Beav.* 493; 3 *Jur. n. s.*, 549; and see *In re Aird's Estate*, L. R. 12 *Ch. Div.* 291.

⁴ *Parkhurst v. Howell*, L. R. 6 *Ch.* 136; *Sims v. Sims*, 2 *Stockt. Ch.* 158; *Hine v. Hine*, 39 *Barb.* 507; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; 3 *Duer*, 477; *Trimmer v. Bayne*, 7 *Ves.* 516; *Williams' Appeal*, 23 *P. F. Smith*, (73 *Pa. St.*) 249; *Roberts v. Weatherford*, 10 *Ala.* 72; *Jones v. Mason*, 5 *Rand.* 577.

⁵ *Richards v. Humphreys*, 15 *Pick.* 135; *Trim-*

to the general rule here laid down where the legacy is given to a stranger for a particular purpose, and the testator subsequently makes a payment or gift to him expressed to be for the same purpose. In such cases, the payment or advancement will be presumed to have been made with the intention of satisfying the legacy.¹

§ 155. **Satisfaction of portions or advancements by legacies.**—In the preceding paragraphs, the legacy preceded the advancement, and the advancement operated as an ademption or satisfaction of the legacy. In the present case, it is the portion or settlement of property upon one which is to be satisfied by the specific legacy. The American cases, in which this phase of the doctrine of satisfaction appears, are very few, inasmuch as it is not an American custom for a father to make such settlement; and hence the opportunity for the application of the doctrine in this particular phase is not frequent. A few American cases are given in the notes below.² The ordinary form in which this class of cases appears is that of a settlement made by a father upon a daughter on the eve of her marriage. It ordinarily takes the form of an agreement, to bestow upon her a certain quantity of property, and this agreement remains executory. Then, subsequently, the father makes a provision in the will for the same married daughter, and the question arises, whether this testamentary provision was intended by the father in satisfaction of the prior agreement for a portion or settlement of property upon her, or whether it should be taken by her in addition to such portion. Inasmuch as the ordinary case appears where the testator and donor is a parent or one standing *in loco parentis* to the donee, the presumption is in favor of the legacy or other testamentary provision having been intended to be a substitute for the portion. While it is usual for the subsequent provision to take the form of a legacy, the same opportunity for the application of the doctrine of satisfaction would be presented, if the subsequent provision was, like the first provision, in the nature of a present settlement or portion; but in that case, the presumption in favor of the intention to make the second provision a satisfaction of the first, would not be so strong as when the subsequent provision is found in a will.³ Inasmuch as the agreement for the portion, which is intended by the testator to be satisfied by the legacy, grants to the beneficiary a positive vested right which the

mer v. Bayne, 7 Ves. 516; Debeze v. Mann, 2 Bro. Ch. 166, 519, 521.

¹ Williams' Appeal, 23 P. F. Smith, (73 Pa. St.) 249; Roberts v. Weatherford, 10 Ala. 72; Jones v. Mason, 5 Rand. 577; Parkhurst v. Howell, L. R. 6 Ch. 136; Sims v. Sims, 2 Stockt. Ch. 158; Hine v. Hine, 39 Barb. 507; Langdon v. Astor's Ex'rs, 18 N. Y. 9; 3 Duer, 477.

² Guignard v. Mayrant, 4 Desau. 614; Winn's Adm'r v. Wier, 3 B. Mon. 648; Taylor v. Lanier, 3 Murphy, 198; see Gilliam v. Chancellor, 43 Miss. 437.

³ In re Tussaud's Estate, L. R. 9 Ch. D. 363; Cooper v. Cooper, L. R. 8 Ch. 813; Palmer v. Newell, 20 Beav. 32, 40; 8 De G. M. & G. 74; Hinchcliffe v. Hinchcliffe, 3 Ves. 516; Chichester v. Coventry, L. R. 2 H. L. 71; Dawson v. Dawson, L. R. 4 Eq. 504; Paget v. Greenfell, L. R. 6 Eq. 7; Duke of Somerset v. Duchess of Somerset, 1 Bro. Ch. 309 n; Campbell v. Campbell, L. R. 1 Eq. 383; Lady Thynne v. Earl of Glengall, 2 H. T. Cas. 131; 1 Keen, 769; Copley v. Copley, 1 P. Wms. 147; Moulson v. Moulson, 1 Bro. Ch. 82.

testator cannot, by his intentional substitution of the legacy, infringe or take away without the consent thereto of such beneficiary, whenever the case arises in which the intention of the testator to make his testamentary provision operate as a satisfaction of the prior settlement is expressed or implied, it is not a case of ademption, but strictly one of satisfaction; that is, the beneficiary is not obliged to accept the testamentary provision in the place of her portion, but may enforce the specific performance of the marriage settlement. She is, therefore, put to her election, to determine which of these provisions she shall accept; she cannot accept both, but she may take whichever of them she prefers.¹ This case of satisfaction differs from the ordinary cases of election, in the fact that in the present case, the prior provision is an executory agreement for the bestowal of property, and not an actual transfer of such property. If there had been an actual transfer of the property at the time of marriage, then it would have been a case of election properly so-called, and not one of satisfaction. So strong is the presumption of the intention to make the legacy operate as a satisfaction of the prior portion, that very slight differences in the characteristics of the prior portion and the subsequent legacy will not be permitted to rebut such presumption, and raise by implication the contrary intention to make an additional provision for such daughter. In many of the cases, often great differences in character between the two provisions do not interfere with the application of the presumption; for example, it has been held that the bequest of a residue of property, which, of course, is uncertain in amount, will be presumed to have been intended as a satisfaction of the prior portion agreed to be given to the same beneficiary.² While the general rule applies to these cases, in respect to the presumption of an intention to make the legacy operate as a satisfaction of the prior portion—as obtains in the case of a prior legacy followed by a subsequent advancement—yet when the question is not one of presumption, but one of fact, as to whether the testator did have such an intention, slighter evidence of such intention is required to rebut the presumption where the portion precedes the legacy and is presumed to be satisfied by such subsequent legacy, than in the case where the legacy precedes the portion and is presumed to be satisfied by such portion. The reason for the distinction is to be found in the fact, that where the portion precedes the legacy the substitution of the legacy for the portion requires the consent of the beneficiary, and is in violation of the vested right of such beneficiary in respect to the portion. In the latter case, the prior provision by will is revocable by the donor or testator, with or without any further

¹ *Pole v. Lord Somers*, 6 Ves. 309; *Hincheliffe v. Hincheliffe*, 3 Ves. 516; *Finch v. Finch*, 1 Ves. 534; *Thynne v. Earl of Glengall*, 2 H. L. Cas. 131; *Copley v. Copley*, 1 P. Wms. 147.

² *Russell v. St. Aubyn*, L. R. 2 Ch. D. 398;

Campbell v. Campbell, L. R. 1 Eq. 383; *Lady Thynne v. Earl of Glendall*, 2 H. L. Cas. 131; 1 Keen, 769; *Sparks v. Cator*, 3 Ves. 530; *Weall v. Rice*, 2 Russ. & My. 251, 268.

provision for such beneficiary; and hence the substitution of a second provision for the former does not require the consent of the beneficiary. The presumption of an intention to substitute the subsequent provision for the former, would in the latter case be strong and in the former case weaker, because it is not so reasonable to suppose that the testator intended to violate the vested rights of the donee in the prior provision, which he cannot do without the consent of such donee.¹

§ 156. **Satisfaction of legacy by subsequent legacy.**—This is a case where the testator after making a provision in his will for another, and, either by the same instrument or by a subsequent will or codicil, he makes an additional provision for the same person. Where the two provisions appear in different instruments, the presumption of an intention to make the second legacy or testamentary provision a substitute for the first arises whenever the legacies are specific, *i. e.*, where the same thing is specifically devised in both cases. Inasmuch as the same thing cannot be disposed of twice, there is a necessary presumption that the second legacy was intended to operate as a substitute for the first legacy.² But where the testator gives, by different instruments, two legacies of a general character, *i. e.*, of a given amount of money or of things, without any words of qualification accompanying the bequest, the second legacy is regarded and treated as additional to the prior legacy, and the testator is not presumed to have intended such subsequent legacy to be a substitute for the prior legacy. The beneficiary, therefore, would be entitled to both gifts, under the presumption that the testator intended him to have them both, whether the second legacy is in amount equal or less than the first legacy, or whether the legacies are of a different character. When this presumption of the intention to give both provisions to such beneficiary is still further strengthened by the fact that there is some variation between the two legacies, either as to the amount, character, or terms of settlement, it becomes almost conclusive.⁴ Where, however, they are expressed to be for the same purpose in both instances, and the legacies are for the same amount, the presumption of an intention to make the additional provision for the legatee is overthrown and the contrary presumption established, that

¹ *Burges v. Mawbey*, 10 Ves. 319, 327; *Donce v. Lady Torrington*, 2 My. & K. 600; *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Goodfellow v. Burchett*, 2 Vern. 298; *Bellasis v. Uthwatt*, 1 Atk. 426, 428; *Grave v. Earl of Salisbury*, 1 Bro. Ch. 425; *Ray v. Stanhope*, 2 Ch. Rep. 159; *Dawson v. Dawson*, L. R. 4 Eq. 504; *Lethbridge v. Thurlow*, 15 Beav. 334.

² *Duke of St. Albans v. Beauclerk*, 2 Atk. 638; *Suisse v. Lowther*, 2 Hare, 424, 432, *per* Wigram, V. C.

³ *De Witt v. Yates*, 10 Johns. 156; *Jones v. Creveling's Ex'rs*, 4 Harrison, 127; 1 Zab. 573 (N. J.); *Edwards v. Rainier's Ex'rs*, 17 Ohio

St. 597; *Cunningham v. Spickler*, 4 Gill, 280; *Rice v. Boston, &c. Aid Soc.*, 56 N. H. 191; *Pitt v. Pigeon*, 1 Ch. Cas. 301; *Hurst v. Beade*, 5 Madd. 358; *Lyon v. Colville*, 1 Coll. 449; *Johnstone v. Lord Harrowby*, 1 De G. F. & J. 183; 1 Johns. 425; *Radburn v. Jervis*, 3 Beav. 450; *Russell v. Dickson*, 4 H. L. Cas. 304; *Hooley v. Hatton*, 1 Bro. Ch. 390 n; *Baillie v. Butterfield*, 1 Cox, 392; *Forbes v. Lawrence*, 1 Coll. 495.

⁴ *Wray v. Field*, 2 Russ. 257; 6 Madd. 300; *Strong v. Ingram*, 6 Sim. 197; *Atty.-Gen. v. George*, 8 Sim. 138; *Bartlett v. Gillard*, 2 Russ. 149; *Spire v. Smith*, 1 Beav. 419; *Sawrey v. Rumney*, 5 De G. & Sm. 698.

the second legacy was intended to be a substitute for the first. But it must be observed that there must be a concurrence of the two elements, viz.: the same amount and the same motive, in both legacies, in order that the second legacy may be presumed to be a substitute for the first. If either of these elements is absent, the presumption is in favor of the second legacy being accumulative instead of substitutionary. The presumption, therefore, in favor of the substitutionary character of the second legacy will not arise where the second legacy, although expressed to be for the same motive as the first, is for a different amount than the first.¹

It must in this connection, however, be borne in mind that we are dealing so far only with the question of presumption of the intention of the testator. If there be any language employed by the testator in either case, any statement from which it can be inferred that the testator intended the second legacy to be a substitute for the first, the usual presumption would be overthrown by such evidence of a contrary intention. In this case, the question is not one of presumption, but one of interpretation of the will and the intention of the testator.²

The same rule would apply when the second instrument expressly refers to the former instrument. The two instruments would have to be compared together, in order to ascertain from the language of the testator his intention in creating a second provision for the same beneficiary. Where, by comparison of the two instruments, it appears that the one instrument is almost an exact copy of the other, with only slight modifications, it would be presumed that the second instrument was intended simply as the revision of the first, and that the testator intended the one instrument, in all its parts, to be a substitute for the former.³ So, also, would it be possible to show an intention, to make the second legacy a substitute for the former, by proof of the fact that changes have taken place in the relation of the parties and in their circumstances, which would satisfactorily account for the intention to make the second legacy a substitute for the first.⁴

Where the two legacies are given by the same instrument, and they are legacies for the same amount, the presumption is that the testator intended the second to be a substitute for the former.⁵ This rule is

¹ *Hurst v. Beach*, 5 Madd. 352; *Lord v. Sutcliffe*, 2 Sim. 273; *Roch v. Callen*, 6 Hare, 531; *Ridges v. Morrison*, 1 Bro. Ch. 388; *Mackinnon v. Peach*, 2 Keen, 555.

² *Blackler v. Boott*, 114 Mass. 24; and see *Mason v. M. E. Church*, 27 N. J. Eq. (12 C. E. Green) 47; *Rice v. Boston, &c. Aid Soc.*, 56 N. H. 191; *Lee v. Pain*, 4 Hare, 201, 221, 233, *per* Wigram, V. C.; *Mackensie v. Mackensie*, 2 Russ. 273; *Townsend v. Mostyn*, 26 Beav. 72; *Suisse v. Lord Lowther*, 2 Hare, 424, 429-438, *per* V. C. Wigram; *Allen v. Callow*, 3 Ves. 289, *per* Lord Alvanley; *Russell v. Dickson*, 2 Dr. & War.

133, *per* Lord Chan. Sugden; s. c., 4 H. L. Cas. 293.

³ *Tuckey v. Henderson*, 33 Beav. 174; *Fraser v. Byng*, 1 Russ. & My. 90; *Campbell v. Lord Radnor*, 1 Bro. Ch. 271; *Barclay v. Wainwright*, 3 Ves. 462; *Hemming v. Gurrey*, 2 S. & S. 311; 1 Bligh, N. s., 479; *Coote v. Boyd*, 2 Bro. Ch. 521 (Belt's ed.), *per* Lord Thurlow; *Currie v. Pye*, 17 Ves. 462.

⁴ *Lee v. Pain*, 4 Hare, 201, 242, 243, *per* Wigram, V. C.; *Osborn v. Duke of Leeds*, 5 Ves. 369; *Allen v. Callow*, 3 Ves. 289, *per* Lord Alvanley.

⁵ *Jones v. Creveling's Ex'rs*, 4 Harrison, 127;

based upon the reasonable presumption that the second provision is an unintentional repetition of the first. But where the legacies given by the same instrument are of unequal amounts, this presumption of repetition cannot apply, and the second provision is presumed by the testator to be intended by him as an additional provision, and the legatee is entitled to both.¹ Here, as elsewhere, this presumption of intention will also be controlled by direct proof of a contrary intention on the part of the testator. In every case, the actual intent of the testator will prevail, whenever such intent is established by competent evidence.² But so strong is the presumption, that in the case of second legacies by the same instrument, the testator intended the second legacy to be accumulative rather than substitutionary, that the strongest evidence of a contrary intention is required to rebut it.³

§ 157. **Satisfaction of debts by legacy.—Legacy by a debtor to his creditor.**—It is stated, as a general rule, by a leading authority⁴ that if one who is indebted bequeathes to his creditor a sum of money as great as, or greater than, the debt, the presumption of law is that such legacy was intended by the debtor to be taken by the creditor in satisfaction of the debt. It is manifest that this intention of the testator can only be carried out by putting the creditor to his election between the enforcement of the debt and the acceptance of the legacy. Where the intention is manifest that the legacy shall be taken in satisfaction of the debt, the creditor cannot claim the legacy in addition to the payment of the debt; and it is, of course, possible for the debtor to insert in the bequest the express declaration of his intention to have the legacy operate as a satisfaction of the debt. In every such case, the intention will be carried out by putting the creditor to his election.⁵ But this presumption is not in favor with the courts, and in many cases it is condemned; and wherever it is still recognized as a binding rule of law, it is enforced only within the strictest limitations. Wherever it is possible for the courts to find a ground, in the facts of the case, for the contrary presumption, that the debtor intended a gift instead of making a provision for payment of the debt, the courts will avail themselves of such circumstances, it matters not

1 Zabr. 573; *Edwards v. Rainier's Ex'rs*, 17 Ohio St. 597; *Greenwood v. Greenwood*, 1 Bro. Ch. 31 n; *Early v. Middleton*, 14 Beav. 453; *De Witt v. Yates*, 10 Johns. 156; *Garth v. Meyrick*, 1 Bro. Ch. 30; *Manning v. Thesiger*, 3 My. & K. 29.

¹ *Baylee v. Quinn*, 2 Dr. & War. 116; *Adnam v. Cole*, 6 Beav. 353; *Windham v. Windham*, Rep. temp. Finch, 267; *Brennan v. Moran*, 6 Ir. Ch. 126; *De Witt v. Yates*, 10 Johns. 156; *Jones v. Creveling's Ex'rs*, 4 Harrison, 127; 1 Zabr. 573.
² *Russell v. Dickson*, 4 H. L. Cas. 293; *Lobley v. Stocks*, 19 Beav. 392.

³ *Lee v. Pain*, 4 Hare, 201, 218, 236, *per* Wigram, V. C.; *Russell v. Dickson*, 2 Dr. & War. 137, *per* Lord Chan. Sugden.

⁴ *Talbot v. Duke of Shrewsbury*, Prec. in Ch. 394; 2 Eq. Leg'd. Cas. 751 (4th Am. ed.).

⁵ *Crouch v. Davis*, 23 Gratt. 62; *Gilliam v. Chancellor*, 43 Miss. 437; *Gilliam v. Brown*, 43 Miss. 641; *Fowler v. Fowler*, 3 P. Wms. 353; *Richardson v. Greese*, 3 Atk. 68; *Parker v. Coburn*, 10 Allen, 82; *Allen v. Merwin*, 121 Mass. 378; *Eaton v. Benton*, 2 Hill, 576; *Harris v. Rhode Island, &c. Co.*, 10 R. I. 313; *Ward v. Coffield*, 1 Dev. Eq. 108; *Byrne v. Byrne*, 3 Serg. & R. 54; *Wesco's Appeal*, 52 Pa. St. (2 P. F. Smith) 195; *Horner's Ex'r v. McGaughy*, 62 Pa. St. (12 P. F. Smith) 189; *Van Riper v. Van Riper*, 1 Green Ch. 1; *Strong v. Williams*, 12 Mass. 389; *Bensusan v. Nehemias*, 4 De G. & Sm. 381; *Shadbolt v. Vanderplank*, 29 Beav. 405; *Dey v. Williams*, 2 Dev. & Bat. Eq. 66; *Perry v. Maxwell*, 2 Dev. Eq. 488, 499.

how slight the circumstances may be, or how insufficient they would be considered in other cases falling under the doctrine of satisfaction.¹

§ 158. **What prevents the presumption of satisfaction of debts by legacies.**—As a general proposition, it may be stated that any variance in character, conditions, or terms, between the debt and the legacy, will operate to prevent the presumption of an intention to make the legacy a satisfaction of the debt. Thus, for example, the presumption will be prevented from applying, where the debt is greater than the legacy.² There is also no presumption of satisfaction where the legacy is payable at a different time from the debt;³ or where the debt was contracted subsequent to the execution of the will.⁴ It has also been held that the presumption of satisfaction is repudiated where there is an express provision in the will to pay debts and legacies, or simply to pay debts.⁵ In these cases, as in every other case of the application of the doctrine of satisfaction, the presumption of satisfaction only exists or arises, in the absence of express proof of intention. The declared and proved intention, that the legacy shall constitute a satisfaction of the debt, will unquestionably prevail over any presumption which might otherwise arise or be inferred from the facts of the case. There are two principal ways, in which this express intention may be manifested: One case is where the testator declares in his will that the legacy shall constitute a settlement of the debt.⁶ In the second case, the intention is manifested by an agreement, made when the debt was contracted, that that debt shall be paid, or its payment provided for, by a testamentary provision. Where the intention is manifest by such an agreement, contemporaneous with the contraction of the debt, not only must the legacy be accepted by the creditor in satisfaction of the debt, but that is the only way in which he could enforce it. In that case, he is not permitted to exercise a right of election; he must accept the legacy or nothing.⁷

¹ *Haynes v. Mico*, 1 Bro. Ch. 130; *Cramer's Case*, 2 Salk. 508; *Mathews v. Mathews*, 2 Ves. Sen. 636; *Stocken v. Stocken*, 4 Sim. 152; *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 153; *Strong v. Williams*, 12 Mass. 389; *Eaton v. Benton*, 2 Hill, 576; *Van Riper v. Van Riper*, 1 Green Ch. 1; *Byrne v. Byrne*, 3 Serg. & R. 54; *Horner v. McGaughy*, 62 Pa. St. (12 P. F. Sm.) 191; *Smith v. Smith*, 1 Allen, 129; *Edelen v. Dent*, 2 Gill & J. 185; *Gilliam v. Brown*, 43 Miss. 641; *Crouch v. Davis*, 23 Gratt. 62; *Dey v. Williams*, 2 Dev. & Bat. Eq. 66; *Perry v. Maxwell*, 3 Dev. Eq. 488, 499.

² *Eaton v. Benton*, 2 Hill, 576; *Strong v. Williams*, 12 Mass. 389; *Cranmer's Case*, 2 Salk. 508; *Atkinson v. Webb*, 2 Vern. 478; *Eastwood v. Vincke*, 2 P. Wms. 613, 617.

³ *Clark v. Sewell*, 3 Atk. 96; *Cole v. Willard*, 25 Beav. 568; *Eaton v. Benton*, 2 Hill, 576; *Van Riper v. Van Riper*, 1 Green's Ch. 1; *Edelen v. Dent*, 2 Gill & J. 185; *Perry v. Maxwell*, 2 Dev. Eq. 488; *Haynes v. Mico*, 1 Bro. Ch. 129; *Jeacock v. Falkener*, 1 Bro. Ch. 195; 1 Cox, 37; *Nichols*

v. Judson, 2 Atk. 300, 332; *Charlton v. West*, 30 Beav. 124, 127; *Byrne v. Byrne*, 3 Serg. & R. 54.

⁴ *Thomas v. Bennet*, 2 P. Wms. 343; *Cranmer's Case*, 2 Salk. 508; *Plunkett v. Lewis*, 3 Hare, 330; *Strong v. Williams*, 12 Mass. 389; *Horner v. McGaughy*, 62 Pa. St. (12 P. F. Sm.) 189.

⁵ *Glover v. Hartcup*, 34 Beav. 74; *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Dawson v. Dawson*, L. R. 4 Eq. 504; *Richardson v. Greese*, 3 Atk. 64, 68; *Hales v. Darell*, 3 Beav. 324, 332; *Jefferies v. Mitchell*, 20 Beav. 15; *Rowe v. Rowe*, 2 De G. & Sm. 297, 298; *Strong v. Williams*, 12 Mass. 389, *per Putnam*, J.

⁶ *Clark v. Bogardus*, 12 Wend. 67; *Van Riper v. Van Riper*, 1 Green Ch. 1; *Morris v. Morris*, 3 Houst. (Del.) 568; *Williams v. Crary*, 5 Cow. 368; 8 Cow. 246; 4 Wend. 443; see, also, *Eaton v. Benton*, 2 Hill, 576.

⁷ *Eaton v. Benton*, 2 Hill, 576, 578; *Williams v. Crary*, 4 Wend. 443, 450; *Patterson v. Patterson*, 13 Johns. 379; *Jacobson v. Legrange*, 3 Id. 199; *Morris v. Morris*, 3 Houst. (Del.) 568.

§ 159. **Debt owing to a child or wife.**—According to the authorities, it seems that no distinction is made, in respect to the strength of the presumption of the intention to make the legacy a satisfaction of the debt, between the cases in which no other relation but that of debtor and creditor exists between the parties, and those in which the debtor and creditor sustain the relationship to each other, respectively, of father and child, and husband and wife. Where the creditor is a wife or child, the presumption that the debt is to be satisfied by the legacy is overthrown by the same circumstances which we have seen tend to overthrow such presumption in the ordinary case of debtor and creditor. That is, at least, the case where the subsequent provision for such wife or child is made by will.¹ If the subsequent provision is made by an advancement, instead of by will, it is held that such advancement is taken under a stronger presumption of an intention to make it a satisfaction of the debt, than in the case where the subsequent provision appears in a will.²

§ 160. **Legacy by a creditor to his debtor.**—Where the legacy is made by the creditor to his debtor, instead of by the debtor to the creditor, there is no room, of course, for the application of the doctrine of satisfaction. The only connection between the debt and the legacy, which may be inferred from the relation existing between the parties, is that the executor may refuse to pay such legacy except by way of offset to the debt; and ordinarily an executor may do this in a court of equity, independently of any express directions of the testator.³ But the will may contain a declaration, accompanying the testamentary provision, expressly making the payment of the debt a special charge upon the legacy; or there may be express declarations accompanying the legacy, or contained in the will, releasing the debt, as well as making the testamentary provision.⁴ Wherever such is the case, the satisfaction of the debt by the enforcement of the legacy must also be taken subject to the claims of the creditors of the testator; in other words, the gift by will of the debt can only be carried out or enforced like any other legacy, viz.: subject to the rights of the creditors of the testator.⁵

§ 161. **Equitable doctrine of performance distinguished from satisfaction.**—As has already been made to appear, the equitable doc-

¹ Tolson v. Collins, 4 Ves. 482; Fairer v. Park, L. R. 3 Ch. D. 309; Cole v. Willard, 25 Beav. 568; Gilliam v. Chancellor, 43 Miss. 437; Bryant v. Hunter, 3 Wash. C. C. 48; Guignard v. Mayrant, 4 Desau. 614; Bryan v. Hunter, 3 Wash. C. C. 48; Kelly v. Kelly's Ex'rs, 6 Rand. 176.

² Wood v. Briant, 2 Atk. 521; Sneed v. Bradford, 1 Ves. Sen. 501; Chave v. Farrant, 18 Ves. 8; Hardingham v. Thomas, 2 Drew. 353; Hayes v. Garvey, 2 Jo. & Lat. 268; Plunkett v. Lewis, 3 Hare, 316, per Wigram, V. C.; see, also, Mackdowell v. Halfpenny, 2 Vern. 484.

³ Hayes v. Hayes, 2 Del. Ch. 191; Brokaw v.

Hudson, 37 N. J. Eq. (12 C. E. Green) 135; Blackler v. Boot, 114 Mass. 24; Huston v. Huston, 37 Iowa, 668; Zeigler v. Eckert, 6 Barr. (6 Pa. St.) 13, 18; Wilmot v. Woodhouse, 4 Bro. Ch. 227; Clark v. Bogardus, 2 Edw. Ch. 387; s. c., 12 Wend. 67; Stagg v. Beckman, 2 Edw. Ch. 89.

⁴ Weskett v. Rahy, 2 Bro. P. C. 386; Byrn v. Godfrey, 4 Ves. 6; Kidder v. Kidder, 9 Casey, 288; Pole v. Lord Somers, 6 Ves. 309, 323; Zeigler v. Eckert, 6 Barr. (6 Pa. St.) 13, 18.

⁵ Clark v. Bogardus, 2 Edw. Ch. 387; 12 Wend. 67; Stagg v. Beckman, 2 Edw. Ch. 89; Hobart v. Stone, 10 Pick. 215.

trine of satisfaction involves the taking of a subsequent provision as a substitute for the obligation or provision previously made for the same person. The second provision is, therefore, not performance of the previous obligation, but something that takes the place thereof. Where, however, the second provision is not a substitute, but is in fact the transfer of the identical thing which the donor was obliged to give under the previous obligation, it is a case of performance; and the equitable doctrine of performance provides, that whenever one has definitely bound himself to do something by which a particular benefit, or proprietary interest is to be acquired by another in a specified manner; and subsequently, or perhaps in a slightly different manner, he bestows the same proprietary interest upon the person for whom it was intended, or permits the same interest to descend upon and vest in such a person by operation of law, so that the person for whom the provision was intended is substantially in the same position, as if there had been a performance of the obligation, equity treats this particular result as the equivalent of the performance of the contract or obligation, and will consider the obligation or contract as fully performed and hence discharged.¹ Two cases may arise under this doctrine: One is where a person covenants to purchase and settle lands upon another, or simply to settle lands upon another, and he purchases the lands or owns them when he dies; but instead of settling them upon the person for whom provision is made by the previous agreement or contract, he dies intestate, and the property devolves by descent upon the covenantee as heir-at-law; that is, the covenantee as heir-at-law of the covenantor becomes vested of lands to the amount or extent, which the ancestor had covenanted to settle upon him. In such a case, the court of equity would presume that the covenant had been fully performed, so that it could not be enforced against the estate, while such covenantee in his character as heir claims his share of the estate in addition to the lands called for in the covenant. This is only another application of the equitable presumption against the intention of bestowing double benefits upon one, to the detriment of another who might be interested in the same estate.² If the lands which descend to the covenantee are less in value than the lands to be purchased under the covenant, it would only operate as a performance *pro tanto*.³ There are several forms which the covenant might have, and in which the doctrine will apply: One is, where the person at the time owns no real estate, but covenants to purchase and settle the lands upon another.⁴ *Secondly*, where

¹ Goldsmith v. Goldsmith, 1 Sw. 211; Blandy v. Widmore, 1 P. Wms. 324; 2 Vern. 709; 2 Eq. Lead. Cas. 833 (4th Am. ed.); Deacon v. Smith, 3 Atk. 323; Snowden v. Snowden, 1 Bro. Ch. 582; 3 P. Wms. 228 n.

² Sowden v. Sowden, 1 Bro. Ch. 582; Mathias v. Mathias, 3 Sm. & Giff. 552; Mornington v. Keane, 2 De G. & J. 292; Lechmere v. Earl of

Carlisle, 3 P. Wms. 211; Tooke v. Hastings, 2 Vern. 97.

³ Sowden v. Sowden, 1 Bro. Ch. 582; 3 P. Wms. 228 n; Lechmere v. Earl of Carlisle, 3 P. Wms. 211.

⁴ Deacon v. Smith, 3 Atk. 323; and see Wellesley v. Wellesley, 4 My. & Cr. 561; Mornington v. Keane, 2 De G. & J. 292.

he merely covenants to settle lands.¹ *Third*, where he covenants to pay a sum of money over to trustees to be invested in lands.² In the third case, the descent of lands to the covenantee or beneficiary to the value, or less than the value, of the land called for by the covenant, would be treated as a performance of such covenant, in whole or *pro tanto*, as the case may be.³ But in order that the covenant might be presumed to have been performed by the descent of lands to the covenantee as heir, the lands acquired by descent must be of the same nature or estate, as those which are called for by the contract.⁴ So, also, if the covenant is to purchase lands and settle them upon the covenantee, it cannot be performed by any transfer of lands owned by the covenantor at the time when he makes the covenant; and hence the descent of such lands to the covenantee would not be any presumptive performance of the covenant.⁵ But the fact, that the purchase of the lands was made without the consent of trustees, in disregard of the provision of the contract to that effect, will not be considered a material obstacle to the application of the equitable doctrine of performance.

The second case is where one covenants to bequeath property to another of a certain amount or kind and the covenantor dies intestate and leaving the property to be divided among the next of kin, one of whom is the covenantee for whom he had covenanted to make provision in his will. Will the covenant to bequeath property be presumed to be performed to the extent that such covenantee acquires property by inheritance from the covenantor?⁶ Where the covenant is by its terms to be performed within a certain specified time, the equitable doctrine of performance will not apply if the covenantor survives the time of performance; for as soon as the time of performance is expired, the contract becomes broken; or, in other words, a positive debt becomes due from the covenantor to the covenantee, which he can enforce by an appropriate action. And if a subsequent provision should be made for such covenantee, it would not be a case of performance, but a case of satisfaction. But since the doctrine of *satisfaction* does not apply to the distributive share which the covenantee might acquire, as next of kin or heir of the covenantor, the covenantee would in such a case, as heir to such covenantor, claim his distributive share in the estate and at the same time enforce the covenant against the same estate.⁷ If, however, the covenantee be provided subsequently

¹ Tooke v. Hastings, 2 Vern. 97; Powdrell v. Jones, 2 Sm. & Giff. 335.

² Sowden v. Sowden, 1 Bro. Ch. 582; 3 P. Wms. 228 n.

³ Wilson v. Piggott, 2 Ves. 351, 356; 1 Watson's Compend. of Eq., p. 609.

⁴ Pinnell v. Hallett, Amb. 106; Atty.-Gen. v. Whorwood, 1 Ves. Sen. 534, 540; Deacon v. Smith, 3 Atk. 323.

⁵ See Warde v. Warde, 16 Beav. 103; Letchmere v. Letchmere, Cas. temp. Talb. 80;

Lechmere v. Earl of Carlisle, 3 P. Wms. 211.

⁶ Lord Eldon, in Grathshore v. Chalie, 10 Ves. 1; Thacker v. Key, L. R. 8 Eq. 408; Goldsmid v. Goldsmid, 1 Sw. 211; Blandy v. Widmore, 1 P. Wms. 324; 2 Vern. 209; 2 Eq. Lead. Cas. 834, 842 (4th Am. ed.).

⁷ Lang v. Lang, 8 Sim. 451; and see Grathshore v. Challe, 10 Ves. 1, 12, *per* Lord Eldon; Couch v. Stratton, 4 Ves. 391; Salisbury v. Salisbury, 6 Hare, 526; Young v. Young, 5 L. Rep. Eq. 615.

with a legacy, as an after-thought and not in performance of a contemporaneous agreement, while the equitable doctrine of performance will not apply, it is a case for the application of the doctrine of satisfaction.¹ In this connection it must be borne in mind, that the covenant, which is presumed to have been performed by the subsequent devolution of property of the same kind upon the covenantee as the covenantor's heir, is not a covenant for the purchase and settlement of a specific piece of property upon the covenantee, but of lands in general of a certain kind or character. Hence the covenantee cannot claim to have, under the covenant, any equitable lien upon the land, in the event of a purchase by the covenantor, as he would be able to do if the covenant had provided for the purchase of a specified parcel or tract of land, and the same tract had been purchased by such covenantor.²

¹ Note of Mr. Cox to *Blandy v. Widmore*, 1 P. Wms. 324; and see remarks in *Goldsmid v. Goldsmid*, 1 Sw. 211, 220, 221; *Ante*, Section 158 on Satisfaction; see *Haines v. Mico*, 1 Bro. Ch. 129; *Devese v. Pontet*, 1 Cox, 188.

² *Roundell v. Breary*, 2 Vern. 482; see *Pinch v. Anthony*, 8 Allen, 536; *Mornington v. Keane*, 2 De G. & J. 292; *Deacon v. Smith*, 3 Atk. 323.

CHAPTER X.

EQUITABLE DOCTRINE OF CONVERSION AND RECONVERSION.

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§ 164. **Definition or general explanation.**—The general meaning of the equitable maxim, "Equity regards as done that which ought to be done," has already been fully explained in a preceding chapter;¹ and as was stated there, the maxim finds its most important application in the case of conversion. Conversion of property may be defined to be that change in the character and characteristics of property in the contemplation of law, which follows a direction, in a deed or will, to change the character of property given by such an instrument, from real into personal property, or *vice versa*. Under the operation of the equitable maxim just referred to, equity will treat the property, so directed to be sold or converted into property of another kind, as having been actually converted; and will determine the rights of parties in and to the property so directed to be converted, according to their claims on the property when actually converted. In other words, if the property is land, and the will or deed which transfers it directs the land to be sold, and the proceeds of sale to be divided among certain beneficiaries, equity will treat the interest of all the parties in the property subject to this provision, and determine their rights in detail, by treating the property as personal property. So, on the other hand, if a sum of money is directed to be invested in lands for the benefit of certain persons, the rights of the beneficiary, under that provision, or of persons claiming through such beneficiary, will be determined by treating the property, so disposed of, as real estate, and not as personal. This is a doctrine of purely equitable origin, and wherever the courts of equity are still retained in their separate autonomy, the courts of equity alone have jurisdiction in the enforcement of the rights of parties under this doctrine.²

¹ Chap. II, § 20.

² Dodge v. Williams, 46 Wis. 70; Gould v. Taylor Orphan Asylum, 46 Wis. 106; Jones v. Throckmorton, 57 Cal. 368; Hilton v. Hilton, 2 MacArthur, 70; Lorrillard v. Coster, 5 Paige,

172, 218, Chancellor Walworth; Succession of Gamble, 23 La. Ann. 9; Collins v. Champ's Heirs, 15 B. Mon. 118; Green v. Johnson, 4 Bush, 164, 167; Hocker v. Gentry, 3 Metc. (Ky.) 463; Thomas v. Wood, 1 Md. Ch. 296; *Ex parte*

§ 165. **What words are sufficient to produce conversion.**—It is not necessary, in order that the equitable conversion of property may take place, that the donor shall manifest his intention to have the conversion take place;¹ but it is necessary that he should direct the actual conversion of the property from one character to another. If the act of converting the property is not an imperative duty of the trustees or executors, and such conversion is left to the discretion of such trustees or executors, then no equitable conversion will take place, and the rights of parties in and to the property, prior to the actual conversion of the property, will be treated as if there was no provision for conversion; for the doctrine of equitable conversion applies only when the conversion of the property is imposed upon the trustees or executors as an imperative duty and not as a discretionary authority.² But when one speaks here of a discretion, as to the conversion of the property, operating to prevent the application of the doctrine of equitable conversion, reference is made only to cases of absolute discretion as to whether the conversion shall be made at all. If the discretion only applies to the time and the manner of making the conversion, but the conversion of the property at some time and in some reasonable manner is imposed upon the trustee as an imperative duty, then the doctrine of equitable conversion will apply.³ Where money is directed to be laid out in land, or lands sold and the proceeds of sale required to be invested in personal property, with the consent or request of the beneficiary, then the equitable doctrine of conversion does not apply until the consent or request has been made.⁴ In all of these cases, where the conversion of the property is left to the absolute discretion of the trustee or other party, whether the conversion should take place or not, as soon as the discretion has been exercised, as by the sale of the property, then the equitable doctrine of conversion would apply

McBee, 63 N. C. 332; Tayloe v. Johnson, N. C. 381; Masterson v. Pullen, 62 Ala. 145; High v. Worley, 33 Ala. 199; Scudders' Ex'rs v. Van Arsdale, 2 Beas. 109; Orrick v. Boehm, 49 Md. 72; Lynn v. Gephart, 27 Md. 547, 563; Holland v. Cruft, 3 Gray, 162, 180; Cook's Ex'rs v. Cook's Adm'r, 20 N. J. Eq. 375; Smith v. Bayright, 34 N. J. Eq. 424; Prentice v. Janssen, 79 N. Y. 478; Power v. Cassidy, N. Y. 602; Van Vechten v. Keator, 63 N. Y. 52; Moncrief v. Ross, 50 N. Y. 431; Brolasky v. Gally's Ex'rs, 51 Barb. 509; Estate of Dobson, 11 Phila. 81; Estate of McCavoy, 12 Phila. 83; Parkinson's Appeal, 32 Pa. St. 455; Bur v. Sim, 1 Whart. 252; White v. Howard, 46 N. Y. 144; Hood v. Hood, 85 N. Y. 561; Delaney v. McCormack, 8 N. Y. 174; Pleasant's Appeal, 77 Pa. St. 356; Eby's Appeal, 84 Pa. St. 241; McClure's Appeal, 72 Pa. St. 414; Jones v. Caldwell, 97 Pa. St. 42; Page's Estate, 75 Pa. St. 87; Wells v. Wells, 88 N. Y. 323; Lawrence v. Elliott, 3 Redf. 235; Klock v. Buell, 56 Barb. 398; Arnold v. Gilbert, 5 Barb. 190.

¹ Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 215; Scudamore v. Scudamore, Prec. Chan. 543.

² Chew v. Nicklin, 45 Pa. St. 84; Anewalt's Appeal, 42 Pa. St. 414; Bleight v. Man. & Mech. Bank, 10 Barr. 131; Cook's Ex'r v. Cook's Adm'r, 20 N. J. Eq. 375; Pratt v. Toliaferro, 3 Leigh, 419; Hilton v. Hilton, 2 MacArthur, 70; Montgomery v. Milliken, Sm. & Mar. Ch. 495; Dodge v. Williams, 46 Wis. 70; Gould v. Taylor Orphan Asylum, 46 Wis. 106; Janes v. Throckmorton, 57 Cal. 368; Jones v. Caldwell, 97 Pa. St. 42; McClure's Appeal, 73 Pa. St. 414; Miller's and Bowman's Appeal, 60 Pa. St. 404; Estate of Dobson, 11 Phila. 81; Hood v. Hood, 85 N. Y. 561; White v. Howard, 46 N. Y. 144; Lawrence v. Elliott, 3 Redf. 235; Dominick v. Michael, 4 Sandf. 374; Peterson's Appeal, 88 Pa. St. 397; Prentice v. Janssen, 79 N. Y. 478; Power v. Cassidy, N. Y. 602; Fisher v. Banta, 66 N. Y. 468; Moncrief v. Ross, 50 N. Y. 431.

³ Tazewell v. Smith's Adm'r, 1 Rand. 313; but see Christler's Ex'r v. Meddis, 6 B. Mon. 35; Stagg v. Jackson, 1 N. Y. 206.

⁴ Lord v. Wrightwick, 4 De G. M. & G. 803; Sykes v. Sheard, 33 Beav. 114; Davies v. Goodhew, 6 Sim. 585.

for the purpose of providing that the rights of all parties in and to such property shall be determined by the character and kind of property into which it has been converted; that is, from the time when the discretion has been exercised, but not before.¹

It is a doubtful question, how far the imperative character of the direction for conversion should be proven by express statements of the will. It is believed that the direct expression of an intention to make the conversion of the property an imperative duty is not necessary, where the context of the will and the nature of the provision for the ultimate disposition of the property are such that they would not be consistent with any other intention than that of an absolute direction for the conversion of the property. In all such cases, the imperative duty of making the conversion will be necessarily implied.² The more common cases of this kind are, where the power to sell and reinvest is given without any words of command, and on the other hand, without words of discretion. In such a case, the intention of the testator will be largely determined by the character of the provisions of the will in which he directs what to do with the property when converted or changed. If this provision of the will would not be reasonable or effective, unless the exercise of the power to convert the property is imposed as an imperative duty, then such an intention will be implied and overturn the presumption that otherwise might prevail, that the power to convert was a discretionary, and not an imperative duty.³

§ 166. **Conversion in a contract of sale.**—Not only will the equitable doctrine of conversion apply to cases of gifts, whether by deed or by will, but likewise it applies to contracts for the sale of real property. Where lands are sold, during the time that the sale remains executory, *i. e.*, before the formal transfer of the legal title to the property, the vendor is treated as the trustee for the fund in respect to the land, and the vendee as the trustee for the vendor in respect to the purchase money. Under the doctrine of equitable conversion, the vendee is treated as the real owner of the land, and the vendor as the real owner of the purchase money. The interest, therefore, of the vendee in the transaction will be treated as real estate, and the interest of the vendor as personal property, and the rights of the parties claiming under them will be determined accordingly.⁴ But to work a conversion, the contract must be in every respect legal and binding upon

¹ *Lawrence v. Elliott*, 3 Redf. 235; *Van Vechten v. Keator*, 63 N. Y. 52; *Bourne v. Bourne*, 2 Hare, 35; *In re Ibbitson's Estate*, L. R. 7 Eq. 226; *Rich v. Whitfield*, L. R. 2 Eq. 583.

² *Wurts' Ex'rs v. Page*, 19 N. J. Eq. 365; *Page's Estate*, 75 Pa. St. 87; *Dodge v. Williams*, 46 Wis. 70; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; *Mower v. Orr*, 7 Hare, 473; *Fisher v. Banta*, 66 N. Y. 468; *Dodge v. Pond*, 23 N. Y. 69; *Stagg v. Jackson*, 1 N. Y. 206.

³ *De Beauvoir v. De Beauvoir*, 3 H. L. Cas.

524; *Power v. Cassidy*, 79 N. Y. 602; *Simpson v. Ashworth*, 6 Beav. 412; *Cowley v. Hartstonge*, 1 Dow. 361; *Cookson v. Cookson*, 12 Cl. & Fin. 121; *Hereford v. Ravenhill*, 5 Beav. 51.

⁴ *Green v. Smith*, 1 Atk. 572; *Pollexfer v. Moore*, 3 Atk. 272; *Atcherley v. Vernon*, 10 Md. 518; *Masterson v. Pullen*, 62 Ala. 145; see *Tiedeman, Real Prop.*, § 498, and *post*, § 309, for a discussion of implied trusts, arising out of executory contracts of sale.

the parties, and one that the court of equity will specifically enforce.¹ But, on the other hand, the doctrine of conversion will apply, notwithstanding the fact that the sale is made at the option of the purchaser; in such a case, the equitable conversion takes place whenever the purchaser exercises the option.²

§ 167. **Time from which conversion takes place.**—Independently of the agreement of the parties, affecting the question in one way or another, it may be stated, as a general rule, that the equitable conversion takes place, where the provision for the conversion of the property is contained in the will, from the death of the testator;³ and when given in some deed or other conveyance *inter vivos*, from the date of their execution.⁴ There is, however, one exception to the general rule just stated, viz.: in the case of mortgages with a power to sell, due to the fact that a mortgage is given as a security, with no positive intention to provide for the absolute conversion of the property, the provision for the conversion of the property being conditional upon the default in the payment of the debt.⁵ This general rule, as to the time when the equitable conversion takes place, may also be modified by the express direction of the party making the provision for the change in the character of the property; and whatever may be the express provision of the party executing the instrument of conveyance, as to the time when, or the conditions under which, the conversion shall take place, will be respected in determining when and how the equitable conversion is made.⁶ One common case—where the time of the equitable conversion is postponed after the execution of the deed, or the death of the testator, as the case may be, in consequence of provisions contained in the instrument, indicating the intention of the donor or vendor as to the time when the conversion shall take effect—is where the contract of sale is made at the option of the purchaser; in such a case, the equitable conversion of the property will only take place when the purchaser exercises his option to take the property; but whenever he does so exercise his option and determines to buy, the equitable conversion, although it arises only with the exercise of the option, relates back to the time when the contract of sale was made; and the rights of parties claiming under the vendor, will be determined by the consideration of the effect of equitable conversion of the interest of the vendor under the contract of sale.⁷ The equitable conversion cannot

¹ *Frayne v. Taylor*, 10 Jur. n. s., 119; *Garnett v. Acton*, 28 Beav. 333; *Ingle v. Richards*, 28 Beav. 361.

² *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v. Row*, 3 Jur. n. s., 785.

³ *McClure's Appeal*, 72 Pa. St. 414; *Jones v. Caldwell*, 97 Pa. St. 42; *Cook's Ex'r v. Cook's Adm'r*, 20 N. J. Eq. 375; *Beauclerk v. Mead*, 2 Atk. 167; *Fisher v. Banta*, 66 N. Y. 468.

⁴ *Hewett v. Wright*, 1 Bro. Ch. 86; *Clarke v.*

Franklin, 4 K. & J. 257; *Griffith v. Ricketts*, 7 Hare, 299, 311.

⁵ *Jones v. Davies*, L. R. 8 Ch. D. 205; *Bourne v. Bourne*, 2 Hare, 35; *Wright v. Rose*, 2 S. & S. 323.

⁶ *Ward v. Arch*, 15 Sim. 389; *Polley v. Seymour*, 2 Y. & C. Ex. 708; *Moncrief v. Ross*, 50 N. Y. 431; *McClure's Appeal*, 72 Pa. St. 414.

⁷ *Edwards v. West*, L. R. 7 Ch. D. 858, 862, 863; *Emuss v. Smith*, 2 De G. & Sm. 722; *D'Arras v. Keyser*, 26 Pa. St. 249; *Kerr v. Harris*, 112, 114;

take effect until the discretion or option has been exercised, whether the case is a gift or a sale.¹

§ 168. **Effect of conversion.**—It may be stated, as a general proposition, that when the equitable doctrine of conversion applies to a case in which provision is made for the actual conversion of the property from real into personal, or from personal into real property, the effect of such application of the doctrine is to determine the rights of all persons in and to the property, and of all persons claiming under such beneficiaries, or owners of the property prior to the actual conversion of such property, as if there had been an actual conversion. Thus, if lands are directed or agreed to be sold, while they are still unsold, such lands will be treated in every respect as personal property, in determining the rights of claimants thereto. Thus, it would not pass under the devise of the owner's land,² but it would pass under the general gift or bequest of personal property, if there be such a bequest.³ And in the absence of a will, this land which is directed to be sold would, under the equitable doctrine of conversion, go to the personal representatives as money, to be by them distributed among the next of kin, after the satisfaction of the debts of the decedent.⁴ The same rule applies to the conversion which is effected by an executory contract for the sale of land. The interest of the vendor in that case will be so far considered personal property, as that the personal representatives and legatees, and not the heirs, could claim title thereto.⁵ On the other hand, where monetary investments, or other personal property, are directed to be sold and laid out in lands, prior to the performance of this duty, the interest of the beneficiary will be treated as real estate and not personal property. It will,

Lawes v. Bennett, 1 Cox, 167; *Weeding v. Weeding*, 1 J. & H. 424; *Woods v. Hyde*, 31 L. J. Ch. 295.

¹ *White v. Howard*, 46 N. Y. 144; *Van Vechten v. Keator*, 63 N. Y. 52; *Rich v. Whitfield*, L. R. 2 Eq. 583; *Lawrence v. Elliott*, 3 Redf. 235; *In re Ibbitson's Estate*, L. R. 7 Eq. 226.

² *Elliott v. Fisher*, 12 Sim. 505; but see *Klock v. Buell*, 56 Barb. 398.

³ *Chandler v. Pocock*, L. R. 10 Ch. D. 648; *Fisher v. Banta*, 66 N. Y. 468; *Estate of Dobson*, 11 Phila. 81; *Stead v. Newdigate*, 2 Meriv. 521; *Wall v. Colthead*, 2 De G. & J. 683.

⁴ *Harris v. Slaght*, 46 Barb. 470; *Ferguson v. Stuart's Ex'rs*, 14 Ohio, 140, 146; *Collier v. Collier's Ex'rs*, 3 Ohio St. 369; *Rawlings' Ex'rs v. Landes*, 2 Bush, 158; *Loftis v. Glass*, 15 Ark. 680; *Carr v. Ireland*, 4 Md. Ch. 251; *Hood v. Hood*, 85 N. Y. 561; *Van Vechten v. Keator*, 63 N. Y. 52; *Moncrief v. Ross*, 50 N. Y. 431; *Maddox v. Dent*, 4 Md. Ch. 543; *Smithers v. Hooper*, 23 Md. 273; *Fisher v. Banta*, 66 N. Y. 468; *Freeman v. Smith*, 60 How. Pr. 311; *Wurts' Ex'rs v. Page*, 19 N. J. Eq. 365; *Eby's Appeal*, 84 Pa. St. 241; *Washington's Ex'r v. Abraham*, 6 Gratt. 66, 77; *Siter v. McClanachan*, 2 Gratt. 280; *Commonwealth v. Martin's Ex'rs*, 5 Munf. 117,

127; *Jones v. Caldwell*, 97 Pa. St. 42; *McClure's Appeal*, 72 Pa. St. 414; *Brolasky v. Gally's Ex'rs*, 51 Pa. St. 509; *Brothers v. Cartwright*, 2 Jones Eq. 113; *Croom v. Herring*, 4 Hawks, 393; *Ex parte McBee*, 63 N. C. 332; *Wilkins v. Taylor*, 8 Rich. Eq. 291; and see 1 Eq. Lead. Cas. 1157-1160, 1160-1162 (4th Am. ed.).

⁵ *Masterson v. Pullen*, 62 Ala. 145; *Farrar v. Winterton*, 5 Beav. 1, 8, *per* Lord Langdale, M. R.; *Haughwout v. Murphy*, 7 C. E. Green, 531; *Crawford v. Bertholf*, Saxton, 460; *Hoagland v. Latourette*, 1 Green's Ch. 254; *Huffman v. Hummer*, 2 C. E. Green, 264; *King v. Ruckman*, 6 C. E. Green, 599; *Fletcher v. Ashburner*, 1 Bro. Ch. 497; 1 Eq. Lead. Cas. 1118, 1123, 1157 (4th Am. ed.); *Hoagland v. Latourette*, 1 Green's Ch. 254; *Downing v. Risley*, 2 McCarter, 94; *Peters v. Beverly*, 10 Pet. 532, 533; *Taylor v. Benham*, 5 How. (U. S.) 234; *Murray v. Ballou*, 1 Johns. Ch. 566, 581; *Lindsay v. Pleasants*, 4 Ired. Eq. 321; *Brewer v. Herbert*, 30 Md. 301; *Richter v. Selin*, 8 Serg. & R. 425, 440; *Robb v. Mann*, 1 Jones, 300; *Kerr v. Day*, 2 Harris, 12; *Thompson v. Smith*, 63 N. Y. 301, 303; *Worrall v. Munn*, 38 N. Y. 139; *Wood v. Keyes*, 8 Paige, 365; *Wood v. Cone*, 7 Paige, 472; *Champion v. Brown*, 6 Johns. Ch. 403.

therefore, pass under a general devise of lands to the devisee; or, in the absence of a will, it will descend to the heir as real estate, and will not be treated as coming within the provisions of a bequest or gift of personal property.¹

If the heir or the beneficiary should himself die intestate, before the completion of the conversion, the fund or money to be converted would then descend to his heir.² Nor will the equitable conversion be prevented, where the trustees are directed to find temporary investments for the fund until the provisions of the will can be carried out.³ So, also, where money is directed to be invested in lands for the benefit of a married woman, her husband can claim courtesy in such fund; and, under analogous circumstances, the wife can claim dower in such property.⁴ So, also, it has been held in several of the states that the widow has dower in lands which her husband has contracted to purchase, where he died before the deed was delivered.⁵

It is held, however, that there are some limitations to the effect of equitable conversion; and it is stated by some of the cases, that a conversion takes place only so far as such conversion is necessary for the due execution of the will or other instrument.⁶ For example, it has been held that conversion shall not be permitted to take effect so as to evade the statutes of mortmain.⁷ On the other hand, it has been held that the bequest of land which is to be converted into money to an alien is valid, although the devise of such land as land would be void.⁸

Whether the fact that partnership lands would have to be sold for the satisfaction of the debts of the firm, shall be considered as working a complete conversion, or only so far as such conversion is necessary for the protection of the interests of the creditors and of the partners, has been differently decided by the English and American courts. According to the English courts, the conversion is complete for all purposes, so that persons claiming interest in such property through one of the partners can only claim it in its character as personal property; that is, the surplus of the proceeds of sale of the partnership

¹ *Tayloe v. Johnson*, 63 N. C. 381; *Gott v. Cook*, 7 Paige, 521, 534; *Hawley v. James*, 5 Paige, 318, 443; *Green v. Stephens*, 17 Ves. 64, 77; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Johnson*, 4 Bush, 164; *Collins v. Champ's Heirs*, 15, B. Mon. 118; and see 1 Eq. Lead. Cas. 1162 1171 (4th Am. ed.).

² *Gillies v. Longlands*, 4 De G. & Sm. 372; *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Scudamore v. Scudamore*, Prec. Chan. 543.

³ *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Frederick v. Aynscombe*, 1 Atk. 392.

⁴ *Sweetapple v. Bindon*, 2 Vern. 536.

⁵ *Church v. Church*, 3 Sandf. Ch. 434; *Smiley v. Wright*, 2 Ohio, 512; *Robinson v. Miller*, 1 B. Mon. 93; *Davenport v. Farrar*, 2 Ill. 314; *Reed v. Whitney*, 7 Gray, 533; *Lobdell v. Hayes*, 4 Allen, 187; *Joseph v. Fisher*, 122 Ind. 399;

Young v. Young, 45 N. J. Eq. 27; *Bowen v. Brockenbrough*, 119 Ind. 560; see *contra*, *Morgan v. Smith*, 25 S. C. 337; *Morgan v. Wright*, 25 S. C. 601. But if the contract of sale rests upon a condition precedent, which was not performed by the husband, the wife's dower does not attach. *Walters v. Walters*, (Ill. 1890) 23 N. E. Rep. 1120; *Beebe v. Lyle*, 73 Mich. 114.

⁶ See *Orrick v. Boehm*, 49 Md. 72; *Hilton v. Hilton*, 2 MacArthur, 70.

⁷ *Brook v. Bradley*, L. R. 3 Ch. 672, 674, *per* Lord Cairns; *Foster's Appeal*, 74 Pa. St. 391, 397; *Estate of McAvoy*, 12 Phila. 83; *Atty.-Gen. v. Brunning*, 8 H. L. Cas. 243, 265; *Pleasants' Appeal*, 77 Pa. St. 356.

⁸ *De Barante v. Gott*, 6 Barb. 492, 497; *Anstice v. Brown*, 6 Paige, 448; *Craig v. Leslie*, 3 Wheat, 563; *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 My. & Cr. 525.

property, falling to one of the partners in case of his death, would go to the personal representative of such partner as personal property, instead of to the heir and widow as real property.¹ The American rule, on the other hand, limits the conversion to the interest of the partners, and of the creditors of the partnership, and permits the surplus proceeds of sales to go to the widow and heirs of the deceased partner as real property.²

§ 169. **Conversion as between life tenant and remainder-man.**—

Questions under this heading are not likely to arise in this country, although it is possible that they may; but they are quite common in the English courts. The cases are divided into two classes: one where the testator who devises the estate to life tenant and remainder-man provides for the conversion of his property; and the other cases are those in which he does not make such provision at all. In the first class of cases, the question arises as to whether the life tenant is entitled to any income of the property, and if so, to what income before the conversion is made. It is manifest, of course, that the direction of the will, in respect to this question, must be followed, if there be any such direction.³ In the majority of cases, in the absence of any such direction, the tenant for life is held to be entitled to the income from the testator's death.⁴ Under special circumstances, the conversion is, sometimes, considered to have taken place at the end of a year from the testator's death.⁵ And where the circumstances of the case are such that a conversion cannot be made within a year after the testator's death, the life tenant is entitled to income from the expiration of the year.⁶ Where the testator does not direct any conversion of the property, the question arises whether a conversion should be made, whereby property may be invested in a different way from what had been done by the testator during his life, and the interest thereon paid to the life tenant, or whether the life tenant should enjoy the property itself. The general rule is, where personal property is given to different legatees in succession, that such property should be sold and the proceeds of sale reinvested in such a form that the successive legatees may enjoy the income thereof during their lives.⁷ Where, however, there is anything in the will from which may be deduced the intention of the testator to give to the life

¹ *Dixie v. Wright*, 32 Beav. 662; *Kelland v. Fulford*, L. R. 6 Ch. D. 491; *Forbes v. Stevens*, L. R. 10 Eq. 178, 188, 189; *Atty.-Gen. v. Brunning*, 8 H. L. Cas. 243, 265.

² *Foster's Appeal*, 74 Pa. St. 391, 397, 398; *Estate of McAvoy*, 12 Phila. 83; *Offut v. Scott*, 47 Ala. 105; 22 Am. Law Reg. 300, notes 307-310. See, also, generally, *Shearer v. Shearer*, 98 Mass. 107; *Jones' Appeal*, 70 Pa. St. 169; *Bopp v. Fox*, 63 Ill. 540; 1 Pars. on Con. 150.

³ *Sparling v. Parker*, 9 Beav. 524.

⁴ *Wilday v. Sandays*, L. R. 7 Eq. 355; *Brown v. Gullatly*, L. R. 2 Ch. 751; *Allhusen v. Wittell*, L. R. 4 Eq. 295.

⁵ *Macpherson v. Macpherson*. 1 Macqueen, 243; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Dimes v. Scott*, 4 Russ. 195; *Morgan v. Morgan*, 14 Beav. 72, 77.

⁶ *Sitwell v. Bernard*, 6 Ves. 520; *Kilvington v. Gray*, 2 S. & S. 396; *Tucker v. Boswell*, 5 Beav. 607.

⁷ *Johnson v. Johnson*, 2 Coll. 441; *Blann v. Bell*, 2 De G. M. & G. 775; *Hood v. Clapham*, 19 Beav. 90; see *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Thornton v. Ellis*, 15 Beav. 193; *Mills v. Mills*, 7 Sim. 501; *Sutherland v. Cooke*, 1 Coll. 498.

tenant the enjoyment of the property *in specie*, then that intention would be carried out, and no conversion of the property ordered by the court.¹ It is also the rule that when specific legacies are given to one for life, then to another absolutely, that the life tenant should enjoy the income of the property in its original form.²

§ 170. **Conversion by paramount authority.—Involuntary sales of land under statute and by order of court.**—Under this heading, an entirely different view is presented of the doctrine of conversion. So far, we have discussed when and under what circumstances the property which has been ordered to be converted into another form, will be treated as having been converted into its intended form, before the actual conversion takes place, and what effect that doctrine has on the rights of the party in and to the property prior to the actual conversion. Here, the question is, how far will the property in its actually converted form, where that conversion takes place by compulsory process, be considered and treated by the courts as being still in its original character, in determining the rights of the parties thereto. The common cases are those, where land is sold under the order of a court or the authorization of a statute, for the satisfaction of some claim against, or right to, such land; while the proceeds of sale, in whole or in part, remain undisposed of in the satisfaction of such claim or right; and the question arises, to whom do those proceeds belong? Shall the proceeds of sale be treated as personal property, according to its true character, or will the court apply the doctrine of equitable conversion to this case, and treat the surplus proceeds of sale as real estate, and, therefore, belonging to the party from whom the land was taken? The general rule is, that the latter construction will prevail. It must be observed that no reference is made to any voluntary assignments which the parties might make in view of the fact, that if they refuse to make a voluntary assignment, a compulsory process will issue.³ The cases to which we now have reference are cases in which the process by which the sale is effected is compulsory. The general proposition in that connection is, that where the owner of the land which has been sold, or taken under compulsory process, is *sui juris*, then a complete conversion of the property is effected, and the purchase money or surplus proceeds of sale become, to all intents and purposes, personal property. But if the owner of the property is an infant or a lunatic, then the court of equity will permit the conversion of the property to take place only so far as such conversion is necessary to accomplish the particular purpose held in view; but as to the interest of such infant or lunatic in the surplus proceeds of sale, the court will treat the prop-

¹ *Holgate v. Jennings*, 24 Beav. 623; *Burton v. Mount*, 2 De G. & Sm. 383; *Cafe v. Bent*, 5 Hare, 24, 36; *Pickering v. Pickering*, 4 My. & Cr. 289; *Alcock v. Sloper*, 2 My. & K. 699; *Hubbard v. Young*, 10 Beav. 203; *Skirving v. Williams*, 24 Beav. 275; *Green v. Britten*, 1 De G. J. & S. 649.

² *In re Beaufoy*, 1 Sm. & Giff. 20; *Harvey v.*

Harvey, 6 Beav. 134; and see *Phillips v. Sarjent*, 7 Hare, 33; *Vincent v. Newcombe*, 1 Younge, 599.

³ *In re Skeggs*, 2 De G. J. & S. 533; *Righton v. Righton*, 30 L. J. Ch. 61; *Regent's Canal Co. v. Ware*, 23 Beav. 575; *Ex parte Hawkins*, 13 Sim. 569; *In re Manchester, &c. Ry.*, 19 Beav. 245.

erty as not having been converted, and will determine the rights of such party to the proceeds of sale, as if there had never been any conversion of the property.¹ Not only does this application of the doctrine of conversion apply in respect to insane and infant owners of property, but it likewise attains in respect to a wife's dower in the lands of her husband, which are often sold for the satisfaction of some claim against the property. Where her dower is subject to the claim, to satisfy which the property has been sold, she then has dower in the surplus proceeds of sale, the proceeds of sale being treated as still having the characteristics of real property. But it has been held that she is not entitled to dower in the surplus proceeds of sale of the land in foreclosure of a mortgage in which she has renounced her dower. That is, she is not entitled to a share in such surplus, where the foreclosure and sale took place during the life of her husband.²

§ 171. **Reconversion defined.**—Reconversion is defined as “that notional or imaginary process by which a prior *constructive* conversion is annulled and taken away, and the *constructively* converted property is restored, in contemplation of a court of equity, to its original actual quality.”³ A reconversion takes place whenever the parties, for whose benefit the conversion is directed to be made, agree among themselves to take the property in its original form, and thus prevent an actual conversion of the property. Inasmuch as the parties beneficially interested are alone interested in effecting the conversion of the property, with consent or agreement to waive the conversion and to take the property in its original form, would be a sufficient protection for the trustees or executors against liability for failure to carry out the provision of the will in this respect. The parties beneficially interested are estopped from holding the executor or trustee liable in such an event. It is not necessary that an express declaration of the intention of the beneficiaries to receive the property in its unconverted form should be made; such a declaration is sufficient, but not necessary.⁴ The intention to take the property in this unconverted form may be manifested by acts as well as by words; any act or any writing which shows or establishes such an intention being sufficient to effect a recon-

¹ *In re Skeggs*, 2 De G. J. & S. 533; *In re Stewart*, 1 Sm. & Giff. 32, 39; *In re Bagot*, 31 L. J. Ch. 772; *Dixie v. Wright*, 32 Beav. 662; *Pleasants' Appeal*, 77 Pa. St. 356; *Richards v. Atty.-Gen.*, 6 Moo. P. C. 381; *In re Harrop*, 3 Drew. 726; *Kelland v. Fulford*, L. R. 6 Ch. D. 491.

² *Genobles v. West*, 23 S. C. 154; see *contra*, *N. Y. Life Ins. Co. v. Mayer*, 14 Daly, 318; see *Kauffman v. Peacock*, 115 Ill. 212; *Jennison v. Hapgood*, 14 Pick. 345; *Van Vronker v. Eastman*, 7 Metc. 157; *Hawley v. Bradford*, 9 Paige, 200; *Titus v. Neilson*, 5 Johns. Ch. 452; *Schmitt v. Willis*, 40 N. J. Eq. 515; *Willett v. Beatty*, 12 B. Mon. 172; *Crane v. Palmer*, 8 Blackf. 120; *Beavers v. Smith*, 11 Ala. 33; *Chaney v. Chaney*, 38 Ala. 35; *Shaeffer v. Ward*, 5 Ill. 511; *Church*

v. Church, 3 Sandf. Ch. 434; *Smith v. Jackson*, 3 Edw. Ch. 28; *Queen Anne's Co. v. Pratt*, 10 Md. 3; *Bank of Commerce v. Owens*, 31 Md. 320; s. c., 1 Am. Rep. 60; *Bonner v. Peterson*, 44 Ill. 258; *Barnes v. Gay*, 7 Iowa, 26; *Thompson v. Cochran*, 7 Humph. 73; *Williams v. Woods*, 7 Humph. 408; *Keith v. Trapier*, 1 Bailey Eq. 63; *Pifer v. Ward*, 8 Blackf. 252; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Nazereth Inst. v. Lowe*, 1 B. Mon. 257; but see *Newhall v. Five Cents Savings Bank*, 101 Mass. 423; 3 Am. Rep. 387.

³ *Haynes' Outlines*, p. 367.

⁴ *Wheldale v. Partridge*, 8 Ves. 226, 236; *Bradish v. Gee*, Ambli. 229; *Van v. Barnett*, 19 Ves. 102, 109; *Pulteney v. Earl of Darlington*, 1 Bro. Ch. 223, 236, 237.

version.¹ Among the acts which are considered sufficient evidence of an election to take the property without conversion are, the entry into possession of the land and the receipt of the rents and profits,² or receiving the possession and the income of securities which are directed to be laid out in lands;³ the possession of the property by the beneficiary, it matters not how that possession has been acquired;⁴ and any other acts which indicate that the trust is at an end.⁵ But in order that a beneficiary may elect and take the property in its unconverted form, he must be *sui juris*; he cannot make this election if he is under any legal disability.⁶ Infants⁷ and lunatics⁸ cannot elect to have a reconversion. The trustees will not be protected from liability for failure to make the conversion, where the consent of the lunatic or infant is given to such conversion. Married women can, under the general law, elect and take the property in its unconverted form by securing the co-operation of their husbands, in the form in which the law allows married women to convey or release their rights; that is, by a deed signed and sealed by husband and wife, and acknowledged by her in the manner prescribed by the law.⁹ So, also, a difference is recognized, in the power of a beneficiary to elect to take the property in its unconverted form, between the case of an absolute owner of the property and the case in which the property, which is directed to be converted, is given to two or more persons, either as co-owners or as tenants for life and remainder-men. Where the party who makes the election for a reconversion is not the absolute owner, but has only a definite share or a partial interest in such property, he will be permitted to effect a reconversion only when such reconversion, as to his share of the property, takes place without affecting in any manner injuriously the rights and interests of those who are interested with

¹ *Biddulph v. Biddulph*, 12 Ves. 161; *Prentice v. Janssen*, 79 N. Y. 478; *Beatty v. Byers*, 6 Harris, 105; *Harcourt v. Seymour*, 2 Sim., n. s., 12, 46; *Cookson v. Cookson*, 12 Cl. & Fin. 121, 146.

² *Dixon v. Gayfere*, 17 Beav. 433; *In re Gordon*, L. R. 6 Ch. D. 531; *Griesbach v. Tremantle*, 17 Beav. 314; *Kirkman v. Miles*, 13 Ves. 338; *Crabtree v. Bramble*, 3 Atk. 680; *Mutlow v. Bigg*, L. R., 1 Ch. D. 385.

³ *In re Pedder*, 5 De G. M. & G. 890; *Gillies v. Longlands*, 4 De G. & Sm. 372; *Lingen v. Sowray*, 1 P. Wms. 172, 176; *Harcourt v. Seymour*, 2 Sim. n. s., 12; *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 Ves. Sen. 460, 461; *Cookson v. Cookson*, 12 Cl. & Fin. 121, 147.

⁴ *In re Pedder*, 5 De G. M. & G. 890; *Chichester v. Brickerstaff*, 2 Vern. 295; *Wheldale v. Partridge*, 8 Ves. 226, 235; see *Pulteney v. Earl of Darlington*, 1 Bro. Ch. 223.

⁵ *In re Davidson*, L. R. 11 Ch. D. 341; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343; *Davies v. Ashford*, 15 Sim. 42.

⁶ *Sisson v. Giles*, 32 L. J. N. S. (Ch.) 606; *Benson v. Benson*, 1 P. Wms. 130; 3 De G. J. & S. 614; *Prentice v. Janssen*, 79 N. Y. 478.

⁷ *Van v. Barnett*, 19 Ves. 102; *Seeley v. Jago*, 1 P. Wms. 389; *Robinson v. Robinson*, 19 Beav. 494; *Carr v. Ellison*, 2 Bro. Ch. 56; *In re Harrop*, 3 Drew. 726, 734.

⁸ *In re Wharton*, 5 De G. M. & G. 33; *Ashby v. Palmer*, 1 Meriv. 296; *In re Barker*, L. R. 17 Ch. D. 241.

⁹ *Briggs v. Chamberlain*, 11 Hare, 69; *Bowyer v. Woodman*, L. R. 3 Eq. 313; *Tuer v. Turner*, 20 Beav. 560; *Forbes v. Adams*, 9 Sim. 462; *May v. Roper*, 4 Sim. 360; *Standerer v. Hall*, L. R. 11 Ch. D. 652; *Wallace v. Greenwood*, L. R. 16 Ch. D. 362; *Oldham v. Hughes*, 2 Atk. 452, 453; *Binford v. Bawden*, 1 Ves. 512; 2 Ves. 38; *Frank v. Frank*, 3 My. & Cr. 171; *Sisson v. Giles*, 32 L. J. N. S. (Ch.) 606; 3 De G. J. & S. 614; *Franks v. Bollans*, L. R. 3 Ch. 717. This statement of the law in respect to married women is, of course, materially affected by the modern statute, in many of the American states which have more or less planted the disabilities of coverture, to which reference is made in other connections. See *ante*, § 257.

him in the property to be converted. In the case of joint ownership of the property, the distinction is made in this connection between the conversion of land into money, and that of money into land. Where lands are directed to be converted into money for the joint benefit of two or more persons, then one of them cannot elect to take his share in the lands without conversion, but must take his share as directed by the will in the proceeds of sale; unless, of course, all of the co-owners consent to the conversion.¹ On the other hand, where money is directed to be laid out in lands for the joint benefits of two or more persons, then one of these parties may elect to take his share of money and leave the surplus to be invested in the lands.² In the latter case, no possible injury could result to the other in consequence of the election of one to take his share in money; but in the former case, the purchase price of a part of the land may not be so profitable, as it would be if the entire tract of land was sold without division. In consequence of the effect of such conversion upon the interest of the life tenant³ and other prior owners, there is a general agreement of the authorities that the remainder-man may take a reconversion, which will be binding upon his own real and personal representatives, but such reconversion shall not have the effect of interfering in any way with the interests of the life tenant.³

§ 172. **Double conversion.**—Somewhat similar to reconversion, in its effect, is what is known as double conversion; but its operation is different from reconversion. Double conversion takes place where a will or deed directs land to be sold and converted into money, and the proceeds of sale thus attained are directed to be again invested in lands so that the ultimate form of the property is the same as obtained before the conversion took place at all. In such a case, all the interests of the party in and to the property will remain unaffected by the double conversion, except, of course, that such rights will be transferred from the property sold to the lands bought with the proceeds of sale.⁴

§ 173. **Resulting trust upon failure of the purpose of conversion.**—Where property is given by will or deed, with the direction that it shall be converted into another form for the carrying out of certain purposes, it is always a disposition of property in trust; and the trust will only continue to exist or call for the act of conversion, so far as the performance of the trust is necessary for securing the purpose intended. Where, therefore, there should be a failure of the purpose of the trust and of the conversion, there will be a resulting trust to the grantor, or to the heirs or representatives of the testator, of whatever part of the property is not required to be converted, in consequence of such fail-

¹ *Deeth v. Hale*, 2 Moll. 317; *Holloway v. Radcliffe*, 23 Beav. 163; *Fletcher v. Ashburner*, 1 Bro. Ch. 497, 500.

² *Elliott v. Fisher*, 12 Sim. 505; *Seeley v. Jago*, 1 P. Wms. 389.

³ *Meek v. Devenish*, L. R. 6 Ch. D. 566; *Walrond v. Rosslyn*, L. R. 11 Ch. D. 640; *Triquet v.*

Thornton, 13 Ves. 345; *Gillies v. Longlands*, 4 De G. & Sm. 372, 379; *Sisson v. Giles*, 32 L. J. N. S. (Ch.) 606; 3 De G. J. & S. 614; *Cookson v. Cookson*, 12 Cl. & Fin. 121; *Prentice v. Janssen*, 79 N. Y. 478.

⁴ *In re Pedder*, 5 De G. M. & G. 890; *Pearson v. Lane*, 17 Ves. 101; *White v. Howard*, 46 N. Y. 144.

ure. There is such a resulting trust, whether the failure of the purpose of the conversion is total or partial; but the character of such trust varies with the extent of such failure.¹ The character of the resulting trust also varies with the form of the instrument in which the conversion is provided for.

Where a conversion of land into money, or of money into land, is directed either by will or by an instrument *inter vivos*, and there should be a total failure of the purpose and object for which the conversion was directed, the property so directed to be converted will, of course, remain in its original condition and, therefore, will in nowise be affected by the provision for conversion. It will, therefore, pass in its original form to the heirs or to the personal representatives of the testator and to the grantor, or to his heir and personal representative, as the case may be. There is no exception to the operation of this rule.²

The variance of the authorities arise in the case of partial failure in testamentary directions for the conversion of property. Where, instead of a total failure of the purpose of the conversion, only a partial failure occurs, it is still necessary to effect the conversion of the property, in order to carry out those purposes of the conversion which still exist and are valid. In the case where the conversion is of land into money, the land is still to be sold, and the question arises, what is to become of the surplus of the proceeds of sale of the land, after the valid and effective purpose of the conversion has been satisfied? It is quite likely that, if the valid purpose of the conversion can be satisfied by a sale of only a part of the land, and the failure occurs prior to any sale at all, the trustee would be obliged to limit the conversion of the property to the extent of the needs of the trust; and the surplus land which remains unconverted would pass to the heir of the testator or to the grantor, or to his heir, as real estate in its unchanged form. But where the entire land has been sold, before the partial failure of the purpose of the conversion took place, then the rule applies that the surplus proceeds of sale shall go to the heir of the testator as real estate, but in its form as personal property; that is, the heirs would be entitled to claim the surplus proceeds of property in its form as personal property, but under the doctrine of equitable conversion, as if it

¹ Marsh v. Wheeler, 2 Edw. Ch. 156, 160; Pennell's Appeal, 8 Harris, 515; Nagle's Appeal, 1 Harris, 260-264; Craig v. Leslie, 3 Wheat. 563, 582; Holland v. Cruft, 3 Gray, 162, 180; Wood v. Cone, 7 Paige, 471, 476; Wood v. Keyes, 8 Paige, 365, 369; Hawley v. James, 5 Paige, 318, 323, 486; Proctor v. Ferebee, 1 Ired. Eq. 143, 146; Newby v. Skinner, 1 Dev. & Bat. Eq. 488; North v. Valk, Dudley's Eq. 212, 216; Arnold v. Gilbert, 3 Sandf. Ch. 531, 556; Arnold v. Gilbert, 5 Barb. 190, 195; Bogert v. Hertell, 4 Hill, 492, 495, 500; Wright v. Trustees, &c., Hoff. Ch. 202, 205, 219; Burr v. Sim. 1 Whart. 252, 262; Pratt v. Taliaferro, 3 Leigh, 419, 423; Lindsay v. Pleasants, 1 Ired. Eq. 320, 323.

² Edwards v. Tuck, 23 Beav. 268; McCarty v. Deming, 4 Lans. 440, 443; Giraud v. Giraud, 58 How. Pr. 175; Ackroyd v. Smithson, 1 Bro. Ch. 503; 1 Eq. Lead. Cas. 1171, 1181, 1197 (4th Am. ed.); Clarke v. Franklin, 4 K. & J. 257; Slocum v. Slocum, 4 Edw. Ch. 613; Davis' Appeal, 83 Pa. St. (2 Norris) 348; Morrow v. Brenizer, 2 Rawle, 184; Smith v. Claxton, 4 Madd. 484, 492; Ripley v. Waterworth, 7 Ves. 425, 435; Chitty v. Parker, 2 Ves. 271; Wilson v. Major, 11 Ves. 205; Commonwealth v. Martin's Ex'rs, 5 Munf. 117; Smith v. McCrary, 3 Ired. Eq. 204; but see Evans' Appeal, 63 Pa. St. 183.

had been, and still was, real property. But if the heir of the testator should in turn die, even though his death should occur before the partial failure of the purpose of the conversion, his share of the surplus proceeds of sale, although he would claim it as real estate, would go to his personal representatives as personal property, instead of to his heirs as real estate; in other words, the doctrine of reconversion would only apply so far as to determine the right of the testator's heir to the surplus proceeds of sale, but would not be extended so as to give to the heir of the testator's heir the claim to such proceeds of sale as real estate, in the place of the personal representative of such a heir.¹

This rule is enforced strictly in favor of the heir of the testator, even though the will should contain a declaration that the heir should not participate at all in the benefits of the estate. And it has also been held that the heir could claim the surplus proceeds of sale upon the partial failure of the conversion, even though the will directed that all of the property left by the testator, whether personal or real, should be converted into cash and blended into one fund, out of which all legacies are to be paid. Even under these circumstances, the heir of the testator, under the doctrine of conversion, would be entitled to his share of the surplus proceeds of sale.² But this view is not supported by the American cases, at any rate by some of them; according to these American cases, a declaration that the property should all be sold and the proceeds of sale blended into one fund, would preclude the claim of the testator's heirs to any share in the surplus proceeds.³ The same general rule applies in the case of a will directing the conversion of money into land; the partial failure of the conversion will cause the surplus fund, whether it has actually been converted into land at the time of the partial failure of the purpose of the conversion, or before, to go to the personal representatives of the testator or his next of kin, or the residuary legatee, as the case may be.⁴

§ 174. **Conversion by deed.**—Where a deed directed a conversion of land into money, inasmuch as the conversion took place during the

¹ *Collins v. Wakeman*, 2 Ves. 683; *Watson v. Hayes*, 5 My. & Cr. 125; *Jones v. Mitchell*, 1 S. & S. 290, 294; *Buchanan v. Harrison*, 1 J. & H. 662; *Ackroyd v. Smithson*, 1 Bro. Ch. 503; 1 Eq. Lead. Cas. 1171, 1181, 1197 (4th Am. ed.); *Fitch v. Weber*, 6 Hare, 145; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Wall v. Colthead*, 2 De G. & J. 683; *Smith v. Claxton*, 4 Madd. 484; see, also, *Wright v. Wright*, 16 Ves. 188; *Jessopp v. Watson*, 1 My. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204; *Spencer v. Wilson*, L. R. 16 Eq. 501; *McCarty v. Deming*, 4 Lans. 440, 442; *Wood v. Cone*, 7 Paige, 471; *Craig v. Leslie*, 3 Wheat. 563; *North v. Valk*, *Dudley's Eq.* 212; *Newby v. Skinner*, 1 Dev. & Bat. Eq. 483; *Lindsay v. Pleasants*, 4 Ired. Eq. 330; *Wright v. Trustees*, &c., *Hoff. Ch.* 202.

² *Amphlett v. Parke*, 2 Russ. & My. 221; *Rob-*

inson v. Governors of London Hospital, 10 Hare, 19; *Barrs v. Fewkes*, 2 Hem. & M. 60; 11 Jur. n. s., 669; *Spencer v. Wilson*, L. R. 16 Eq. 501; see *Ackroyd v. Smithson*, *supra*; *Taylor v. Taylor*, *supra*; *Jessopp v. Watson*, 1 My. & K. 665; *Cruse v. Barley*, 3 P. Wms. 20, 22, note by Mr. Cox; *Edwards v. Tuck*, 23 Beav. 268; *Wall v. Colthead*, 2 De G. & J. 683; *Bective v. Hodgson*, 10 H. L. Cas. 656.

³ *Burr v. Sim*, 1 Whart. 252; also *Morrow v. Brenizer*, 2 Rawle, 185; *Craig v. Leslie*, 3 Wheat. 563.

⁴ *Reynolds v. Godlee*, *Johns.* 536, 582; *Curteis v. Wormald*, L. R. 10 Ch. D. 172; *Cogan v. Stephens*, 1 Beav. 482 n.; 5 L. J. N. S. (Ch.) 17; *Hereford v. Ravenhill*, 1 Beav. 481; 5 Beav. 51; *Hawley v. James*, 5 Paige, 318.

life of the grantor, the surplus of the proceeds of sale of the conversion of the land into money would go to such grantor, not as land, but as personal property, and, therefore, would devolve upon the personal representatives as a part of the general personal estate.¹

So, on the other hand, if the deed directs the conversion of money into land, in case of a partial failure of the trust after the money has been completely converted into land, the portion of land which remains undisposed of will result to the grantor, or his heir, as land and not as personal property.²

¹ *In re Newberry's Trusts*, L. R. 5 Ch. D. 746;
and see *Van v. Barnett*, 19 Ves. 102; *Hewitt v.*
Wright, 1 Bro. Ch. 86; *Clarke v. Franklin*, 4 K.
& J. 257.

² *Pulteney v. Earl of Darlington*, 1 Bro. Ch.
223; *Lechmere v. Lechmere*, Cas. temp. Talb. 80.

CHAPTER XI.

EQUITABLE RELIEF ON THE GROUND OF ACCIDENT AND MISTAKE.

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§ 175. **Limitation of jurisdiction in cases of accident.**—"Accident," as defined by Mr. Pomeroy, as a ground for equitable jurisdiction, "is an unforeseen and unexpected event, occurring to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his intention and wish, he loses some legal right and becomes subject to some legal liability; and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain."¹ The jurisdiction of equity was assumed in all such cases for the purpose of providing for relief, where the courts of law did not and could not furnish adequate remedy. It will be remembered, from the definition quoted from Mr. Pomeroy, that the remedy for the accident exists only in cases of unexpected and unforeseen events, which happen independently of any acts of the party claiming relief, and from causes existing outside of the party affected by the event. In that respect, it differs from the ground of equitable relief in the case of mistake, which is to be discussed in the same chapter. It will also be observed, that the relief is only afforded when the party who profits by the consequences of the unforeseen event is held by a court of equity to be in

¹ 2 Pom. Eq. Jur., § 823, see, also, *Earl of Bath v. Sherwin*, 10 Mod. 1, 3; *Story's Eq.*, § 78,

conscience bound to give up such benefit, or to restore the party suffering from such accident to the condition in which he was prior to the accident. The extent of the jurisdiction of the court in such a case has always been more or less uncertain. At an early day, it was supposed that the court would grant relief in every case of an unexpected occurrence, which brought misfortune to one without any fault of his. Such is the definition given by Lord Coke. But in the course of time, the jurisdiction has been brought within narrower limits; and while the distinction between the cases in which equity will afford relief from accident, and those in which the equitable relief will be refused, is sometimes irrational and arbitrary, yet it is very well established by the adjudications, and the courts are not likely to enlarge such jurisdiction in the absence of modifying statutes.

§ 176. **Cases in which the court will not grant relief from accident.**—Where a contract is made by parties, without a provision for release from liability in the case of an inability to perform the contract, equity will not afford any relief by way of defense against the enforcement of the obligation, although the inability to perform the obligation is due to some accident which places it beyond the power of the obligor to perform, without being traced to any fault of his own, and where such accident could not be foreseen or anticipated;¹ except in cases of penalties, which have been already fully discussed.²

Relief will, of course, be refused to one whose negligence causes the accident.³ While it has also been held to be impossible, as a general rule, for a court of equity to supply or establish the records of a court of law which have been lost or destroyed, yet a court of equity will afford relief to judgment creditors by enabling them to prove by parol evidence the rights which they had acquired by the record.⁴ But in order that in any case the equitable relief might be claimed, one must have a vested right of some sort which is affected by the accident. If a mere possibility of acquiring an interest was lost or prevented by accident, as where a testator has been by accident prevented from making a bequest in favor of another, the latter could not claim equitable relief.⁵ So, also, will this equitable relief be refused to one who only has an equity equal to that of the party against whom the relief is to be granted. In order that one may ask for such equitable relief, he must show that his equity is superior to that of the other party;⁶ and the claim for relief in this, as in every

¹ *Mortimer v. Capper*, 1 Bro. Ch. 156; *Pym v. Blackburn*, 3 Ves. 34, 38; *Fowler v. Bott*, 6 Mass. 63; *Hallett v. Wylie*, 3 Johns. 44; *Wood v. Hubbell*, 10 N. Y. 479; 5 Barb. 601; *Brewer v. Herbert*, 30 Md. 301; *McKecknie v. Sterling*, 48 Barb. 330, 335; but see *Smith v. McCluskey*, 45 Barb. 610, 613.

² See *ante*, Chap. III.

³ *Ex parte Greenway*, 6 Ves. 812; *Penny v. Martin*, 4 Johns. Ch. 566, 569; see, however,

Chase v. Barrett, 4 Paige, 148; *Barnet v. Turnp. Co.*, 15 Vt. 757; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336.

⁴ *Garrett v. Lynch*, 45 Ala. 204.

⁵ *Pierson v. Garnet*, 2 Bro. Ch. 38, 226; *Brown v. Higgs*, 8 Ves. 561; *Tollet v. Tollet*, 2 P. Wms. 489.

⁶ *Jenkins v. Kemis*, 1 Chan. Cas. 103; *Weal v. Lower*, 1 Eq. Abr. 266; *Powell v. Powell*, Prec. Ch. 278.

other case, will not be granted against the rights of a *bona fide* purchaser.¹

§ 177. **Equitable relief in suits on lost instruments.**—Since the common law required proof to be made of the legal instrument of indebtedness upon which the action is brought, and did not provide for a bond of indemnity, where suit is brought on a lost instrument, the general rule has been laid down, that where an instrument of indebtedness has been lost, the party entitled to recover on it must resort to a court of equity for relief; and upon giving a bond of indemnity, the court of equity will order the payment of the amount called for in the lost instrument. A bond of indemnity is executed for the purpose of indemnifying the payor against the possible necessity of having to pay the same sum over again to a *bona fide* holder of the lost instrument. The equitable remedy was very generally resorted to in cases of lost sealed instruments, bonds and the like;² but the same relief was granted in cases of loss of all sorts of negotiable instruments, where they are lost before maturity, whether they were payable to bearer, indorsed in blank, or not indorsed at all.³ It has been denied, that the equitable jurisdiction will extend to actions on non-negotiable instruments, which are unsealed; for the reason that an action at law could also be maintained, and that no indemnity was necessary.⁴ But the weight of authority is certainly against this position and in favor of recognizing the equitable jurisdiction over these cases, as well as over cases of lost negotiable instruments.⁵ It has been held also that the equitable jurisdiction does not extend to destroyed instruments as distinguished from lost instruments.⁶ But this is not likely to be recognized by any of the American cases.⁷ It is customary in all such equitable actions for the plaintiff to put in his complaint an offer of indemnity; but if he should fail to make this offer, it would not affect the jurisdiction of the court, as it could be corrected by the decree making the recovery conditional upon the filing of a bond of indemnity.⁸ In all these cases it will be seen that the action is strictly a legal action, and the decree is legal in effect, with the exception of the execution of the bond of indemnity; and the court of equity assumes jurisdiction only for the purpose of securing the bond of

¹ *Ligon v. Rogers*, 12 Ga. 281, 292; *Whitman v. Weston*, 30 Me. 285; *Penny v. Watts*, 2 De G. & Sm. 501; s. c., 1 Macn. & G. 150; *Marshall v. Collett*, 1 Y. & C. Exch. 232, 238; *Malden v. Menil*, 2 Atk. 8.

² *Hickman v. Painter*, 11 W. Va. 386; *Force v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 408; *Donaldson v. Williams*, 50 Mo. 407; *Livingston v. Livingston*, 4 Johns. Ch. 294; *Thornton v. Stewart*, 7 Leigh, 128; *Hudspeth v. Thomason*, 46 Ala. 470; *Lawrence v. Lawrence*, 42 N. H. 109; *Patton v. Campbell*, 70 Ill. 72; *Howe v. Taylor*, 6 Oreg. 284, 291; *Allen v. Smith*, 29 Ark. 74.

³ *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Exch. 604.

⁴ See *Massop v. Eadon*, 16 Ves. 430, 433, 434.

⁵ *Hickman v. Painter*, 11 W. Va. 386; *Allen v. Smith*, 29 Ark. 74; *Force v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 408; *Macartney v. Graham*, 2 Sim. 285; *Hardeman v. Battersby*, 53 Ga. 36, 38.

⁶ *Wright v. Lord Maidstone*, 1 K. & J. 701, 708, *per* Page-Wood, V. C.

⁷ See American cases cited in previous note.

⁸ *Bromley v. Holland*, 7 Ves. 3, 19-21; *Mossoy v. Eadon*, 16 Ves. 430, 433, 434; *Savannah Nat. B'k v. Haskins*, 101 Mass. 370; *Walmsley v. Child*, 1 Ves. Sen. 341, 344, 345; *Glynn v. B'k of Eng.*, 2 Id. 281.

indemnity and giving judgment subject to that condition. Actions on lost instruments of indemnity are now permitted by statute in courts of law of the states in which the reformed code of procedure has been adopted, as well as in others. In these states, this question as to equitable jurisdiction does not arise; for the equitable remedy, in case of lost instruments, has become there a common remedy in law as well as in equity.

§ 178. **Defective execution of powers.**—The general rule is that an execution, defective because of a failure to conform to the directions of the donor, will be nugatory, and the appointment absolutely void. And if the appointment is a mere gift to the appointee, and the power is general and free from the character of a trust, the slightest defect will invalidate the execution.¹ But if the power is special, or the execution is a trust and a peremptory duty upon the donee; or if the donee has received a valuable consideration for the appointment; equity will correct or make good the defective execution by ordering a re-execution,² provided there has been a substantial compliance with the conditions of execution, and the defect relates only to the formalities of execution, such as the number of attesting witnesses, the technical words of limitation, or conveyance, etc.³ But there is no relief against the defective execution of a statutory power. The remedy for relief is confined to powers created by act of the owner of the property.⁴

§ 179. **Equitable relief in non-execution of powers.**—But if the donee has failed altogether to execute the power, or disregarded the material conditions imposed by the donor upon its execution, equity will not interfere to compel an execution,⁵ unless the power be a trust, the execution of which is mandatory. In such a case, equity will not permit any accident or neglect of the donee to defeat the trust, and thus deprive the beneficiaries of their right under the

¹ Sugden on Pow., 98; Tud. Ld. Cas. 317.

² Hughes v. Wells, 9 Hare, 749; Tollet v. Tollet, 1 Eq. Lead. Cas. 365, and notes; Beatty v. Clark, 20 Cal. 11; Love v. Sierra, & Co., 32 Id. 639, 653; Thorp v. McCullum, 1 Gilman, 614; Hout v. Hout, 20 Ohio St. 119; Schenck v. Ellingwood, 3 Edw. Ch. 175; Clifford v. Burlington, 2 Vern. 379; Bruce v. Bruce, L. R. 11 Eq. 371; Pepper's Will, 1 Pars. Eq. 436, 446; Porter v. Turner, 3 Serg. & R. 108, 114; Dennison v. Goehring, 7 Barr. 175; Huss v. Morris, 63 Pa. St. 367; Atty.-Gen. v. Sibthorp, 2 Russ. & My. 107; *In re Dyke's Estate*, L. R. 7 Eq. 337; Dowell v. Dew, 1 Y. & C. 345; Watt v. Watt, 3 Ves. 244; Tudor v. Anson, 2 Ves. Sen. 582.

³ Story Eq. Jur., §§ 169-175; 2 Sugden on Pow. 88, *et seq.*; Schenck v. Ellingwood, 3 Edw. Ch. 175; Hunt v. Rousmaniere, 2 Mason, 251; Roberts v. Stanton, 2 Munf. 129; McRea v. Farrow, 4 Hen. & M. 444; Mutual Life Ins. Co. v. Everett, 40 N. J. Eq. 345; Tollet v. Tollet, 1 Eq. Lead. Cas. 365; *In re Dyke's Estate*, L. R. 7 Eq.

337; Garth v. Townsend, L. R. 7 Eq. 220; Piatt v. McCullough, 1 McLean, 69; Mitchell v. Denson, 29 Ala. 327; Kearney v. Vaughan, 50 Mo. 284; Stewart v. Stokes, 33 Ala. 494; Blackwell v. Ogden, 2 Bush, 265; Porter v. Turner, 3 Serg. & R. 108, 111, 114; Long v. Hewitt, 44 Iowa, 363; Bradish v. Gibbs, 3 Johns. Ch. 523, 550; Barr v. Hatch, 3 Ohio, 527.

⁴ Gridley's Heirs v. Phillips, 5 Kans. 349; Kearney v. Vaughan, 50 Mo. 284; Smith v. Bowes, 38 Md. 463; Earl of Darington v. Pulteney, Comp. 260; and see Stewart v. Stokes, 33 Ala. 494.

⁵ Howard v. Carpenter, 11 Md. 259; Lines v. Darden, 5 Fla. 51; Mitchell v. Denson, 29 Ala. 327; Wilkinson v. Getty, 13 Iowa, 157; Bull v. Vardy, 1 Ves. 270; Johnson v. Cushing, 15 N. H. 298; Lippencott v. Stokes, 2 Halst. Ch. 122; Tollet v. Tollet, 2 P. Wms. 489; 1 Eq. Lead. Cas. 365, and notes (4th Am. ed.); Arundell v. Phillipot, 2 Vern. 69.

power. All mandatory powers, whether general or special, are trusts; and courts of equity will execute such powers, even if the donee has failed to exercise the power, and died. But there can never be any interference by the courts with discretionary powers, if the donees have refused to exercise them.¹

§ 180. **Accidental forfeitures.**—The ordinary rule which equity affords against penalties, as distinguished from forfeitures, has been already fully explained.² But the case referred to in this connection, is that of forfeitures strictly so-called; where the breach of the condition, which caused the forfeiture, is the result of some unforeseen accident and is not occasioned by the party's fault or negligence. In such cases, the courts will afford relief against the forfeiture, even though compensation cannot be accurately made in money, provided everything is done, that is possible under the circumstances, to place the party claiming the forfeiture in the position in which he would have been, had the breach of the condition not occurred.³ It has also been held that a court of equity will afford this extraordinary relief to one who has by some accident or mistake tendered less than the required amount in the payment of a debt; he will be saved from the forfeiture of his property or rights in consequence of a failure to make tender.*

§ 181. **Judgments at law.**—Another case for relief on the ground of accident is, where a judgment has been obtained at law against one who has an equitable ground for avoiding such judgment, which could not, however, be entered as a defense in a legal action. In such a case, a court of equity will relieve the defendant from the judgment at law by the employment of whatever remedy may be suitable to that end.⁵

§ 182. **Failure of subject-matter of the contract or bequest.**—Equity will also afford relief wherever the subject-matter of a contract fails from some accident, and the party is, therefore, unable to deliver the subject-matter of the contract. The court will also afford relief to the party who is obliged to pay the consideration, and secure substantial justice in the settlement of the claims of the par-

¹ Story Eq. Jur., §§ 169-175, 1062; 2 Sugden on Pow. 88, *et seq.*; Gorin v. Gordon, 38 Miss. 214; Neves v. Scott, 9 How. 196-213, Sedgwick v. Lavin, 10 Allen, 432; 1 Sugden on Pow. 158; Warneford v. Thompson, 3 Ves. 513; Gibbs v. Marsh, 2 Met. 243; Norsum v. D'Oench, 17 Mo. 98; Thorp v. McCullum, 1 Gilm. 614, 625; Withers v. Yeadon, 7 Rich. Eq. 324, 329; Brown v. Higgs, 8 Ves. 561, 574.

² See *ante*, Chap. III.

³ Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248; Eaton v. Lyon, 3 Ves. 690, 693, *per* Lord Alvanley; Wheeler v. Conn. Mut. Life Ins. Co., 82 N. Y. 543, 549; Gilles v. Austin, 62 N. Y. 486; Whitbeck v. Van Rensselaer, 64 N. Y. 27; 2 Hun, 55; 4 T. & C. 382; Wing v. Harvey, 5 De G. M. & G. 265; Palmer v. Ford, 70 Ill. 369; Orr v.

Zimmerman, 63 Mo. 72; Eveleth v. Little, 16 Me. 374, 377; Atkins v. Rison, 25 Ark. 138; Bostwick v. Stiles, 35 Conn. 195; Whelan v. Reilly, 61 Mo. 565.

⁴ Clark v. Drake, 63 Me. 354.

⁵ Richmond Enquirer v. Robinson, 24 Gratt. 548; Shields v. McClung, 6 W. Va. 79; see Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Eq. Lead. Cas. 1291, and notes (4th Am. ed.); Robinson v. Wheeler, 51 N. H. 384; Craft v. Thompson, 51 Id. 536; Holland v. Totter, 22 Gratt. 136; N. Y., &c. R. R. v. Haws, 56 N. Y. 175; Barber v. Rukeyser, 39 Wis. 590; Thomason v. Fannin, 54 Ga. 361; Grubb v. Kolb, 55 Id. 630; Cairo, &c. R. R. v. Titus, 27 N. J. Eq. (12 C. E. Green) 102; Darling v. Baltimore, 51 Md. 1; Alford v. Moore, 15 W. Va. 597.

ties against each other.¹ So, also, where an executor or administrator has paid out debts or legacies in full, believing the assets to be sufficient, and by some unforeseen accident the amount of assets has proved insufficient, equity will afford the executor or administrator the relief needed for securing him against such loss, and compelling an equitable redistribution of the assets among the creditors and legatees.²

§ 183. **Mistake defined and distinguished from accident, fraud and negligence.**—The authorities and judges are not always happy in their definitions of mistake, in many cases defining, as Professor Pomeroy has pointed out,³ the consequences of mistake instead of the fact itself. Such has been particularly the case with Judge Story in his *Equity Jurisprudence*, and those who have followed him. Thus, Judge Story says, mistake “is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.”⁴

Mistake consists of an erroneous mental conception, concerning the circumstances of the law which surrounds a given transaction. The erroneous mental conception of the condition of affairs leads one to do an act, which he would not have done, had not his misconception led him to believe that the consequences of that act would have been different from what they really were. As defined by Mr. Pomeroy, mistake is “an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time.”⁵ As will be observed by a close study of this definition, mistake is to be distinguished from accident in that accidents are the result of some external aberration which produces results not expected or contemplated by the parties to the transaction; whereas mistakes consist of misconceptions, not due to external causes. The mistake is also to be distinguished from fraud, in that there is no intention or design on the part of anyone to produce the misconception. And, furthermore, the mistake must occur under circumstances, which would not justify the imputation of negligence against the person laboring under the mistake. One cannot ask relief of a court of equity from a mistake which has been occasioned by his own negligence. He must be able to show that the mistake occurred, notwithstanding he exercised the care of a reasonably prudent man, and that a pru-

¹ *Hale v. Webb*, 2 Bro. Ch. 78; *Davies v. Wattier*, 1 S. & S. 463; *May v. Bennett*, 1 Russ. 370; *Hachett v. Pattle*, 6 Madd. 4.

² *Orr v. Kaines*, 2 Ves. Sen. 194; *Moore v. Moore*, *Id.* 598, 600; *Noel v. Robinson*, 1 Vern. 90, 94; *Edwards v. Freeman*, 2 P. Wms. 435, 447; *Walcot v. Hall*, 2 Bro. Ch. 305; *Hawkins v. Day*, *Ambl.* 160; *Pooley v. Ray*, 1 P. Wms. 355;

Clough v. Bond, 3 My. & Cr. 490; *Jones v. Lewis*, 2 Ves. Sen. 240.

³ 2 Pom. Eq. Jur., § 839.

⁴ *Story's Eq. Jur.*, § 110; see, also, *Snell (Principles of Equity, 370)* and *Kerr (Fraud and Mistake, 396)*.

⁵ 2 Pom. Eq. Jur., § 839.

dent man would have been misled by the circumstances of the case.¹

§ 194. **Kinds of mistake.**—The misconception or erroneous understanding, which leads one to the expectation, from a given transaction, of consequences different from what are realized, may arise from a misapprehension of the rule or rules of law which govern the transaction in question, or from ignorance of the real facts, either past or present, which bear upon and produce the result. Where one enters into a transaction, having a full knowledge of all the facts of the case, but ignorant of the legal effect of the transaction upon his interests, either he does not know what are his antecedent legal rights, or he misunderstands the legal effect of the proposed transaction on his rights and interests. In both these instances the mistake is essentially and primarily one of law. On the other hand, where one is cognizant of the law governing the transaction and of his own antecedent legal rights, but he is mistaken as to some material fact, which leads him to expect from the transaction different results from what are realized, it is a mistake of fact. These two classes of mistakes are different in character and consequences, and must be discussed separately.

Mistakes as to foreign laws are not held to be mistakes of law, but mistakes of fact.²

§ 185. **Mistakes of law.—General rule.—Ignorantia juris non excusat.**—As has already been hinted in the preceding paragraph, there are three distinct and different cases of mistakes of law, which must be separately defined and differentiated. In the first place, the mistake of the law may consist of ignorance of the rules of law which govern one's duties and relations to the state and to third persons in general, independently of any contractual relations. In the second place, the mistake of law may consist of a misunderstanding as to the legal effect of a given transaction, arising *ex contractu*, although one fully understands the antecedent legal rights bearing upon the case, and the facts connected with the transaction. The third case, is where one understands the legal effect of the transaction he is about to enter into, and is fully cognizant of all the material facts affecting the consequences of the transaction, but he is ignorant of his antecedent legal rights which bear upon the transaction and

¹ *Lamb v. Harris*, 8 Ga. 546; *Wallace v. Hussey*, 63 Pa. St. 24; *Smith v. Fly*, 24 Tex. 353; 76 Am. Dec. 109; *Kuhlman v. Baker*, 50 Tex. 630; *Rowe v. Horton*, 65 Tex. 89; *Capehart v. Mhoon*, 5 Jones (N. Car.) Eq. 178; *Bonney v. Stoughton*, 122 Ill. 536; *Voorhis v. Murphy*, 26 N. J. Eq. 434; *Cannon v. Sanford*, 20 Mo. App. 590; *Robertson v. Smith*, 11 Tex. 211; s. c., 60 Am. Dec. 234; *Brown v. Fagan*, 71 Mo. 563; *Toops v. Snyder*, 70 Ind. 554; *Kennerty v. Etiwan Phosphate Co.*, 21 S. Car. 226; s. c., 53 Am. Rep. 669; *Wood v. Patterson*, 4 Md. Ch. 335; *Kearney v. Sascor*, 37 Md. 264; *Penny v. Martin*, 4 Johns. (N. Y.) Ch.

166; *Weller's Appeal*, 103 Pa. St. 594; *Pearce v. Suggs*, 85 Tenn. 724; *Massey v. Cotton States Life Ins. Co.*, 70 Ga. 794; *Foster v. Schneer*, 15 Oreg. 363; *Rhode Island, &c. Bank v. Hawkins*, 6 R. I. 198; *Trigg v. Read*, 5 Humph. (Tenn.) 529; *Diman v. Providence, &c. R. R.*, 5 R. I. 130; *Western R. R. v. Babcock*, 6 Met. 346; *Kite v. Lumpkin*, 40 Ga. 506.

² *McCormick v. Garnett*, 5 De G. M. & G. 278; *Leslie v. Baillie*, 2 Y. & C. 91; *Haven v. Foster*, 9 Pick. 111; *Bk. of Chillicothe v. Dodge*, 8 Barb. 233; *Merch. Bk. v. Spalding*, 12 Id. 302; *Patterson v. Bloomer*, 35 Conn. 57.

affect the result of the same. A distinction has been made by some of the courts between mistakes of law and ignorance of law.¹ But the distinction is immaterial, if at all well founded, and the transaction is similarly affected, whether it be called a mistake of law or ignorance of the law.²

In regard to the first class of cases, there is never an exception to the general rule, embodied in the legal maxim, *ignorantia juris non excusat*. No one can plead ignorance of the law as a defense in a criminal prosecution or an action *ex delicto*. But where the action is *ex contractu*, it becomes doubtful how far the general rule applies in determining the liability of the parties, and precluding a resort to equity for relief from the consequences of the mistake of law. Still, it may be accepted as a general rule, in cases where the mistake relates to the legal effect of the proposed transaction and not to the character of the party's existent legal rights, that unless the circumstances of the case are complicated by extraordinary facts which raise suspicion against the good faith of the other party, or which give rise to exceptional claims for equitable relief, equity will not afford any relief from the consequences of the mistake.³

¹ Walker, J., in *Gwynn v. Hamilton*, 29 Ala. 233; compare *Hopkins v. Masynk*, 1 Hill (S. Car.) Eq. 242; *Hall v. Reed*, 2 Barb. (N. Y.) Ch. 500, 503; *Lawrence v. Beaubein*, 2 Bailey (S. Car.) L. 623; s. c., Am. Dec. 155; *Champlin v. Laytin*, 18 Wend. (N. Y.) 407, 423; s. c., 76 Am. Dec. 382; *Culbreath v. Culbreath*, 7 Ga. 64; s. c., 50 Am. Dec. 375; *Lucas v. Lucas*, 30 Ga. 191; s. c., 76 Am. Dec. 642.

² *Heacock v. Fly*, 14 Pa. St. 540; *Gwynn v. Hamilton*, 29 Ala. 233; *Gebb v. Rose*, 40 Md. 387; *Champlin v. Laytin*, 18 Wend. (N. Y.) 407; s. c., 31 Am. Dec. 382; *Schlisenger v. United States*, 1 Ct. of Cl. 16; *Jacobs v. Morange*, 47 N. Y. 57; *Dow v. Kerr*, *Spears* (S. Car.) Ch. 413.

³ *Snell v. Atlantic Ins. Co.*, 98 U. S. 85; *De Give v. Healey*, 60 Ga. 391; *Ottenheimer v. Cook*, 10 Heisk. 309; *Jenkins v. German Luth. Cong.*, 58 Ga. 125; *Hardigree v. Mitchum*, 51 Ala. 151; *Bk. of U. S. v. Daniel*, 12 Pet. 32; *Hunt v. Rousmaniere*, 8 Wheat. 174; 1 Pet. 1; 2 Mason, 342; *Heavenridge v. Mondy*, 49 Ind. 434; *Gebb v. Rose*, 40 Md. 387; *Thurmond v. Clark*, 47 Ga. 500; *Bledsoe v. Nixon*, 68 N. C. 521; *McMurray v. St. Louis, &c. Co.*, 33 Mo. 377; *Rochester v. Alfred Bk.*, 13 Wis. 432; *Smith v. McDougal*, 2 Cal. 586; *Smith v. Penn.*, 22 Gratt. 402; *Jacobs v. Morange*, 47 N. Y. 57; *Zollman v. Moore*, 21 Gratt. 313; *Goltra v. Sanasack*, 53 Ill. 456; *Bryant v. Mansfield*, 22 Me. 360; *Good v. Herr*, 7 W. & S. 253; *State v. Reigart*, 1 Gill, 1; *Davis v. Bagley*, 40 Ga. 181; *Dill v. Shahan*, 25 Ala. 694; *Lyon v. Sanders*, 23 Miss. 530; *State v. Paup*, 13 Ark. 129; *Garnar v. Bird*, 57 Barb. 277; *Stoddard v. Hart*, 23 N. Y. 556; *Hinchman v. Emans*, Saxt. 100; *Wintermute v. Snyder*, 2 Green's Ch. 489; *Peters v. Florence*, 38 Pa. St. 194;

Proctor v. Thrall, 22 Vt. 262; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Gilbert v. Gilbert*, 9 Barb. 532; see, also, *Gerald v. Elley*, 45 Iowa, 322; *Glenn v. Statler*, 42 Id. 107; *Nelson v. Davis*, 40 Ind. 366; *Moorman v. Collier*, 32 Iowa, 138; *Hoover v. Reilly*, 2 Abb. U. S. 471; *Norris v. Laberee*, 58 Me. 260; *Kennard v. George*, 44 N. H. 440; *Heaton v. Fryberger*, 38 Iowa, 185, 190, 201; *Hearst v. Pujol*, 44 Cal. 230; *Mellish v. Robertson*, 25 Vt. 603; *Molony v. Rourke*, 100 Mass. 190; *Haven v. Foster*, 9 Pick. 111; *Barnes v. Bartlett*, 47 Ind. 98; *Wood v. Price*, 46 Ill. 439; *Montgomery v. Shockey*, 37 Iowa, 107; *Wheaton v. Wheaton*, 9 Conn. 96; *O'Donnell v. Harmon*, 3 Daly, 424; *Clayton v. Freet*, 10 Ohio St. 544; *Evantis v. Strobe*, 11 Ohio, 480; *Martin v. Hamlin*, 18 Mich. 354; *Champlin v. Laytin*, 18 Wend. 407; *Crosier v. Acer*, 7 Paige, 137; *Hall v. Reed*, 2 Barb. Ch. 500; *Dupre v. Thompson*, 4 Barb. 279; *Bentley v. Whittemore*, 18 N. J. Eq. 366; *McElderry v. Shipley*, 2 Md. 25; *Watkins v. Stockett*, 6 Har. & J. 435; *Alexander v. Newton*, 2 Gratt. 266; *Durant v. Bacot*, 2 Beasl. 201; *Garwood v. Eldridge*, 1 Green's Ch. 145; *Light v. Light*, 9 Harris, 407; *Rankin v. Mortimore*, 7 Watts, 372; *Storrs v. Baker*, 6 Johns. (N. Y.) Ch. 166, 167; s. c., 10 Am. Dec. 316; *Wood v. Price*, 46 Ill. 439; *Sparks v. Pittman*, 51 Miss. 511; *Nelson v. Davis*, 40 Ind. 366; *Shafer v. Davis*, 13 Ill. 395; *Paine v. Jones*, 75 N. Y. 593; *Leavitt v. Palmer*, 3 N. Y. 19; s. c., 51 Am. Dec. 33; *Fellows v. Heermans*, 4 Lans. (N. Y.) 230; *Burt v. Wilson*, 28 Cal. 632; s. c., 87 Am. Dec. 142; *Kelly v. Turner*, 74 Ala. 513; *Oiler v. Gard*, 23 Ind. 212; *Coley v. Coley*, 19 Conn. 114; *Farley v. Bryant*, 32 Me. 474; *Zane v. Cawley*, 21 N. J. Eq. 130; *Troops v. Snyder*, 70

The exceptional circumstances which will entitle the party to relief from such mistake of law will be explained in subsequent paragraphs.

§ 186. **Mistake of law accompanied by inequitable conduct of the other party.**—The general rule, that equity will not relieve against mistakes as to the legal import or effect of a transaction is, however, not followed, where the entry of one party into the transaction is not induced solely by his ignorance of the legal effect of the transaction, but by a combination of such ignorance and some inequitable conduct on the part of the other party; in such cases, equity will afford relief from the contract or transaction, although neither the inequitable conduct nor the mistake of law would alone have afforded sufficient ground for relief. Pure cases of fraudulent misrepresentation would always be ground enough for relief from the contract. The relief will be afforded, even when the inequitable conduct consists only of a knowledge that the other party is under the influence of a mistake as to the legal effect of the transaction.¹

§ 187. **Mistake of law between parties in relations of trust.**—This exception to the general rule, as to denial of relief from mistakes of law, is particularly strong, where a fiduciary relation exists between

Ind. 554; *Hawralty v. Warren*, 18 N. J. 124; s. c., 90 Am. Dec. 613; *Oswald v. Sproehule*, 16 Ill. App. 368; *Gordere v. Downing*, 18 Ill. 492; *Arthur v. Arthur*, 10 Barb. (N. Y.) 9; *McAninch v. Laughlin*, 13 Pa. St. 371; *Rector v. Collins*, 46 Ark. 167; s. c., 55 Am. Rep. 571; *Bell v. Steele*, 1 Humph. (Tenn.) 148; *Birk Lanser v. Schmitt*, 45 Wis. 316; *Upton v. Triblicock*, 91 U. S. 45; *Lamborn v. Dickinson Com.*, 97 U. S. 181; *United States v. Ames*, 99 U. S. 35; *Sandlin v. Ward*, 94 N. Car. 490; *Goodenow v. Ewer*, 16 Cal. 461; s. c., 76 Am. Dec. 540; *Champlin v. Laytin*, 6 Paige, (N. Y.) 189; *Zenor v. Johnson*, 107 Ind. 69; *Nabours v. Cooke*, 24 Miss. 44; *Sibert v. McAvoy*, 15 Ill. 106; *Trigg v. Read*, 5 Humph. (Tenn.) 529; s. c., 42 Am. Dec. 447; *Allen v. Galloway*, 30 Fed. Rep. (U. S.) 466; *Gwynn v. Hamilton*, 29 Ala. 233; *Broadwell v. Broadwell*, 6 Ill. 599; *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395; *Williamson v. Hitner*, 79 Ind. 233; *Newell v. Stiles*, 21 Ga. 118; *Beebe v. Swartwout*, 3 Gil. (Ill.) 162; *Baker v. Pyatt*, 108 Ind. 61; *Norton v. Highleyman*, 88 Mo. 621; *Price v. Estill*, 87 Mo. 378. It may be repeated, in this connection, that all mistakes as to foreign law are held to be mistakes of fact, and, like such mistakes, can always be relieved against. Citing *McCormick v. Garnett*, 5 De G. M. & G. 278; *Leslie v. Baillie*, 2 Y. & C. Ch. 91; *Patterson v. Bloomer*, 35 Conn. 57; *Haven v. Foster*, 9 Pick. 112; *Bk. of Chilli-cothe v. Dodge*, 8 Barb. 233; *Mech. Bk. v. Spalding*, 12 Barb. 302.

¹ *Champlin v. Laytin*, 18 Wend. 407, 422; *Rider v. Powell*, 28 N. Y. 310; *Green v. Morris*, &c. R. R., 1 Beasli. 165; *Whelan's Appeal*, 70 Pa. St. 410, 425, *Light v. Light*, 9 Harris, 407, 412; *Tyson v. Passmore*, 2 Barr. 122; *Watts v. Cummins*, 59 Pa. St. 84; *Phillips v. Hollister*, 2 Coldw. 269; *Bryan*

v. Masterson, 4 J. J. Marsh. 225; *Hardigree v. Mitchum*, 51 Ala. 151; *Metropolitan Bk. v. Godfrey*, 23 Ill. 579; *Cathcart v. Robinson*, 5 Pet. 264, 276; *Wheeler v. Smith*, 9 How. (U. S.) 55; *Spurr v. Benedict*, 99 Mass. 463; *Chestnut Hill, &c. Co. v. Chase*, 14 Conn. 123; *Woodbury, &c. Bk. v. Charter Oak Ins. Co.*, 31 Id. 517. Cases of Surprise.—*Tyson v. Tyson*, 31 Md. 134; *Jones v. Munroe*, 32 Ga. 181; *Harney v. Charles*, 45 Mo. 157; *Carley v. Lewis*, 24 Ind. 23; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Wheaton v. Wheaton*, 9 Conn. 97, 99; *Bigelow v. Barr*, 4 Ohio, 358; *Williams v. Champion*, 6 Ohio, 169; *Trigg v. Read*, 5 Humph. (Tenn.) 528; s. c., 42 Am. Dec. 447; *Sparks v. White*, 5 Humph. (Tenn.) 86; *Martin v. New York, &c. R. Co.*, 36 N. J. Eq. 109, 111; *Bryan v. Masterson*, 4 J. J. Marsh. (Ky.) 225; *Drew v. Clark*, *Cooke*, (Tenn.) 374; s. c., 56 Am. Dec. 698; *Mortimer v. Pritchard*, 1 Bail. (S. Car.) Eq. 505; *Sands v. Sands*, 112 Ill. 225; *Goode-now v. Ewer*, 16 Cal. 461; s. c., 76 Am. Dec. 540; *Freeman v. Curtis*, 51 Me. 140; s. c., 81 Am. Dec. 564; *Jordan v. Stevens*, 51 Me. 78; s. c., 81 Am. Dec. 556; *Stover v. Poole*, 67 Me. 217; *Ramey v. Allison*, 64 Tex. 697; *Berry v. Whitney*, 40 Mich. 65; *Bales v. Hunt*, 77 Ind. 355; *Mason v. Pelletier*, 82 N. Car. 40; *Jenkins v. German Lutheran Cong.*, 58 Ga. 125; *Montgomery v. Shockey*, 37 Iowa, 107; *Briscoe v. Pacific Mut. Ins. Co.*, 4 Daly, (N. Y.) 246; *McCormick v. Miller*, 102 Ill. 208; s. c., 40 Am. Rep. 577; *Wheeler v. Smith*, 9 How. (U. S.) 55; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Rankin v. Mortimore*, 7 Watts, (Pa.) 372; see, also, *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 1; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Brown v. Armistead*, 6 Rand. (Va.) 594, *Dill v. Shahan*, 25 Ala. 694; s. c., 60 Am. Dec. 510; *Haden v. Ware*, 15 Ala. 149.

the parties, and the party affected by the mistake of law is the beneficiary. Equity will afford relief from a transaction entered into by such parties, in relation to the subject-matter of the trust, under a misapprehension by the beneficiary as to the legal effect of the transaction, although there may be no direct proof of any inequitable conduct on the part of the trustee. In consequence of the fiduciary relation between the parties, equity considers it inequitable, on account of the danger of undue influence, to insist upon a performance of the contract, or the maintenance of the transaction.¹

§ 188. **Mistakes common to all parties.**—**Mistakes as to legal effect of written instruments.**—It has been claimed that mistakes of law, which were common to both parties, could always be relieved against, whatever may be their effect. “If both parties should be ignorant of a matter of law and should enter into a contract for a particular object, the result thereof would by law be different from what they naturally intended: here, on account of the surprise or immediate result of the mistake of both, there can be no reason why the court should not interfere in order to prevent the enforcement of the contract, and relieve from the unexpected consequences of it. To refuse, would be to permit one party to take an unconscientious advantage of the other, and derive a benefit from a contract which neither of them intended it should produce.”² But where there is any foundation for this opinion, it will be found that the case falls within one of the exceptions, which are established on other grounds. Leaving out of consideration, for the present, those cases where the mistake consists of a misunderstanding as to one’s existent legal rights, which will be explained in a subsequent paragraph, there are but two cases in which it can be claimed that equity will afford relief where the mistake is common to both parties, viz.: Where the mistake as to the legal effect of a transaction is complicated by some inequitable conduct of the other party to the transaction;³ *secondly*, where the parties have fully agreed upon a contract by verbal negotiations, and during such negotiations no mistake of law or of facts has been made; but the parties or the scrivener have, in reducing the transaction to

¹ *Wheeler v. Smith*, 9 How. (U. S.) 55; *Baker v. Massey*, 50 Iowa, 399; *Dickey v. Beatty*, 14 Ohio St. 389; *Nelson v. Betts*, 21 Mo. App. 219; *Pickering v. Pickering*, 2 Beav. (N. J.) 31; *Wheeler v. Smith*, 9 How. (U. S.) 55; *Jordan v. Stevens*, 51 Me. 78; s. c., 81 Am. Dec. 556; *Langstaffe v. Fenwick*, 10 Ves. 405; and see *Cooke v. Nathan*, 16 Barb. 342; *Dill v. Shahan*, 25 Ala. 694; *Moreland v. Atchinson*, 19 Tex. 303; *Ex parte James*, L. R. 9 Ch. 609, 614.

² *State v. Paup.*, 13 Ark. 129; s. c., 56 Am. Dec. 303; see, also, *Koonegay v. Everett*, 99 N. Car. 30; *Green v. Morris, & Co. R. Co.*, 12 N. J. Eq. 165; *Champlin v. Laytin*, 1 Edw. (N. Y.) Ch. 467; *Griiffith v. Sebastian Co.*, 49 Ark. 24. See, generally, *Glassell v. Thomas*, 3 Leigh, (Va.) 113;

Bowlin v. Pollock, 7 Mon. (Ky.) 26, 33; *Drew v. Clark, Cooke's*, (Tenn.) 373, 374; s. c., 5 Am. Dec. 698; *Willin v. Willin*, 16 Ves. 72; *Stapylton v. Scott*, 13 Ves. 424; *Bryan v. Masterson*, 4 J. J. Marsh. (Ky.) 225; compare *Fowler v. Richardson*, 3 Sneed, (Tenn.) 508; *Harrell v. De Normandie*, 26 Tex. 120; *Freiknight v. Meyer*, 8 N. J. L. J. 167; *Champlin v. Laytin*, 6 Paige, (N. Y.) 189; *Mead v. Johnson*, 3 Conn. 592; *Lowndes v. Chisolm*, 2 McCord (S. Car.) Eq. 455; s. c., 16 Am. Dec. 687; *Lawrence v. Beaubien*, 2 Bailey (S. Car.) L. 623; s. c., 23 Am. Dec. 55; *Hopkins v. Mazynek*, 1 Hill (S. Car.) Eq. 242, 250; *Fitzgerald v. Peck*, 4 Littell, (Ky.) 127.

³ See *ante*, § 186.

writing, or in executing the written instrument, which is to constitute the performance of the agreement, employed words and phrases, whether of a technical or untechnical character, under a mistake as to their legal effect, and which do not represent the intention of either party, as had been embodied in the verbal agreement. Equity will grant relief from this wrongfully executed instrument, on the ground that the mistake did not occur as to the contract which the parties actually made, but in an attempted reduction of the contract to writing. The contract in writing is not the contract which the parties had actually made, and hence it could be properly treated as a mistake of fact.¹ It seems to be the generally accepted rule of law that equity will grant relief against an instrument which does not express the true intent of the parties, whether the mistake in the terms of the written contract arises from ignorance of law or a mistake of fact.² But these cases of mistake in reducing the contract to writing must not be confounded with cases, where the parties have accurately expressed their intentions in the written instrument, and the mistake has not occurred in the reduction of the contract to writing. Equity will not grant relief in a case where the error as to the law occurred in the original contract, and is merely reproduced in the written instrument.³

§ 189. **Relief where mistake is as to existent legal rights.**—Where the mistake consists of a misunderstanding as to the legal

¹ *Canedy v. Marcy*, 13 Gray, (Mass.) 373; *Clayton v. Freet*, 10 Ohio St. 544; *Cooke v. Husbands*, 11 Md. 492; *Springs v. Harven*, 3 Jones (N. Car.) Eq. 96; *Young v. Miller*, 10 Ohio, 85; *McNaughton v. Partridge*, 11 Ohio, 223; s. c., 38 Am. Dec. 31; *Bushby v. Littlefield*, 31 N. H. 193; *Kennard v. George*, 44 N. H. 440; *Beardsley v. Knight*, 10 Vt. 185; s. c., 36 Am. Dec. 193; *Browne v. Glines*, 42 N. H. 160; *Green v. Morris*, &c. R. Co., 12 N. J. Eq. 165; see, also, *Holds-worth v. Tucker*, 143 Mass. 369; *Stapylton v. Scott*, 13 Ves. 424; *Champlin v. Laytin*, 1 Edw. (N. Y.) Ch. 467; *James v. Cutler*, 54 Wis. 172; *Hunt v. Rousmaniere*, 8 Wheat. 174; 1 Peters, 1; *Pitcher v. Hennessey*, 48 N. Y. 415; *Lanning v. Carpenter*, 48 Id. 408; *O'Donnell v. Harmon*, 3 Daly, 424; *Gillespie v. Moon*, 2 Johns. Ch. 585, 586; *Stedwell v. Anderson*, 21 Conn. 139; *Huss v. Morris*, 63 Pa. St. (13 P. F. Sm.) 367; *Moser v. Libenguth*, 2 Rawle, 428; *Larkins v. Bibble*, 21 Ala. 252; *Stone v. Hale*, 17 Id. 557; *Clopton v. Martin*, 11 Id. 187; *Worley v. Tuggle*; 4 Bush, 168; *Smith v. Jordan*, 13 Minn. 264; *Sparks v. Pittman*, 51 Miss. 511; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Oliver v. Mut. &c. Ins. Co.*, 2 Curtis' C. C. 277.

² *Kennard v. George*, 44 N. H. 440; see, also, *Beardsley v. Knight*, 10 Vt. 185; *Canedy v. Marcy*, 13 Gray, (Mass.) 373; *Browne v. Glines*, 42 N. H. 160; *Heacock v. Fly*, 14 Pa. St. 540; see, also, *Gross v. Leber*, 47 Pa. St. 520; *Leach v. Noyes*, 45 N. H. 364; *Clayton v. Freet*, 10 Ohio St. 544; *Remington v. Higgins*, 54 Cal. 6201; see, also, *Daggett v. Rankin*, 31 Cal. 321; *Racouillat*

v. Sausevain, 32 Cal. 376, 389; *Clayton v. Bussey*, 30 Ga. 246; *Larkins v. Bibble*, 21 Ala. 252; *Clopton v. Martin*, 11 Ala. 187; *Stone v. Hale*, 17 Ala. 557; s. c., 52 Am. Dec. 185; *Wyche v. Gneul*, 16 Ga. 49; *Benson v. Markoe*, 37 Minn. 30; *Green v. Morris*, &c. R. Co., 12 N. J. Eq. 165; *McMillan v. New York, &c. Co.*, 29 N. J. Eq. 610; *Wintermute v. Snyder*, 3 N. J. Eq. 489, 500; *Huyler v. Atwood*, 11 C. E. Green, (N. J.) 504; *Sisson v. Donnelly*, 36 N. J. L. 432; *McKay v. Simpson*, 6 Ired. (N. Car.) Eq. 452; *Stedwell v. Anderson*, 21 Conn. 139; *Petesich v. Hambach*, 48 Wis. 443; *German Am. Ins. Co. v. Davis*, 131 Mass. 316; *O'Donnell v. Harmon*, 3 Daly, (N. Y.) 424; *Sparks v. Pittman*, 51 Miss. 511; *Evants v. Strode*, 11 Ohio, 480.

³ *Norman v. Norman*, 26 S. Car. 41; see, also, *De Give v. Healy*, 60 Ga. 391; *Andrews Bros. v. Youngstown Coke Co.*, 39 Fed. Rep. 353; *Marble v. Whitney*, 28 N. Y. 297; *Goodenow v. Ewer*, 16 Cal. 461; s. c., 86 Am. Dec. 540; *Hoover v. Reilly*, 2 Abb. (U. S.) 471; *Leonard v. Wills*, 24 Kans. 231; *Leavitt v. Palmer*, 3 N. Y. 19; *Durant v. Bacot*, 13 N. J. Eq. 201; *Hunt v. Rousmaniere*, 2 Mason, (U. S.) 342; *Irnham v. Child*, 1 Bro. C. C. 91; *Arthur v. Arthur*, 10 Barb. (N. Y.) 9; *Robertson v. Walker*, 51 Ala. 484; *Larkins v. Bibble*, 21 Ala. 252; *Betts v. Gunn*, 31 Ala. 219; *Trapp v. Moore*, 21 Ala. 693; *Gerald v. Elley*, 45 Iowa, 322; *Burt v. Wilson*, 28 Cal. 632; s. c., 87 Am. Dec. 142; see, also, *Fishback v. Woodford*, 1 J. J. Marsh. (Ky.) 84; s. c., 19 Am. Dec. 55; *Farley v. Bryant*, 32 Me. 474.

effect of a transaction, the mistake is purely one of law; there is no mingling of facts and law in the mistake. But where there is a misunderstanding of one's existent legal rights, and in consequence of such misunderstanding, a party enters into a transaction, which he would have avoided, if he had not been under the influence of his mistake as to his existent rights; in many, if not in all, of the cases of this kind, the mistake is one both of law and of fact. The existence of the legal right is a fact upon which he bases his determination to enter into the transaction, and about which he is mistaken. An existent legal right is the resultant of a legal rule and the facts of a past transaction; and a misunderstanding concerning the existence or non-existence of a given legal right, must arise from a joint mistake of law and fact.¹ Now, the authorities are not unanimous as to the grounds upon which they grant relief in cases of this kind; but it will be found that whatever may be the reason assigned, the courts very generally grant relief where the mistake relates to the existence or non-existence of antecedent legal rights.² The true reason for this distinction, in respect to the grant of relief,

¹ "A misrepresentation of law is this: When you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may; she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that the marriage ceremony was null and void, though it had not been declared so by any court; and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, 'Now, you see the lady is single,' that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law. There is not a single fact connected with the personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that was the first-born son after the marriage, or, in some countries, before. Therefore, to say it is not a representation of facts seems to arise from a

confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you say that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds consols, involves all sorts of law." Opinion of Sir George Jessel, in *Englesfield v. Marquis of Londonderry*, L. R. 4 Ch. D. 693, 702, 703.

² *Whelan's Appeal*, 70 Pa. St. 410; *Hearst v. Pujol*, 44 Cal. 230; *Morgan v. Dod*, 3 Col. 551; *Zollman v. Moore*, 21 Gratt. 313; *Irick v. Fulton*, 3 Gratt. (Va.) 193; *Williams v. Champion*, 6 Ohio, 169; *Skillman v. Teeple*, 1 N. J. Eq. 232; *Kornegay v. Everett*, 99 N. Car. 30; *Fly v. Brooks*, 84 Ind. 50; see, also, *King v. Doolittle*, 1 Head, (Tenn.) 77; *Lammot v. Bowly*, 6 Har. & J. (Md.) 500; *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117; *Gardner v. Gardner*, 1 Desau. (S. Car.) Eq. 437; *Freeman v. Curtis*, 51 Me. 140; *Moreland v. Atchison*, 19 Tex. 303; *Haden v. Ware*, 15 Ala. 149; *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Carley v. Lewis*, 24 Ind. 23; *Layton v. Chaplin*, 1 Edw. (N. Y.) Ch. 467; *Cocking v. Pratt*, 1 Ves. Ch. 400; *Trigg v. Read*, 5 Humph. (Tenn.) 529; s. c., 42 Am. Dec. 447; *Bonney v. Stroughton*, 123, Ill. 536; *Goff v. Gott*, 5 Sneed, (Tenn.) 532; *Farnsworth v. Dinsmore*, 2 Swan, (Tenn.) 38, 42. Compare *Bentley v. Whittemore*, 18 N. J. Eq. 366; *Peters v. Florence*, 38 Pa. St. 194. But see *contra*, *Hudson v. Conway*, 9 Lea, (Tenn.) 410; see, also, *Baldwin v. Richman*, 9 N. J. Eq. 394; *Zollman v. Moore*, 21 Gratt. (Va.) 313.

between mistakes as to existent legal rights and mistakes as to the legal import of the present transaction is, however, believed to be that the former class of mistakes are mistakes both of law and of fact. Mr. Pomeroy states the rule as follows: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either property, or contract, or personal status, and enters into some transaction the legal scope and opinion of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."¹ The general rule is, however, subject to exceptions; which will be given in the next succeeding paragraphs.

§ 190. **Compromises and settlements of disputes over legal rights as affected by mistakes of law.**—It must not, however, be supposed that relief will be afforded whenever a party enters into a transaction, under a mistaken conception as to his legal rights. It depends upon the purpose and character of the transaction. If the transaction is altogether an independent one, and the inducement of one of the parties to enter into it is a misunderstanding of his antecedent legal rights, relief will be granted to him; as, for example, where one is induced to sell his interest in a piece of property at a given price, because he is under the mistaken impression that he has only a life-interest in such property, equity will relieve him from the contract. But if the parties have had a dispute over each other's rights in and to the property in question, and for the purpose of compromising their dispute without a resort to the courts, they enter into an agreement for a settlement, without any fraud or other inequitable conduct on the part of either of the parties, the fact that the compromise was based upon an erroneous conception of one's rights, will not furnish ground for a relief from the compromise.² There are some cases in which the judicial *dicta* seem to lay down a different rule, but a closer examination of the cases will disclose the fact that some inequitable conduct or undue influence has induced the agreement to the compromise, and furnished the ground for equitable relief.³

§ 191. **Payment of money under mistake of law.**—Another exception to the general rule that equity will afford relief from a mistake as to one's existent legal rights is to be found in the case of payment of money under a mistake as to one's legal liability to pay. It is

¹ 2 Pomeroy Eq. Jur., § 849, pp. 314, 315.

² Good v. Kerr, 7 Watts & Serg. 253; Stub v. Lels, 7 Watts, 43; Shartel's Appeal, 64 Pa. St. (14 P. F. Sm.) 25; Wistar's Appeal, 80 Pa. St. (30 P. F. Sm.) 484; Brandon v. Medley, 1 Jones Eq. 313; Bell v. Lawrence, 51 Ala. 160; Stapilton v. Stapilton, 1 Atk. 2; 2 Eq. Lead Cas. and notes, 1675 (4th Am. ed.).

³ Gross v. Leber, 11 Wright, 520; Light v. Light, 9 Harris, 407, 412; Cabot v. Haskins, 3 Pick. 83; Larkins v. Bibble, 21 Ala. 252, 256; Naylor v. Winch, 1 S. & S. 555, 564; Bingham v. Bingham, 1 Ves. Sen. 126; and see Willan v. Willan, 16 Ves. 72.

held, without any special ground for the exception, that where one makes payment under the wrongful impression as to his legal liability, but with a full knowledge, or with ample means of obtaining a full knowledge, of all the circumstances of the case, he cannot recover back the money so paid,⁴ unless the payment has been induced by misrepresentation or other inequitable conduct on the part of the other party to the transaction.²

§ 192. **Mistakes of fact.—General statement.**—The general rule of equity is, that mistakes of fact as distinguished from mistakes of law will be relieved against; and it is rather the exception than the general rule, that equity will refuse relief in mistakes of fact. Mistakes of fact are of an infinite variety; and it will be impossible, in this connection, to attempt any general classification of the cases of mistake of fact in which equity will afford relief. It will only be possible to state, in a very general way, the character of the mistakes of fact which are remediable. A mistake of fact involves a mental misconception as to the existence or non-existence of facts or circumstances in the past or in the present. The party or parties to the agreement may be ignorant or unconscious or forgetful of the fact which existed in the past or is now existent, and which has some relation with the agreement about to be entered into. In this case, the mental misconception is a passive one. On the other hand, the party or parties may believe that a fact or facts existed in the past or are now existent, when no such fact either did or does exist; in that case the mistake consists of an active or affirmative misunderstanding. In both classes of cases a court of equity will afford relief.³ From this definition it is plain that the misconception is an involuntary mental condition. There cannot, therefore, be any claim for relief on the ground of a mistake, where the parties have intentionally omitted some condition or provision of the agreement. Whether there be any equitable relief in such a case or not, it will not be afforded on the ground of mistake.⁴

¹ *Livermore v. Peru*, 55 Me. 469; *Bate v. Hooper*, 5 De G. M. & G. 338; *Clarke v. Dutcher*, 9 Cow. 674; *Ege v. Koontz*, 3 Barr. 109; *Shotwell v. Murray*, 1 Johns. Ch. 512, 516; *Storrs v. Barker*, 6 *Id.* 166; *Railroad Co. v. Soutter*, 13 Wall. 517 524; Bk. of U. S. v. Daniel, 12 Peters, 32; *Elliot v. Swartout*, 10 *Id.* 137; *Haven v. Foster*, 9 Pick. 112.

² *Bingham v. Bingham*, 1 Ves. Sen. 126; *Davis v. Morier*, 2 Coll. 303; *Ex parte James*, L. R. 9 Ch. 609; *Rogers v. Ingham*, L. R. 3 Ch. D. 351, 356; *Pusey v. Desbouvrie*, 3 P. Wms. 315.

³ 2 Pom. Eq. Jur., § 854. In the civil code, which was designed and proposed for adoption in the State of New York, and which has been adopted as the civil code of California, mistakes of fact are defined as follows: "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forget-

fulness of a fact, past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed." See *Mut. L. Ins. Co. v. Wagner*, 27 Barb. 354; *Clarke v. Dutcher*, 9 Cow. 674; *Milnes v. Duncan*, 6 B. & C. 671; *U. S. Bk. v. Bk. of Ga.*, 10 Wheat. 333; *McDaniels v. Bk. of Rutland*, 29 Vt. 230, 238; *Allen v. Mayor*, 4 E. D. Smith, 404; *Mowatt v. Wright*, 1 Wend. 355, 360; *Martin v. McCormick*, 8 N. Y. 331, 335; *Briggs v. Vanderbilt*, 19 Barb. 222, 239; *Kip v. Munroe*, 29 Barb. 579; *Gardner v. Mayor, &c.*, 26 *Id.* 423; *Wheaden v. Olds*, 20 Wend. 174; *Durkin v. Craston*, 7 Johns. 442; *Rheel v. Hicks*, 25 N. Y. 289; *Ketchum v. Bk. of Commerce*, 19 *Id.* 499, 502; *Belknap v. Sealy*, 14 *Id.* 143; *Huthmacher v. Harris Adm'r*, 38 Pa. St. 491; *Hastie v. Couturier*, 9 Exch. 102; 5 H. L. Cas. 673.

⁴ See *Marquis of Townshend v. Stangroom*,

The general rule is that an intentional omission of a clause or condition from a contract cannot be relieved against;¹ but a distinction is made by many of the authorities, who hold that a determination to enforce the contract without the modification of the omitted provision would in itself be a fraud from which equity would afford relief.² The cases in which this rule has been applied involve the enforcement of deeds which are absolute on their face, as mortgages or as trusts, where the provision or clause which would establish the character of the deed as a mortgage or as a trust has been intentionally omitted.³

§ 193. **The requisites to relief in mistakes of fact.**—In order that one might claim relief from a mistake of fact, whether that relief be defensive or affirmative, two requisites are said to be essential: First, the mistake must be in relation to a fact which is material to the transaction and which affects the interests of the parties in a substantial manner. The mistake must be so material and so important, that the action of the parties in entering into the agreement must have been influenced by such mistake, and but for that mistake the parties would not have made the contract on the terms and conditions as agreed upon. If the mistake is immaterial and does not have any particular effect upon the interest of the parties, no relief will be afforded. The second requisite has often been stated, in terms without qualification, to be that the mistake should not have been the result of the negligence of the party complaining. If it can be shown that the party complaining has been guilty of negligence, in his consideration of the terms of the contract and the circumstances of the case, no relief will be afforded to him on the ground of the mistake. This, however, is too broad a statement of the requirement of the law. In order that the negligence of the party may be a bar to equitable relief, it must amount to a violation of duty; and equity will afford relief even in the case of a clearly established negligence, if the other party has not been prejudiced thereby.⁴

Ves. 328, 332; *Lord Irnham v. Child*, 1 Bro. Ch. 92; *Betts v. Gunn*, 31 Ala. 219; see, also, *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16; *Bellows v. Stone*, 14 N. H. 175; *Ruffner v. McConnel*, 17 Ill. 212; s. c., 63 Am. Dec. 362; *Gillespie v. Moon*, 2 Johns. (N. Y.) Ch. 585; s. c., 7 Am. Dec. 559; *Gordere v. Downing*, 18 Ill. 19; *Lyman v. United Ins. Co.*, 17 Johns. (N. Y.) 373; *Spencer, C. J.*; *Farley v. Bryant*, 32 Me. 474, 475; *Leis v. Stubb*, 6 Watts. (Pa.) 48; *Coffing v. Taylor*, 16 Ill. 457; *Nevius v. Dunlap*, 33 N. Y. 676; *Wemple v. Stewart*, 22 Barb. (N. Y.) 154.

¹ *Stevens v. Cooper*, 1 Johns. Ch. 425; *Dwight v. Pomeroy*, 17 Mass. 303; *Towner v. Lucas*, 13 Gratt. 705; *Knight v. Bunn*, 7 Ired. Eq. 77; *Westbrook v. Harbeson*, 2 McCord Eq. 112; *Ware v. Cowles*, 24 Ala. 446.

² *Rearich v. Swinehart*, 1 Jones, (Pa.) 233; *Renshaw v. Gans*, 7 Barr. 119; *Oliver v. Oliver*,

4 Rawle, 141; *Miller v. Henderson*, 10 S. & R. 290; *Campbell v. McClenachan*, 6 Id. 171; see *Murray v. Dake*, 46 Cal. 644; *Taylor v. Gilman*, 25 Vt. 411; *Coger's Ex'rs v. Magee*, 2 Bibb, 321.

³ See §§ 330, 443.

⁴ *Glenn v. Statler*, 42 Iowa, 107, 110; and see *Butman v. Hessey*, 30 Me. 263; *Hill v. Bush*, 19 Ark. 522; *Allen v. Mayor, &c.*, 4 E. D. Smith, 404; *Voorhis v. Murphy*, 26 N. J. Eq. 434; *Wood v. Patterson*, 4 Md. Ch. 335; *Capehart v. Mhoon*, 5 Jones Eq. 178; *Lewis v. Lewis*, 5 Oreg. 169; *West R. R. v. Babcock*, 6 Met. 346; *Diman v. Providence R. R.*, 5 R. I. 130; but see *Mut. L. Ins. Co. v. Wagner*, 27 Barb. 354; *Clarke v. Dutcher*, 9 Cow. 674; *Mason v. Crosby*, 1 Woodb. & M. (U. S.) 342; *Daniel v. Mitchell*, 1 Story, (U. S.) 172; *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90; *Juzin v. Toulmin*, 9 Ala. 662; s. c., 44 Am. Dec. 448; *Ferson v. Sanger*, 1 Woodb. & M. (U. S.) 138; *Belt v. Mehen*, 2

§ 194. **Compromises and speculative contracts.**—As a consequence of the rule, that relief on the ground of mistake will not be afforded, where the parties intentionally do what causes the unexpected results, it has been held that no relief will be afforded to the party to a contract, where the contract consists of a compromise of a dispute over some past transaction, and where the dispute was concerning the facts of that transaction; or where the parties have knowingly and with their eyes open entered into a contract of a speculative character, the results of which are uncertain. Where such a contract is entered into, and the case is not complicated by any fraudulent conduct of either of the parties, the fact that the results of such a contract were not anticipated by the parties to the contract, or by one of them, will not furnish a ground for relief. In such a case, the parties are supposed to have duly weighed the chances of the speculation or the benefit of the compromise, and whatever mistake has occurred is not a mistake as to existing or past facts, but a mistake of judgment as to the future consequences of the present transaction.¹

§ 195. **Remedies and nature of relief.**—The relief, which equity will afford for mistakes, may in the first place be considered according to the mode in which the mistake is presented to the court: *First*, where the mistake is presented as a defense against the action; and, *secondly*, where it is presented by the plaintiff as a ground for affirmative relief. There is little to be said in respect to the relief which is afforded in the case of defense, except to state that the proof of the mistake will enable the defendant to resist the enforcement of the plaintiff's cause of action.² In states in which the reformed procedure has been adopted, the equitable defense of mistake may be set up in a legal action.³ But, according to the old practice, mistake will only serve as a defense where the action was brought in a court of equity.

Cal. 159; *McCobb v. Richardson*, 24 Me. 82; *Hunter v. Goudy*, 1 Ohio, 449; *Wilson v. Western N. C. Land Co.*, 77 N. C. 445.

¹*Pickering v. Pickering*, 2 Beav. 31, 56, *per* Lord Langdale; *Williams v. Sneed*, 3 Coldw. 533; *Stover v. Mitchell*, 45 Ill. 213; *Bell v. Lawrence*, 51 Ala. 180; *Shotwell v. Murray*, 1 Johns. Ch. 512, 516; *Good v. Herr*, 7 W. & S. 253; *Brandon v. Medley*, 1 Jones Eq. 313; *Durham v. Wadlington*, 2 Strobb. Eq. 258; *Walworth v. Abel*, 52 Pa. St. 370; *Leis v. Stubb*, 6 Watts, (Pa.) 48; *Gibson, C. J.*; *Shartel's Appeal*, 64 Pa. St. 25; *Burkholder's Appeal*, 105 Pa. St. 31-37; *Ackla v. Ackla*, 6 Pa. St. 228; *Wilen's Appeal*, 105 Pa. St. 121; *Hurlbut v. Phelps*, 30 Conn. 42-50; *Gordon v. Gordon*, 3 Swanst. 463; *Frank v. Frank*, 1 Ch. Cas. 84; *Brooks v. Hall*, 36 Kans. 697; *Fuller v. Fuller*, 23 Fla. 236; *Hanson v. Jones*, 20 Mo. App. 595; *Wells v. Neff*, 14 Oreg. 66; *Lord, J.*; *Kraushaar v. Brant*, 22 Mo. App. 162; *Nabours v. Cooke*, 24 Miss. 44; *Easton v. Strother*, 57 Iowa, 506; *Hall v. Claggett*, 2 Md. Ch. 148; *Newell v. Smith*, 53 Conn. 72; *Boone v.*

Ridgway, 29 N. J. Eq. 543; *May v. Adams*, 58 Vt. 74; *Jones v. Monroe*, 32 Ga. 1815; *Stover v. Mitchell*, 45 Ill. 213; *Jordan v. Stevens*, 51 Me. 78, 83; s. c., 81 Am. Dec. 556; *Steele v. White*, 2 Paige, (N. Y.) 478; *Trigg v. Reed*, 5 Humph. (Tenn.) 529; s. c., 42 Am. Dec. 447; *Smith v. Penn*, 22 Gratt. (Va.) 402; *Korne v. Korne*, 30 W. Va. 1; *Mills v. Lee*, 6 T. B. Mon. (Ky.) 91, 97; s. c., 17 Am. Dec. 118; *Bennet v. Paine*, 5 Watts, (Pa.) 259; *Durham v. Wabblington*, 2 Strobb. (S. Car.) Eq. 258.

²*Doggett v. Emerson*, 3 Story, 700; *West R. v. Babcock*, 6 Metc. 346; *Post v. Leet*, 8 Paige, 337; *Mortimer v. Pritchard*, 1 Bailey Eq. 505; *Helsham v. Langley*, 1 Y. & C. 175; *Moxey v. Bigwood*, 4 De G. F. & J. 351; *Webb v. Kirby*, 7 De M. & G. 376; *Davis v. Shepherd*, L. R. 1 Ch. 410; *Hooper v. Smart*, L. R. 18 Eq. 683; *Allen v. Richardson*, L. R. 13 Ch. D. 524; *Denny v. Hancock*, L. R. 6 Ch. 1.

³See *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462.

By way of affirmative relief, the equitable jurisdiction will be resorted to only where the remedies at law prove inadequate. Where money has been paid, or goods delivered through mistake, the legal action for the recovery of either of them is adequate, and a resort to equity is not necessary. There are other cases of affirmative relief in which the legal action is not sufficient, as where land, through mistake, has been conveyed or contracted to be conveyed; and possibly there are cases where the common law action for the recovery of money or goods, which have been delivered by mistake, may prove inadequate. In every such case, a court of equity will furnish the required relief.¹

The affirmative relief which the court of equity will give in cases of mistakes is of two kinds: One is, that of cancellation or rescission of a contract; and the second is, that of reformation or re-execution of the contract. Cancellation is the proper and, in fact, only possible remedy, where the mistake of law or of fact is an error of only one of the parties; or where both parties have made different mistakes. For the proof of the mistake or mistakes, under these circumstances, shows that the parties did not enter into an agreement with each other; that their minds did not meet in agreement in respect to the same subject-matter and on the same terms, and that no agreement was made at all.² But where both parties make the same mistake, or one of them makes the mistake and the other fraudulently takes advantage of such a mistake; and the evidence in the case discloses the fact that there was a contract made by the parties, in respect to whose terms and conditions the parties were fully agreed; but that the contract as written down did not record the contract which was actually made: in such cases, the court will not cancel the transaction, but will reform the contract and make it represent the real intentions of the parties, as proven by the facts of the case.³

— § 196. **Illustrations of cases in which affirmative relief may be granted.—Relief in cases of wills.**—It may be stated, in very general terms, that instruments of conveyance or agreement which operate *inter vivos*, of every description whatsoever—whether they be executed contracts, such as deeds of conveyance, leases and the like, or merely

¹ Wheadon v. Olds, 20 Wend. (N. Y.) 174; Van Sauten v. Standard Oil Co., 17 Hun. (N. Y.) 140; Lane v. Pere Marquette Boom Co., 62 Mich. 63; Buffalo v. O'Malley, 61 Wis. 255; s. c., 50 Am. Rep. 137; Billingslea v. Ware, 32 Ala. 415; Guild v. Baldrige, 2 Swan, (Tenn.) 295; Manzy v. Hardy, 13 Neb. 36; Davis v. Krum, 12 Mo. App. 279; Grimes v. Blake, 16 Ind. 160; Goodspeed v. Fuller, 46 Me. 141; s. c., 71 Am. Dec. 572; Glenn v. Shannon, 12 S. Car. 570; Newell v. Smith, 53 Conn. 72; Wolf v. Beard, 123 Ill. 585; Baldwin v. Foss, 71 Iowa, 388.

² Nevins v. Dunlap, 33 N. Y. 676; Story v. Conger, 36 Id. 673; Welles v. Yates, 44 Id. 525; Duman v. Providence R. R., 5 R. I. 130, 135; Sawyer v.

Hovey, 3 Allen, 331; Woodbury, &c. Bk. v. Ins. Co., 31 Conn. 517; Tessen v. Atlantic Co., 40 Mo. 33; Childers v. Childers, 1 De G. & J. 482; Holmes v. Clark, 10 Iowa, 423; Jackson v. Andrews, 59 N. Y. 244.

³ Weston v. Wilson, 31 N. J. Eq. 51; Sanders v. Wagner, 39 Id. 506; Gump's Appeal, 65 Pa. St. 476; Chew v. Gillespie, 56 Id. 308; Dulany v. Rogers, 50 Md. 524; Bradford v. Union Bk., 13 How. (U. S.) 55, 57, 66; Rider v. Powell, 28 N. Y. 310; De Peyster v. Hasbrouck, 11 Id. 532; Ford v. Joyce, 78 Id. 618; Moran v. McLarty, 75 Id. 25; Cone v. Niagara Ins. Co., 60 Id. 619; Comer v. Himes, 49 Ind. 482, 489; Mackenzie v. Coulson, L. R. 8 Eq., 368.

executory obligations, such as bonds, negotiable paper, policies of insurance, and the like—in all such cases, mistake in the execution of the instrument will not only serve as a good defense in the attempted enforcement of the agreement thus erroneously executed, but equity will likewise affirmatively relieve therefrom by a decree of cancellation or reformation, as the case may be.¹ So, also, will equity afford

¹ *Prescott v. Hawkins*, 16 N. H. 122; *Loss v. Obry*, 22 N. J. Eq. 52; *Blodgett v. Hobart*, 18 Vt. 414; *Davis v. Cox*, 6 Ind. 481; *Lindsay v. Davenport*, 18 Ill. 375; *Cavall v. Wilson*, 14 Ark. 482; *Bartlett v. Judd*, 23 Barb. (N. Y.) 282; *Richardson v. Bleight*, 8 B. Mon. (Ky.) 580; *Grundy v. Grundy*, 12 B. Mon. (Ky.) 269; *James v. Cutler*, 54 Wis. 172; *Kellogg v. Chapman*, 30 Fed. Rep. 882; *Strang v. Beach*, 11 Ohio St. 283; *Dunbar v. Newman*, 46 Miss. 231; *Conyers v. Mericles*, 75 Ind. 443; *Levy v. Ward*, 33 La. An. 1033; *De Ford v. Mercer*, 24 Iowa, 118; s. c., 92 Am. Dec. 460; *Fowler v. Vreeland*, 44 N. J. Eq. 268; *Raines v. Calloway*, 27 Tex. 678; *Blackburn v. Randolph*, 33 Ark. 119; *Christman v. Colbert*, 33 Minn. 509; *Parker v. Benjamin*, 53 Ill. 255; *Dayton v. Citizens' Nat. Bank*, 11 Ill. App. 501; *Jones v. Sweet*, 77 Ind. 187; *Sowler v. Day*, 58 Iowa, 252; *Davenport v. Sovil*, 6 Ohio St. 459; see, also, *Wagenblast v. Washburn*, 12 Cal. 208; *Morrison v. Collier*, 79 Ind. 417; *Weart v. Rose*, 16 N. J. Eq. 290; *Gouveneur v. Titus*, 6 Paige, (N. Y.) 347; *Dod v. Paul*, 43 N. J. Eq. 302; *Johnson v. Johnson*, 8 Baxt. (Tenn.) 261; see, also, *Warburton v. Lauman*, 2 Greene, (Iowa) 420; *Mitchell v. Tinsley*, 69 Mo. 442; *Eaton v. Eaton*, 15 Wis. 259; *Colchester v. Culver*, 29 Vt. 111; *Bullock v. Whip*, 15 R. I. 195; *Wadsworth v. Wendell*, 5 Johns. (N. Y.) Ch. 224; *Allen v. Elder*, 76 Ga. 674; *Daniels v. Davison*, 17 Ves. 433; *Probate Court v. May*, 52 Vt. 182; *Rutland v. Paige*, 24 Vt. 181; *Montville v. Haughton*, 7 Conn. 543; *Mitchell v. Tinsley*, 69 Mo. 442; *Bernard's Township v. Stebbins*, 109 U. S. 341; *Draper v. Springfield*, 104 U. S. 501; *Neal v. Gregory*, 19 Fla. 356; *Bruce v. Bonney*, 12 Gray, (Mass.) 107; *Althey v. McHenry*, 6 B. Mon. (Ky.) 50; *Sawyer v. Hanson*, 48 Wis. 611; *Summers v. Coleman*, 80 Mo. 488; *Clayton v. Freet*, 10 Ohio St. 544; see, also, *Day v. Day*, 84 N. Car. 408; *Wright v. Delafield*, 23 Barb. (N. Y.) 498; *Hunt v. Frazier*, 6 Jones (N. Car.) Eq. 90; *Nicholson v. Carless*, 59 Ind. 39; *Randolph v. New Jersey, &c. R. Co.*, 28 N. J. Eq. 49; *Wanner v. Sisson*, 29 N. J. Eq. 141; *Gale v. Morris*, 29 N. J. Eq. 222; *McMillan v. Fish*, 29 N. J. Eq. 610; *Rutledge v. Smith*, 1 Bush. (N. Car.) Eq. 283; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; *Watson v. Sherman*, 84 Ill. 263; *Jones v. Sweet*, 77 Ind. 187; *Exchange Bank v. Russell*, 50 Mo. 531; *Real Estate Trust Co. v. Balch*, 45 N. Y. Super. Ct. 528; *Whitesides v. Taylor*, 105 Ill. 496; *McCann v. Letcher*, 8 B. Mon. (Ky.) 320; see, also, *Courtwright v. Courtwright*, 63 Iowa, 356; *Stedwell v. Anderson*, 21 Conn. 139; *Parlin v. Stone*, 1 McCrary, (U. S.) 443; *Bohanan v. Bohanan*, 3 Ill.

App. 502; *Roszell v. Roszell*, 109 Ind. 354; *Carver v. Carver*, 97 Ind. 497; *Douglass v. Branch Bank*, 19 Ala. 659; *McMillan v. New York, &c. Co.*, 29 N. J. Eq. 610; *Winston v. Browning*, 61 Ala. 80; *Hoover v. Senseman*, (Pa. 1886) 4 Atl. Rep. 730; *Winnipisogee, &c. Co. v. Perley*, 46 N. H. 483; *Stamper v. Hawkins*, 6 Ired. (N. Car.) Eq. 7; *Belknap v. Sealey*, 2 Duer, (N. Y.) 570; *Quessel v. Woodlief*, 6 Call, (Va.) 218; *Harrison v. Talbott*, 2 Dana, (Ky.) 258; *Shelby v. Smith*, 2 A. K. Marsh. (Ky.) 504; *Couse v. Boyles*, 4 N. J. Eq. 212; *Large v. Penn.*, 6 S. & R. (Pa.) 488; *Stebbins v. Eddy*, 4 Mason, (U. S.) 414; *Williams v. Hathaway*, 19 Pick. (Mass.) 387; *Kreiter v. Bomberger*, 82 Pa. St. 59; *Beall v. Berkhalter*, 26 Ga. 566; *Powell v. Clark*, 5 Mass. 355; s. c., 4 Am. Dec. 607; *Mann v. Pearson*, 2 Johns. (N. Y.) 37; *Perkins v. Webster*, 2 N. H. 287; *Marvin v. Bennett*, 26 Wend. (N. Y.) 169; see, also, *Brumbaugh v. Chapman*, 45 Ohio St. 368; *Whitney v. Smith*, 33 Minn. 124; *Dunham v. New Britain* 55 Conn. 378; *Martin v. Hamlin*, 18 Mich. 354; s. c., 100 Am. Dec. 181; *Iverson v. Wilburn*, 65 Ga. 103; *Goldsborough v. Ringgold*, 1 Md. Ch. 239; *O'Connell v. Duke*, 29 Tex. 299; *Farenholt v. Perry*, 29 Tex. 316; *Coons v. North*, 27 Mo. 73; *Nelson v. Matthews*, 2 Hen. & M. (Va.) 164; s. c., Am. Dec. 620; *Thomas v. Perry*, 1 Pet. (C. C.) 49; *O'Connell v. Duke*, 94 Am. Dec. 282; *Compare Paine v. Upton*, 87 N. Y. 327; s. c., 41 Am. Rep. 571; *Noble v. Goo-gins*, 99 Mass. 231; *Smallwood v. Hatton*, 4 Md. Ch. 95; see, also, *Stull v. Hurtt*, 9 Gill, (Md.) 446; *Ketchum v. Stout*, 20 Ohio, 453; *Marvin v. Bennett*, 26 Wend. (N. Y.) 169; *Morris Canal Co. v. Emmett*, 9 Paige, (N. Y.) 168; s. c., 37 Am. Dec. 388; see, also, *McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130; *Armstrong v. Short*, 95 Ind. 327; *Heavenridge v. Mondy*, 49 Ind. 434; *Easter v. Severin*, 64 Ind. 375; *Easter v. Severin*, 78 Ind. 540; *Nelson v. Davis*, 40 Ind. 386; *Nicholson v. Caress*, 59 Ind. 39; *Schwickerath v. Cooksay*, 53 Mo. 75; *Burns v. Hamilton*, 33 Ala. 210; s. c., 70 Am. Dec. 570; see, also, *Bennett v. Owen*, 3 Ark. 117; *Miller v. Craig*, 83 Ky. 623, 625; *Dawson v. Goodwin*, 15 B. Mon. (Ky.) 439; *Cosby v. Wickliffe*, 12 B. Mon. (Ky.) 202; *Glass v. Hurlbert*, 102 Mass. 24; s. c., 3 Am. Rep. 418. But see *contra*, *Hitchins v. Pettingill*, 58 N. H. 386, and cases cited; *Kostenbader v. Peters*, 80 Pa. St. 438; *Oakville Co. v. Double Pointed Tack Co.*, 105 N. Y. 658; *Keeperv. Force*, 86 Ind. 81; *Bradwell v. Phillips*, 30 Ohio St. 255; *Kilpatrick v. Strozier*, 67 Ga. 247; *Dwight v. Tyler*, 49 Mich. 614; *Wall v. Arrington*, 13 Ga. 88; *Weston v. Wilson*, 31 N. J. Eq., 51; *Noel v. Gill*, 84 Ky. 241; *Busby v. Littlefield*, 31 N. H. 193.

affirmative relief in the case of mistakes in the execution of powers;¹ but in this connection it must be remembered that it is only in respect to defective execution of powers that a court of equity will apply relief,² and that no relief will be granted in the case of the non-execution of the power, except when the execution of the power was a mandatory duty of the donee and was not left to his discretion.³

Marriage settlements and family compromises, which have been entered into through some mistake of fact, will be corrected whenever there is a clear case of mistake, and the mistake was of such a strong character as to support the claim of a surprise on the part of the person entering into the settlement. But the relief will not be afforded where the mistake relates to the anticipated consequences of the settlement, instead of to the existing or past facts or circumstances of the case.⁴ Where a receipt has been given upon some mistake of fact as to payment of money, the receipt may be corrected or cancelled by decree of the court.⁵

A court of equity will also grant affirmative relief against mistakes which have been made in judgments and decrees or orders of a court, wherever the error is clerical or ministerial; but not where the mistake was judicial. Against judicial mistakes there is no relief, except by appeal to a higher court. Where a mistake is made in an award, the court of equity has jurisdiction for the purpose of correcting such a mistake; but the mistake must appear on the face of the award itself, or upon some contemporaneous writing; or it must be admitted by the arbitrator himself.⁷ The court of equity will also

¹ *Oliver v. The Mutual, &c. Ins. Co.*, 2 Curt. (U. S.) 277; 2 Sugden on Powers, 94; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 544; *Barr v. Hatch*, 3 Ohio, 527; *Johnson v. Cushing*, 15 N. H. 298; s. c., 41 Am. Dec. 694; *Lippincott v. Stokes*, 6 N. J. Eq. 22; *Shannon v. Bradstreet*, 1 S. & L. 63; *Love v. Sierra Nevada Min. Co.*, 32 Cal. 639; s. c., 91 Am. Dec. 602; *Tollett v. Tollet*, 1 Lead. Cas. Eq. 371; *Bakewell v. Ogden*, 2 Bush, (Ky.) 265; *Marshall v. Stephens*, 8 Humph. (Tenn.) 159; s. c., 47 Am. Dec. 601; *Ford v. Russell*, 1 Freeman (Miss.) Ch. 42; *Slifer v. Beates*, 9 S. & R. (Pa.) 166; *Porter v. Turner*, 3 S. & R. (Pa.) 108; *Pepper's Will*, 1 Parson's Eq. (Pa.) 436.

² *Barr v. Hatch*, 3 Ohio, 527; *Johnson v. Cushing*, 15 N. H. 298; s. c., 41 Am. Dec. 694; *Lippincott v. Stokes*, 6 N. J. Eq. 22.

³ *Norcum v. D'Oench*, 17 Mo. 98; *Beatty v. Clark*, 20 Cal. 11, 12; *Howard v. Carpenter*, 11 Md. 259; *Witkinson v. Getty*, 13 Iowa, 157; s. c., 81 Am. Dec. 428; *Johnson v. Cushing*, 15 N. H. 298; s. c., 41 Am. Dec. 694.

⁴ *Love v. Graham*, 25 Ala. 187; *Gardner v. Gardner*, 1 Desau. (S. Car.) Eq. 437; *Breadalbane v. Chandos*, 2 My. & Cr. 711; *Bold v. Hutchinson*, 5 De G. M. & G. 558, 566; *Hanley v. Pearson*, L. R. 13 Ch. D. 545; *Cogan v. Duffield*, L. R. 20 Eq. 789; *In re De la Touche's Settlement*, L. R. 10 Eq. 599; *Merryweather v. Jones*, 4 Giff. 509.

⁵ *Elliott v. Logan*, Phill. (N. Car.) Eq. 163; *Wright v. Wright*, 2 McCord (S. Car.) Ch. 185; *Aultman & Co. v. Graham*, 29 Ill. App. 77; *Collett v. Frazier*, 3 Jones (N. Car.) Eq. 80.

⁶ *Palmer v. Bethard*, 66 Ill. 529; *Chapman v. Hurd*, 67 Id. 234; *Stites v. Wiedmer*, 35 Ohio St. 555; *Pool v. Docker*, 92 Ill. 501; *Young v. Morgan*, 9 Neb. 169; but see *Wardlaw v. Wardlaw*, 50 Ga. 544; *Colwell v. Warner*, 36 Conn. 224; *Loss v. Obry*, 22 N. J. Eq. 52; *Wheeler v. Kirtland*, 23 Id. 13, 15; *Gump's App.*, 65 Pa. St. 476; *Byrne v. Edmonds*, 23 Gratt. 200; *Kearney v. Sacer*, 37 Md. 264; *Barthell v. Roderick*, 34 Iowa, 517; *Smith v. Butler*, 11 Oreg. 46; see, also, *Baker v. O'Riordan*, 65 Cal. 368; *Bates v. Garrison*, Harr. (Mich.) 221; *Swaggerty v. Neilson*, 8 Baxt. (Tenn.) 32; *Campbell County Court v. Coons*, 6 B. Mon. (Ky.) 521; *Senter v. Senter*, 70 Cal. 619; *Robins v. Swain*, 68 Ill. 197; *Davis v. Young*, 5 J. J. Marsh. (Ky.) 165; *Quivey v. Baker*, 37 Cal. 465; *Mastick v. Thorp*, 29 Cal. 444; see, also, *Darling v. Baltimore*, 51 Md. 1; *Alford v. Moore*, 15 W. Va. 597; *Atlantic F. & M. Ins. Co. v. Wilson*, 5 R. I. 479; see, also, *Rhode Island, &c. Bank v. Hawkins*, 6 R. I. 198; *Sanders v. Wagner*, 32 N. J. Eq. 506.

⁷ *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Bouck v. Wilber*, 4 Id. 405; *Underhill v. Van Cortland*, 2 Id. 339, 361; 17 Johns. 405; *Winship v. Jewett*, 1 Barb. Ch. 173; *Hartshorn v. Cutt-*

afford affirmative relief in all cases of mistakes in the settlement of accounts,¹ or where an instrument has been surrendered or satisfied through mistake.²

Where the application, however, is for affirmative relief against a mistake which has been made in the execution of a will, a different rule is applied. In the examples and illustrations just enumerated, where mistakes have been made in the execution of an instrument operating *inter vivos*, the mistake may be shown by evidence outside of the instrument itself; and in fact the almost universal rule is, that in such cases the mistake is shown by proof of extraneous facts and circumstances. But the rule is laid down without exception that no relief can be granted for the correction of an error in the execution of a will, where it is not certain, from the face of the will, whether a mistake was made or what the testator had intended to have inserted instead.³ The statement here made must, however, not be confounded with the rule of law, which admits testimony as to extraneous circumstances, for the purpose of explaining an ambiguity which appears upon the will or which arises out of the circumstances of the will. In such cases, the ambiguity is explained away by the extraneous evidence; but it cannot be said that in such a case a mistake in the will has been corrected.⁴ A court of equity will, however, grant affirmative relief in cases where the will itself shows that certain words have been omitted which are material to the under-

rell, 1 Green's Ch. 297; Ryan v. Blunt, 1 Dev. Eq. 386; Burrows v. Sweet, 143 Mass. 316; Morgan's Appeal, 110 Pa. St. 271; Bispham v. Price, 15 How. (U. S.) 162; see, also, Valle v. North Missouri R. Co., 37 Mo. 445; McJinsey v. Traverse, 1 Stew. (Ala.) 244; s. c., 18 Am. Dec. 43; Mansfield, &c. Co. v. Veeder, 17 Ohio, 385; Whiteman v. New York, 21 Hun. (N. Y.) 117; Muldrow v. Norris, 2 Cal. 74; Baynard v. Norris, 5 Gill. (Md.) 468; s. c., Am. Dec. 647; Thurmond v. Clark, 47 Ga. 500; Williams v. Warren, 21 Ill. 541; Tracy v. Herrick, 25 N. H. 381; Rand v. Redington, 13 N. H. 72; Herrick v. Blair, 1 Johns. (N. Y.) Ch. 101; Brown v. Bellows, 4 Pick. (Mass.) 179; Howell v. Howell, 26 Ill. 460; Morris v. Ross, 2 H. & M. (Va.) 408; Spofford v. Spofford, 10 N. H. 254; Johnson v. Noble, 13 N. H. 806; Kennedy v. New York, &c. R. Co. 3 Duer. (N. Y.) 69; Port Huron, &c. R. Co. v. Callaman, 61 Mich. 22; Muldrow v. Morris, 56 Am. Dec. 313; Taylor v. Sayre, 24 N. J. L. 647; Crissman v. Crissman, 5 Ired. (N. Car.) L. 498; Champneys v. Wilson, R. M. Charlt. (Ga.) 206; Greenough v. Rolfe, 4 N. H. 357; Johns v. Stevens, 3 Vt. 308; State v. Williams, 9 Gill. (Md.) 128; Claypool v. Miller, 4 Blackf. (Ind.) 163; Conger v. James, 2 Swan. (Tenn.) 213; Smith v. Douglass, 16 Ill. 34; Merritt v. Merritt, 11 Ill. 565; Ross v. Watt, 16 Ill. 99; McDonald v. Arnout, 14 Ill. 58; Root v. Renwick, 15 Ill. 461; Moore v. Barnett, 17 Ind. 349; Daniels v. Ripley, 10 Mich. 237;

Church, 65 Pa. St. 9; McCrae v. Hollis, 4 Desau 122; Mounin v. Beroujon, 51 Ala. 196; Barnett v. Barnett, 6 J. J. Marsh. 499; Waggoner v. Minter, 7 Id. 175.

² Swaggerty v. Neilson, 8 Baxt. (Tenn.) 32; Lemon v. Phoenix, &c. Ins. Co., 38 Conn. 294; Scholefield v. Templar, Johns. 155; East Ind. Co. v. Donald, 9 Ves. 275; East Ind. Co. v. Neave, 5 Id. 173.

³ Jackson v. Payne, 2 Metc. (Ky.) 567; Hunt v. White, 24 Tex. 643; Sherwood v. Sherwood, 45 Wis. 357; s. c., 30 Am. Rep. 757; Goode v. Goode, 22 Mo. 518; s. c., 66 Am. Dec. 630; Chambers v. Watson, 56 Iowa, 676; Williams v. Allen, 17 Ga. 81; Machem v. Machem, 28 Ala. 374; Snyder v. Warbasse, 11 N. J. Eq. 463; Nutt v. Nutt, 1 Freem. Ch. (Miss.) 128.

⁴ Goode v. Goode, 22 Mo. 518; Trexler v. Miller, 6 Ired. Eq. 248; Johnson v. Hubbell, 2 Stockt. Eq. 332; Yates v. Cole, 1 Jones' Eq. 110; McAlister v. Butterfield, 31 Ind. 25; Erwin v. Hammer, 27 Ala. 296; Machem v. Machem, 28 Id. 274; Alter's Appeal, 67 Pa. St. 341; Nutt v. Nutt, 1 Freem. Eq. 128; Garland v. Beverley, L. R. 9 Ch. D. 213; Farrer v. St. Catherine's Coll., L. R. 16 Eq. 19; McKechnie v. Vaughan, L. R. 15 Eq. 289; Hart v. Tulk, 2 De G. M. & G. 300; Campbell v. Bouskell, 27 Beav. 325; Snyder v. Warbasse, 3 Stockt. 463; Wood v. White, 32 Me. 340; Jackson v. Paye, 2 Metc. (Ky.) 567; *In re Aird's Estate*, L. R. 12 Ch. D. 291; Barber v. Wood, L. R. 4 Ch. D. 885; Wilson v. Morley, Id. 5 Id. 776; Traverse v. Blundell, Id. 6 Id. 436.

standing of the provisions of the will.¹ So, also, where words have been inserted producing confusion or misunderstanding, and where the context of the will shows that the testator had inserted those words by mistake; if the context will be intelligible without the consideration of these words, the court will reject them.² "Or" may be changed into "and," and "and" to "or," where this construction is necessary to an intelligent interpretation of the will.³ So, also, may there be a correction of any mistake which appears on the face of the will to have been made in respect to the description of the property,⁴ or in the names of the beneficiaries.⁵ But where a mistake has been made in the name of the beneficiary or in the description of the property, but there is property or a person answering to the erroneous description, the relief will not be granted, nor the mistake corrected.⁶

§ 197. **How mistakes may be proven.—When parol evidence is admissible.**—No difficulty will be experienced in answering the question propounded at the head of this paragraph, where the contract itself is parol; for a mistake in respect to a parol contract could be established by the same kind of evidence which is employed in proving the contract itself. The question of importance in this connection applies to the proof of mistakes in written contracts, and the necessity in most cases, if not in all, of resorting to parol evidence to prove the mistake. The general rule is, that parol evidence is inadmissible to vary the terms of the written contract; and if parol evidence is admissible at all for such a purpose, it must be in exceptional cases and on exceptional grounds. The exceptions are generally confined by the courts of equity to cases of variation of the written contract from the real intentions of the parties, through some accident, mistake or fraud; at any rate, it is held that a court of equity will admit parol evidence for the purpose of proving, that a written contract through some mistake, accident or fraud, failed to represent the real intention of the parties.⁷ In all suits for reformation and cancellation, the authorities

¹ *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Radford v. Radford*, 1 Keen, 486; *Mellor v. Daintree*, 33 Chan. Div. 198; see, also, *Towns v. Wentworth*, 11 Moo. P. C. C. 526; *Sweeting v. Prideaux*, 2 Chan. D. 413.

² *Coryton v. Helyar*, 2 Cox, 340; and see *Chapman v. Gilbert*, 4 De G. M. & G. 366; *Doe v. Stenlake*, 12 East, 515; *Hugo v. Williams*, L. R. 14 Eq. 224.

³ *Soule v. Gerrard*, Cro. Eliz. 525; *Moore*, 422; *Walsh v. Peterson*, 3 Atk. 193; *Framlingham v. Brand*, Atk. 390; *Great v. Great*, 26 Beav. 621; *Miles v. Dyer*, 5 Sim. 435; *Grant v. Dyer*, 2 Dow. 73; see *In re Sanders' Trusts*, L. R. 1 Eq. 675; *In re Kirkbride's Trusts*, L. R. 2 Eq. 400; *Hetherington v. Oakman*, 2 Y. & C. Ch. 299; *Maynard v. Wright*, 26 Beav. 285.

⁴ *Doe v. Bower*, 3 B. & Ad. 453; *Pullin v. Pullin*, 3 Bing. 47; *Hastead v. Searle*, 1 Ld. Raym. 728; *Blague v. Gold*, Cro. Car. 447; *Stephens v. Powys*, 1 De G. & J. 24; *Goodtitle v. Southern*,

1 M. & S. 299; *Slingsby v. Grainger*, 7 H. L. Cas. 273, *per* Lord Cranworth; *Polden v. Bastard*, L. R. 1 Q. B. 156; *Doe v. Martin*, 4 B. & Ad. 771; *Cleveland v. Spilman*, 25 Ind. 95; *Black v. Richards*, 95 Ind. 184; *Pocock v. Redinger*, 108 Ind. 573; s. c., 58 Am. Rep. 71.

⁵ *Adams v. Jones*, 9 Hare, 485; *Hodgson v. Clarke*, 1 De G. F. & J. 394; *Wood v. White*, 32 Me. 340; s. c., Am. Dec. 854; *Smith v. Ceney*, 6 Ves. 42; *Bradshaw v. Bradshaw*, 2 Young & C. 72; *Yates v. Cole*, 1 Jones (N. Car.) Eq. 110; *Garth v. Meyrick*, 1 Bro. C. C. 30.

⁶ *Webber v. Stanley*, 16 C. B., N. S., 698; *Pedley v. Dodds*, L. R. 2 Eq. 819; *Lister v. Pickford*, 34 Beav. 576; but see *Harman v. Gurner*, 35 Beav. 478; *West v. Lawday*, 11 H. L. Cas. 375; *Sampson v. Sampson*, L. R. 8 Eq. 479; *Robbins v. Magee*, 79 Ind. 381.

⁷ *Conover v. Wardell*, 20 N. J. Eq. (5 C. E. Green) 266; *Chamness v. Crutchfield*, 2 Ired. Eq. 148; *Harrison v. Howard*, 1 Id. 407; *Perry v.*

are quite agreed that the parol evidence is admissible for the purpose of establishing the mistake and of laying the foundation for the granting of the relief asked for.¹ But the equitable relief will not be granted, unless the mistake has been established by clear and convincing evidence. If there is any reasonable doubt as to there having been a mistake in the contract, the court will refuse to grant the relief. This is especially the case, where the relief asked for is that of reformation; the court will not reform a legal instrument except upon certain proof of the mistake.²

Pearson, 1 Humph. 431; Blanchard v. Moore, 4 J. J. Marsh. 471; Chambers v. Livermore, 15 Mich. 381; Van Ness v. City of Washington, 4 Pet. 232; Canterbury Aq. Co. v. Ensworth, 22 Id. 608; Patterson v. Bloomer, 35 Id. 57; Margraff v. Muir, 57 N. Y. 155; Best v. Stow, 2 Sandf. Ch. 298; White v. Williams, 48 Barb. 222; Morganthau v. White, 1 Sweeney, 395; Ryno v. Darby, 20 N. J. Eq. (5 C. E. Green) 231; Peterson v. Grover, 20 Me. 363; Bradbury v. White, 4 Greenl. 391; Rogers v. Saunders, 16 Me. 92; Goodell v. Field, 15 Vt. 448; Lawrence v. Staigg, 8 R. I. 256; Quinn v. Roath, 37 Conn. 16; Murray v. Parker, 19 Beav. 305, 308; see Lord Westbury, in McCormick v. Grogan, L. R. 4 H. L. 82, 97; Osborne v. Phelps, 19 Conn. 63; s. c., 48 Am. Dec. 133; Webster v. Webster, 33 N. H. 18; s. c., 66 Am. Dec. 705; Gates v. Green, 4 Paige, (N. Y.) 355; s. c., 27 Am. Dec. 68; Lyman v. United States Ins. Co., 2 Johns. (N. Y.) Ch. 630; Gillespie v. Moon, 2 Johns. (N. Y.) Ch. 585; s. c., 7 Am. Dec. 559; Davenport v. Mason, 15 Mass. 85; Wilkinson v. Scott, 17 Mass. 251; Leland v. Stone, 10 Mass. 459; Turpin v. Marksbury, 3 J. J. Marsh. (Ky.) 622; Schettiger v. Hoople, 3 Grant, (Pa.) 54; Woodward, J.; Stites v. Weidner, 35 Ohio St. 555; Greer v. Cadwell, 14 Ga. 207; s. c., 58 Am. Dec. 553; Bond v. Dorsey, 65 Md. 310; Bushby v. Littlefield, 31 N. H. 193; McKay v. Simpson, 6 Ired. (N. Car.) Eq. 452; Canedy v. Marcy, 13 Gray, (Mass.) 373; Wall v. Arrington, 13 Ga. 88; Louisville, &c. Railroad Co. v. Power, 119 Ind. 269; Smith v. Buttlir, 11 Oreg. 46; Belows v. Stone, 14 N. H. 175; Prescott v. Hawkins, 12 N. H. 19; Bartle v. Vosbury, 3 Grant, (Pa.) 277; Hunter v. Bilyeu, 30 Ill. 228; Wood v. Price, 46 Ill. 439, 440; Emery v. Mohler, 69 Ill. 221, 228; Gelpcke v. Blake, 15 Iowa, 387; s. c., 83 Am. Dec. 418; Jack v. Naber, 15 Iowa, 450; Jones v. Sweet, 77 Ind. 187; Morris v. Stern, 80 Ind. 227.

¹ McCloskey v. McCormick, 44 Ill. 336; Mills v. Lockwood, 42 Id. 111; Cleary v. Babcock, 41 Id. 271; Shively v. Welch, 2 Or. 288; Bradford v. Union Bk., 13 How. (U. S.) 57, 66; Lauderdale v. Hallock, 7 Sm. & Mar. 622; Wurzbarger v. Meric, 20 La. An. 415; Mattingly v. Speak, 4 Bush, 316; Graves v. Mattingly, 6 Id. 361; McCann v. Letcher, 8 B. Mon. 320; Baynard v. Norris, 5 Gill, 468; Newcomer v. Kline, 11 Gill & J. 457; Ifick v. Fulton, 3 Gratt. 193; Keyton v. Brawford, 5 Id. 39; Larkins v. Biddle, 21 Ala.

252; Hale v. Stone, 14 Id. 803; Waldron v. Letson, 2 McCart. 126; Blair v. McDonnell, 1 Halst. Ch. 327; Gump's Appeal, 65 Pa. St. (15 P. F. Sm.) 476; Chew v. Gillespie, 56 Id. (6 Id.) 308; Lauchner v. Rex, 8 Harris, 464; Gower v. Sterner, 2 Whart. 75; Chamberlain v. Thompson, 10 Conn. 243; Wooden v. Haviland, 18 Id. 101; Many v. Beekman Iron Co., 9 Paige, 188; Firmstone v. De Camp, 17 N. J. Eq. (2 C. E. Green) 317; Peterson v. Grover, 20 Me. 363; Belows v. Stone, 14 N. H. 175; Langdon v. Keith, 9 Vt. 299.

² Burgin v. Giberson, 26 N. J. Eq. 72; Green v. Morris, 1 Beas. 165, 170; Durant v. Bacot, 2 Id. 201; 2 McCart. 411; Hall v. Claggett, 2 Md. Ch. 151; Philpott v. Elliott, 4 Id. 273; Showman v. Miller, 6 Md. 479; Brantley v. West, 27 Ala. 542; Mosby v. Wall, 23 Miss. 81; Tesson v. Atlantic Ins. Co., 40 Mo. 33, 36; Beebe v. Young, 14 Mich. 136; Shay v. Pettes, 35 Ill. 360; Edmonds' App., 59 Pa. St. 220; Potter v. Potter, 27 Ohio St. 84; Heavenridge v. Mondy, 49 Ind. 434; Mines v. Hess, 47 Ill. 170; Newton v. Holley, 6 Wis. 564; State v. Frank, 51 Mo. 98; Lestrade v. Barth, 19 Cal. 660, 675; Hathaway v. Brady, 23 Id. 122; Shively v. Welch, 2 Oreg. 288; U. S. v. Munroe, 5 Mason, 572; Andrews v. Essex Ins. Co., 3 Id. 6; Tucker v. Madden, 44 Me. 206; Farley v. Bryant, 32 Me. 474; Brown v. Lamphear, 35 Vt. 252; Lyman v. Little, 15 Id. 576; Preston v. Whitcomb, 17 Id. 183; Sawyer v. Hovey, 3 Allen, 331; Andrew v. Spurr, 8 Id. 412; Canedy v. Marcy, 13 Gray, 373; Nevins v. Dunlap, 33 N. Y. 676; Mead v. Westchester Ins. Co., 64 Id. 453; White v. Williams, 48 Barb. 222; Smith v. Mackin, 4 Lans. 41; Lyman v. U. S. Ins. Co., 2 Johns. Ch. 630; 17 Johns. 373; Douglas v. Grant, 12 Ill. App. 273; Lanning v. Carpenter, 48 N. Y. 478; Palmer v. Hartford Fire Ins. Co., 54 Conn. 488; Columbus, &c. R. Co. v. Steinfeld, 42 Ohio St. 449; Ferson v. Sanger, 1 W. & M. 138; Lockhart v. Cameron, 29 Ala. 212; Brantley v. West, 27 Ala. 542; Cullinane v. District of Columbia, 18 Ct. of Cl. 577; Dean v. The Equitable Fire Ins. Co., 4 Cliff. (U. S.) 575; Wall v. Arrington, 13 Ga. 88; Broadwell v. Broadwell, 6 Ill. 599; Lyman v. United Ins. Co., 2 Johns. (N. Y.) Ch. 630; Gillespie v. Moon, 2 Johns. (N. Y.) Ch. 585; s. c., 7 Am. Dec. 559; Keisselbrack v. Livingston, 4 Johns. (N. Y.) Ch. 144; Kent v. Manchester, 29 Barb. (N. Y.) 595; Griswold v. Smith, 10 Vt. 452; Gill v. Claggett, 4 Md. Ch. 470; Shattuck v. Gray, 45

§ 198. **Parol evidence in suits for specific performance.**—When the question of the admissibility of parol evidence, for the purpose of establishing a mistake in the execution of a contract, arises in suits for specific performance, it is very difficult, if at all possible, to furnish a common ground upon which the decisions of the court may be reconciled. A remedy for specific performance is one which is granted only in a court of equity. When and whether the remedy should be afforded or not is completely governed by equitable con-

Vt. 87; *Watkins v. Stockett*, 6 Har. & J. (Md.) 435; *Stover v. Poole*, 67 Me. 217; *Brocking v. Straat*, 17 Mo. App. 296; *Griswold v. Hazard*, 26 Fed. Rep. 135; *Brohammer v. Hoss*, 17 Mo. App. 1; *Vreeland v. Bramhall*, 28 N. J. Eq. 85; *Bruce v. Bonney*, 12 Gray, (Mass.) 111; s. c., 71 Am. Dec. 739; *Hileman v. Wright*, 9 Ind. 126; *O'Neil v. Teague*, 8 Ala. 345; *Shiveley v. Welch*, 2 Oreg. 288; *Wemple v. Stewart*, 22 Barb. (N. Y.) 154; *Beard v. Hubble*, 9 Gill, (Md.) 420; *Groff v. Rohrer*, 35 Md. 327; *Mendenhall v. Steckel*, 47 Md. 454; s. c., 28 Am. Rep. 481; *Sylvius v. Kosek*, 117 Pa. St. 67; *Murray v. N. Y., & C. R. Co.*, 103 Pa. St. 37; *First Presbyterian Church of Logan v. Logan*, 77 Iowa, 326; *Smith v. Jordan*, 13 Minn. 264; s. c., 97 Am. Dec. 232; *Remillard v. Prescott*, 8 Oreg. 37; *Miner v. Hess*, 47 Ill. 170; *McCoy v. Bailey*, 8 Oreg. 196; *Greer v. Cadwell*, 14 Ga. 207; s. c., 58 Am. Dec. 553; *Ruffner v. McConnell*, 17 Ill. 212; *Trapp v. Moore*, 21 Ala. 693; *Bailey v. Bailey*, 8 Humph. (Tenn.) 230; *McDonnell v. Milholland*, 48 Md. 540; *Cummins v. Bulgin*, 37 N. J. Eq. 476; *Yocum v. Foreman*, 14 Bush, (Ky.) 494; *Cox v. Woods*, 67 Cal. 317; *Smith v. Butler*, 11 Oreg. 46; *Ellinger v. Crowl*, 17 Md. 361; *McDonald v. Starkey*, 42 Ill. 442; *Cleary v. Babcock*, 41 Ill. 271; *Thompson v. Fullinwider*, 5 Ill. App. 551; *Chapman v. Hurd*, 67 Ill. 234; *Davenport v. Sovil*, 6 Ohio St. 459; *Crockett v. Crockett*, 73 Ga. 647; *Hileman v. Wright*, 9 Ind. 126; *Davidson v. Greer*, 3 Sneed, (Tenn.) 384; *Ruffner v. McConnell*, 17 Ill. 212, 217; s. c., 63 Am. Dec. 362; *Hall v. Claggett*, 2 Md. Ch. 148, 151; *Leas v. Eidson*, 9 Gratt. (Va.) 277; *National Ins. Co. v. Crane*, 16 Md. 260; s. c., 77 Am. Dec. 289; *Adams v. Robertson*, 27 Ill. 45; *Greer v. Badwell*, 14 Ga. 207; s. c., 58 Am. Dec. 553; *Jackson v. Magbee*, 21 Fla. 622; *Clopton v. Martin*, 11 Ala. 187; *Bond v. Dorsey*, 65 Md. 310; *Kinney v. Con. Virginia M. Co.*, 4 Sawyer, (U. S.) 2; *Giles v. Hunter*, 103 N. Car. 194; *Bushby v. Littlefield*, 31 N. H. 198; *Fritzler v. Robinson*, 70 Iowa, 500; *Jones v. Perkins*, 1 Jones (N. Car.) Eq. 337; *Wyche v. Greene*, 11 Ga. 159; *Weiderrbusch v. Hartenstein*, 12 W. Va. 760; *Bunser v. Agee*, 47 Mo. 270; *Jarrel v. Jarrel*, 27 W. Va. 743; *Ligon v. Rogers*, 12 Ga. 281; *Hervey v. Savery*, 48 Iowa, 313; *Strayer v. Stone*, 47 Iowa, 333; *Sable v. Maloney*, 48 Wis. 331; *Rowley v. Flannelly*, 30 N. J. Eq. 612; *Ivinson v. Hatton*, 98 U. S. 79; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85; *Monroe v. Skelton*, 36 Ind. 302; *Stockbridge Iron Co.*

v. Hudson Iron Co., 102 Mass. 45; *Linn v. Barkley*, 7 Ind. 69; *Hinton v. Citizens' Mut. Ins. Co.*, 63 Ala. 488; *Muller v. Rhuman*, 62 Ga. 332; *Goldensborough v. Ringgold*, 1 Md. Ch. 273; *Mosby v. Wall*, 23 Miss. 81; s. c., 55 Am. Dec. 71; *Andrews v. Andrews*, 81 Me. 337; *Fessenden v. Ockington*, 74 Ma. 123; *Goodwell v. Heaton*, 40 Kans. 56; *Syms v. Mayor of N. Y.*, 50 N. Y. Super. Ct. 289; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Albany City Savings Institution v. Burdick*, 87 N. Y. 40; *Cox v. Woods*, 67 Cal. 317; *Wittbicker v. Walters*, 69 Tex. 470; *Ruhling v. Hackett*, 1 Neb. 360; *Kennard v. George*, 44 N. H. 440; *Sapp v. Phelps*, 92 Ill. 588; *Hamlin v. Sullivant*, 11 Ill. App. 423; *Cummins v. Bulgin*, 37 N. J. Eq. 476; *Morris v. Penrose*, 38 N. J. Eq. 629; *Bent v. Coleman*, 89 Ill. 364; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *McDonald v. Starkey*, 42 Ill. 442; *Miner v. Hess*, 47 Ill. 170; *Goltra v. Sanasack*, 53 Ill. 456; *Sutherland v. Sutherland*, 69 Ill. 481; *Russell v. Ranson*, 76 Ill. 167; *Canedy v. Marcy*, 13 Gray, (Mass.) 373; *Sawyer v. Hovey*, 3 Allen, (Mass.) 331; s. c., 81 Am. Dec. 659; *Franklin v. Jones*, 22 Fla. 526; *Jackson v. Magbee*, 21 Fla. 622; *Minot v. Tilton*, 64 N. H. 371; *Adams v. Stevens*, 49 Me. 362; *Firmstone v. De Camp*, 17 N. J. Eq. 309; *Webster v. Harris*, 16 Ohio, 490; *Foster v. Schmeer*, 15 Oreg. 363; *Goodell v. Field*, 15 Vt. 448; *Harrison v. Howard*, 1 Fed. (N. Car.) Eq. 407; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Hunter v. Belyeu*, 30 Ill. 228; *Mills v. Lockwood*, 42 Ill. 111; *McCloskey v. McCormick*, 44 Ill. 336; *Palmer v. Converse*, 60 Ill. 313; *Shepard v. Shepard*, 36 Mich. 173; *Lucos v. Labertue*, 88 Ind. 277; *Reese v. Wyman*, 9 Ga. 430; *Trout v. Goodman*, 7 Ga. 383; *Farley v. Bryant*, 32 Me. 474; *Nevius v. Dunlap*, 33 N. Y. 676; *Beardsley v. Knight*, 10 Vt. 185; *Tripp v. Hascelg*, 20 Mich. 254; 4 Am. Rep. 388; *Case v. Peters*, 20 Mich. 298; *Ludington v. Ford*, 33 Mich. 123; *Vary v. Shea*, 36 Mich. 388; *Reese v. Wyman*, 9 Ga. 430; *Lockhart v. Cameron*, 29 Ala. 355; *Ligon v. Rogers*, 12 Ga. 281; *Linn v. Barkley*, 7 Ind. 69; *Hall v. Claggett*, 2 Md. Ch. 148; *Leitensdorfer v. Delphy*, 15 Mo. 160; s. c., 55 Am. Dec. 137; *New York Ice Co. v. Northwestern Ins. Co.*, 31 Barb. (N. Y.) 72; *Mansfield, & Co. City R. Co. v. Veeder*, 17 Ohio, 385; *Bailey v. Bailey*, 8 Humph. (Tenn.) 230; *Lake v. Meachan*, 13 Wis. 355; *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 432; *Watkins v. Storkett*, 6 Har. & J. (Md.) 435; *Nat. Fire Ins. Co. v. Crane*, 16 Md. 360; s. c., 77 Am. Dec. 289.

siderations; if the transaction is in any way inequitable, the court will refuse the decree for specific performance, although the contract may be enforceable in law. It is a well-settled rule, therefore, that in actions for specific performance of the contract, parol evidence is admissible to show that the contract which the plaintiff has attempted to enforce does not represent the real intentions of the parties, in consequence of some mistake.¹ And a court will refuse a decree for specific performance, where the mistake was induced or made possible by any act of the plaintiff; or where the mistake was not altogether that of the defendant, and for which the plaintiff could in nowise be made responsible. If the fact is established that the contract which the plaintiff seeks to enforce is not what the defendant intended to agree to, it is sufficient to induce the court of equity to withhold its power to enforce the contract.² On the same general principle, it has been held that where the terms of a contract or the description of its subject-matter are so ambiguous that a misunderstanding as to the obligation of the contract may be readily presumed from the reading of the contract, equity will refuse to enforce such an agreement, even where it is not absolutely proven, that there was a distinct or special mistake in the facts.³ Where the defendant in the action for the specific performance sets up a mistake as a defense, it will not merely serve as a ground for defense, resulting in the dismissal of the suit; but the court may provide in this decree for a specific performance of a contract as thus modified by the proof of the mistake; that is, it will give to the plaintiff the option of executing the decree for the enforcement of the contract as modified by the mistake or submit to the dismissal of the suit.⁴ Under the reformed procedure, the defendant could insist upon a specific performance of the contract in his own behalf as modified by the mistake. Where the mistake is set up in a suit for specific performance by the plaintiff, and he asks for a specific

¹ *Bradbury v. White*, 4 Greenl. 391; *Quinn v. Roath*, 37 Conn. 16; *Best v. Stow*, 2 Sandf. Ch. 388; *Coles v. Browne*, 10 Paige, 526; *Ely v. Perine*, 1 Green's Ch. 396; *Ryno v. Darby*, 20 N. J. Eq. (5 C. E. Green) 231; *Towner v. Lucas*, 13 Pratt. 705, 714; *Chambers v. Livermore*, 15 Mich. 381; *Cathcart v. Robinson*, 5 Pet. 263; *Jord Gordon v. Marq. of Hetford*, 2 Madd. 106; *Lampbell v. Durham*, 86 Ala. 299; *Mansfield v. Sherman*, 81 Me. 365; *Caldwell v. Depew*, 40 Finn. 523; *Fry v. Spec. Perf.*, § 733; *Bowen v. Vaters*, 2 Paine, (U. S.) 1; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Post v. Leet*, 8 Paige, 37; *Ring v. Ashworth*, 3 Iowa, 452; *Wodworth . Cook*, 2 Blatch. (U. S.) 151; *Gillespie v. Moon*, Johns. (N. Y.) Ch. 585; *s. c.*, 7 Am. Dec. 559; *Isborne v. Phelps*, 19 Conn. 63; 48 Am. Dec. 33; *Dennis v. Dennis*, 4 Rich. (S. Car.) Eq. 307; *Jerry v. Whitney*, 40 Mich. 65; *Chambers v. Livermore*, 15 Mich. 389.

² *Western R. R. v. Babcock*, 6 Mete. 346; *Park . Johnson*, 4 Allen, 259, *Post v. Leet*, 8 Paige,

337; see, however, *Mortimer v. Pritchard*, 1 Bailey Eq. 505; *Denny v. Hancock*, L. R. 6 Ch. 1; *Doggett v. Emerson*, 3 Story, 700; *Rider v. Powell*, 28 N. Y. 310; *Matthews v. Terwilliger*, 3 Barb. 50.

³ *Wycombe Ry. v. Donnington Hospital*, L. R. 1 Ch. 268; *Wood v. Scarth*, 2 K. & J. 33; *Manser v. Back*, 6 Hare, 443; *Clowes v. Higginson*, 1 V. & B. 524; *Harnett v. Yielding*, 2 Sch. & Lef. 549; *Watson v. Marston*, 4 De G. M. & G. 230; *Parker v. Taswell*, 2 De G. & J. 559.

⁴ *Bradford v. Union Bk.*, 13 How. (U. S.) 57; *Quinn v. Roath*, 37 Conn. 16; *Patterson v. Bloomer*, 35 Id. 57; *Wells v. Cruger*, 5 Paige, 164; *Best v. Stow*, 2 Sandf. Ch. 298; *Ferussac v. Thorn*, 1 Barb. 42; *Bradbury v. White*, 4 Green's Ch. 391; *Ryno v. Darby*, 20 N. J. Eq. (5 C. E. Green) 231; *McComas v. Easley*, 21 Gratt. 23; *Arnold v. Arnold*, 2 Dev. Eq. 467; *Huntington v. Rogers*, 9 Ohio St. 511, 516; *Chambers v. Livermore*, 15 Mich. 381; *Murphy v. Rooney*, 45 Cal. 78.

performance of the contract as modified by his proof of the mistake in the terms of the contract, the authorities are at variance. All the courts, both English and American, agree that where there has been a part performance by the plaintiff of the parol provision, which has been omitted by a mistake of the written contract, the decree for specific performance, as provided for by this parol provision, will be given by the court.¹ But where there has been no part performance of the parol portion of the contract, the authorities are not agreed whether parol evidence of this verbal modification of the contract will be admissible in a suit for specific performance of the contract as thus modified. The English cases hold that this cannot be done except where there has been a part performance of the parol portion.² The American courts, however, generally hold, that specific performance of a contract will be granted, after it has been modified by parol evidence of a mistake as to its terms and provisions.³ But in order that the plaintiff may obtain a decree for specific performance, he must produce the most convincing evidence of the mistake in the contract. The burden of proof is on him; and it will not be sufficient for him to establish a mistake by evidence which will be sufficient to furnish the ground for a rescission or cancellation; he must present the strict evidence required in all cases for reformation.⁴

¹ *Anon.*, 5 Vin. Abr. 522, pl. 38; *Legal v. Miller*, 2 Ves. Sen. 299; *Pitcairn v. Ogbourne*, 2 *Id.* 375; *Price v. Dyer*, 17 Ves. 356; *Gilroy v. Allis*, 22 Iowa, 174. This relief will be afforded whether the verbal modification is contemporaneous with the written agreement or consists of a subsequent alteration of the same. *Glass v. Hurlbert*, 102 Mass. 24, 28, *per* Wells, J.; *Allen's Estate*, 1 Watts & S. 383; *Broughton v. Coffey*, 18 Gratt. 184; *Devling v. Little*, 2 Casey, 502; *Moale v. Buchanan*, 11 Gill & J. 314; *Parkhurst v. Cortlandt*, 1 Johns. Ch. 273; 14 Johns. 15; and see *Tilton v. Tilton*, 9 N. H. 385; *Glass v. Hurlbert*, 102 Mass. 24, 43.

² *Martin v. Pycroft*, 2 De G. M. & G. 785; *Pemberton v. Mathers*, 1 Bro. Ch. 52; *Lord Eldon*, in *Marquis Townshend v. Stangroom*, 6 Ves. 328, 339; *Clark v. Grant*, 14 Ves. 519, 524, *per* Sir Wm. Grant; *Clifford v. Turrell*, 1 Y. & C. Ch. 138, *per* V. C. Knight-Bruce; *London, & C. Ry. v. Winter, Cr. & Ph.* 57, 61; *Emmet v. Dewhurst*, 3 Macn. & G. 587; *Atty.-Gen. v. Sitwell*, 1 Y. & C. Ex. 559; *Davies v. Fitton*, 2 Dr. & War. 225, 233.

³ *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 148; *Bellows v. Stone*, 14 N. H. 175; *Smith v. Greeley*, 14 *Id.* 378; *Tilton v. Tilton*, 9 *Id.* 385; *Craig v. Kittredge*, 23 N. H. 231; *Beardsley v. Knight*, 10 Vt. 185; *Grass v. Hurlbert*, 102 Mass. 24, 41; *Metcalf v. Putnam*, 9 Allen, 97; *Quinn v. Roath*, 37 Conn. 16; *Wooden v. Haviland*, 18 *Id.* 101; *Chamberlain v. Thompson*, 10 *Id.* 243; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Lyman v. Un. Ins. Co.*, 17 Johns. 373; *Rosevelt v. Fulton*, 2 Cow. 129; *Gouverneur v. Titus*, 1 Edw. Ch. 477; 6 Paige, 347; *Hyde v. Tanner*, 1 Barb. 75;

Gooding v. McAlister, 9 How. Pr. 123; *Smith v. Allen*, Saxt. (N. J.) 43; *Hendrickson v. Ivins*, Saxt. 562; *Christ v. Dittenbach*, 1 Serg. & R. 464; *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. 348; *Gower v. Sterner*, 2 Whart. 75; *Bowman v. Bittenbender*, 4 Watts, 290; *Clark v. Partridge*, 2 Barr. 13; 4 *Id.* 166; *Wesley v. Thomas*, 6 Har. & J. 24; *Moale v. Buchanan*, 11 Gill & J. 314, 325; *Coutt v. Craig*, 2 Hen. Mun. 618; *Newsom v. Bufferlow*, 1 Dev. Eq. 383; *Brady v. Parker*, 4 Ired. Eq. 430; *Clopton v. Martin*, 11 Ala. 187; *Harris v. Columbiana Ins. Co.*, 18 Ohio, 116; *Webster v. Harris*, 16 *Id.* 490; *Worley v. Tuggle*, 4 Bush, 168, 173; *Shelby v. Smith*, 2 A. K. Marsh. 504; *Bailey v. Bailey*, 8 Humph. 230; *Leitensdorfer v. Delphy*, 15 Mo. 160; *Murphy v. Rooney*, 45 Cal. 78; *Murray v. Dake*, 46 *Id.* 644; *Hall v. Claggett*, 2 Md. Ch. 148; *Ring v. Ashworth*, 3 Iowa, 452; *Mosby v. Wall*, 23 Miss. 81; s. c., 55 Am. Dec. 71; *Coale v. Barney*, 11 G. & J. (Md.) 325; *Depeyster v. Hasbrouck*, 11 N. Y. 582; *Rogers v. Atkinson*, 1 Ga. 12; *Coles v. Brown*, 10 Paige, (N. Y.) 525; *Hallam v. Corlett*, 71 Iowa, 446; *Brugger v. State Investment Ins. Co.*, 5 Sawy. (U. S.) 304; *Kelley v. McKinney*, 5 Lea. (Tenn.) 164; *Thompsonville, & C. Mfg. Co. v. Osgood*, 26 Conn. 16; *Hunter v. Bilyeu*, 30 Ill. 223; *Broadwell v. Broadwell*, 6 Ill. 599.

⁴ *Durant v. Bacot*, 2 McCarter, 411; *Beebe v. Young*, 14 Mich. 136; *Tesson v. Atlantic M. Ins. Co.*, 40 Mo. 33, 36; *Fowler v. Fowler*, 4 De G. & J. 250, 265; *Keisselbrack v. Livingston*, 4 *Id.* 144; *Rider v. Powell*, 28 N. Y. 310; *Matthews v. Terwillinger*, 3 Barb. 50; *Nevins v. Dunlap*, 33 N. Y. 676; *Lyman v. U. S. Ins. Co.*, 2 Johns. Ch. 630; *Lyman v. Union Ins. Co.*, 17 Johns. 373;

The important power of uniting two remedies in the same action—that is, a reformation and subsequently a decree for specific performance of the contract as reformed—is granted by the reformed procedure in respect to all actions, whether legal or equitable in origin. It is also possible, under the reformed procedure, for a plaintiff to have a reformation of a contract, and the judgment for damages or debt on the contract as thus reformed, or any other legal remedy suitable to the facts of the case, such as the recovery of specific property.¹

§ 199. **Effect of the Statute of Frauds upon the admissibility of parol evidence.**—The general question of admissibility of parol evidence to vary a written contract, as it has been explained in the preceding paragraph, does not depend upon any particular statute; but it is itself a rule of evidence resting upon judicial authority, which may be modified more or less by exceptions recognized by the court without any enforcement of statutory rules. That is certainly the case where the rule of evidence referred to, has not been embodied in a statute. But the Statute of Frauds requires, in many cases, that contracts shall be reduced to writing or shall be manifest or proved by some instrument in writing in order to be valid. And it becomes a question of considerable moment, how far parol evidence can be resorted to; not only for the purpose of proving that the contract as written does not represent the intention of the parties, but also where the plaintiff asks that the contract shall be reformed, and enforced as reformed. Where the court is only called upon to cancel a written contract on the ground of mistake or of fraud, it might be stated, in justification of the introduction of parol evidence for that purpose, that there is no violation of the Statute of Frauds, because the contract is not enforced but rescinded. But where a court of equity, upon a proof of the variation of the written contract from the intention of the parties, on account of fraud, accident, or mistake, decrees a reformation of that contract, and thus enables one of the parties to enforce a contract which is not manifest or proved by an instrument in writing, there is certainly an enforcement of a contract, in which it cannot be said that the parties have complied with the Statute of Frauds. The practical answer might be made that, if the Statute of Frauds were permitted to so operate as to exclude parol evidence of proof of accident, fraud,

Harris v. Reece, 5 Gilm. 212; *Beard v. Linthicum*, 1 Md. Ch. 345; *Brady v. Parker*, 4 Ired. Eq. 430; *Harrison v. Howard*, 1 *Id.* 407; *Hunter v. Bilyeu*, 30 Ill. 228, 246; *Selby v. Geines*, 12 *Id.* 69; *Bailey v. Bailey*, 8 Humph. 230.

¹ *Lattin v. McCarty*, 41 N. Y. 107; *Phillips v. Gorham*, 17 *Id.* 270; *Laub v. Buckmiller*, 17 *Id.* 620; *Henderson v. Dickey*, 50 Mo. 161, 165; *Gray v. Dougherty*, 25 Cal. 266; *Walker v. Sedgwick*, 8 *Id.* 398; *Guernsey v. Am. Ins. Co.*, 17 Minn. 104, 108; *Montgomery v. McEwen*, 7 *Id.* 351; *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263; *Cone v. Niagara Ins. Co.*, 60 *Id.* 619; 3 T. & C. 33; N. Y. Ice

Co. v. N. W. Ins. Co., 23 N. Y. 357, 359; *Welles v. Yates*, 44 *Id.* 525; *Caswell v. West*, 3 T. & C. 383. So, also, may the defendant obtain against the plaintiff such a joint relief in the same case. *Murphy v. Rooney*, 45 Cal. 78; *Guedici v. Boots*, 42 *Id.* 452, 456; *Talbert v. Singleton*, 42 *Id.* 390; *Hoppough v. Struble*, 60 N. Y. 430; *Haire v. Baker*, 5 *Id.* 357; *Crary v. Goodman*, 12 *Id.* 266, 268; *Bartlett v. Judd*, 21 *Id.* 200, 203; *Cavalli v. Allen*, 57 *Id.* 508; *Petty v. Maller*, 15 B. Mon. 591, 604; *Ingles v. Patterson*, 36 Wis. 373; *Onson v. Cown*, 22 *Id.* 329.

or mistake, in the making of the contract, instead of serving to prevent fraud, it would be a ready instrument of committing fraud; and in order to prevent that evil consequence of the enactment of the statute, equity is justified in departing from the plain letter of the statute, and permitting the variance of written contracts by the introduction of parol evidence. This particular answer undoubtedly constitutes a justification for the attitude of the courts in general on that subject; but there is nevertheless a violation of the letter of the statute, in securing what is undoubtedly a just end. But the courts in general maintain that parol evidence is admissible for the purpose of securing a reformation of the contract, and an enforcement of it as reformed, even where the Statute of Frauds expressly requires the contract to be written in order to be valid.¹ But in Massachusetts, and a few of the other states, it has been held that the statute will permit the introduction of parol evidence, where the mistake consists of an addition of a provision to the contract which the parties had not provided for, a court may reform the instrument by an excision of that provision; for in that case, the contract as reformed will still have been reduced to writing by the parties, in compliance with the Statute of Frauds. But where the mistake consists of an omission of some clause or provision from the contract as written, the court could not reform the contract by adding or inserting the omitted provision and then decree the performance of the contract as thus reformed; because the court would in so doing be enforcing a contract not reduced to writing, which the Statute of Frauds required to be in writing.²

¹ *Gower v. Sterner*, 2 Whart. 75; *Philpott v. Elliott*, 4 Md. Ch. 273; *Tilton v. Tilton*, 9 N. H. 385; *Murphy v. Rooney*, 45 Cal. 78; *Quinn v. Roath*, 37 Conn. 16; *Monro v. Taylor*, 3 Macn. & G. 713, 718; *Leuty v. Hillas*, 2 De G. & J. 110, 120; *Beardsley v. Duntley*, 69 N. Y. 577; *Keisselbraek v. Livingston*, 4 Johns. Ch. 144; *Gillespie v. Moon*, 2 *Id.* 585; *Phyfe v. Wardell*, 2 Edw. Ch. 47; *Coles v. Brown*, 10 Paige, 526, 535; *Hendrickson v. Ivins*, Saxton, (N. J.) 562; *Workman v. Guthrie*, 5 Casey, 495; *Raffensberger v. Callison*, 4 *Id.* 426; *Tyson v. Passmore*, 2 Barr. 122; *Craig v. Kittredge*, 3 Frost. 231; *Smith v. Greeley*, 14 N. H. 378; *Blodgett v. Hobart*, 18 Vt. 414; *Chamberlain v. Thompson*, 10 Conn. 243; *Gouverneur v. Titus*, 1 Edw. Ch. 477; 6 Paige, 347; *Wiswall v. Hall*, 3 Paige, 313; *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Flagler v. Pleiss*, 3 Rawle, 345; *Moale v. Buchanan*, 11 Gill & J. 314; *Worley v. Tuggle*, 4 Bush, 168, 182; *Provost v. Rebman*, 21 Iowa, 419; *Wright v. McCormick*, 22 *Id.* 545; *Hunter v. Bilyeu*, 30 Ill. 228; *Murray v. Dake*, 46 Cal. 644.

² "The principle on which courts of equity rectify an instrument so as to enlarge its operation, or to convey or to enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission by mutual mistake in the reduction of the agreement to

writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of its terms, the court compels the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement as actually intended to be made shall be truly expressed and executed. (*Hunt v. Rousmaniere*, 1 Pet. 1; *Oliver v. Mut. Ins. Co.*, 2 Curtis C. C. 277.) But when the omitted term or obligation is within the Statute of Frauds, there is no valid agreement which the court is authorized to enforce outside of the writing. In such a case, relief may be had against the enforcement of the contract as written contrary to the purport and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract or some of its terms set aside, annulled, or restricted, as to a defendant resisting its specific performance. (*Gillespie v. Moon*; *Keisselbraek v. Livingston*.) Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the Statute of Frauds. That statute forbids the enforcement of certain

Mr. Pomeroy has, in his work upon equity jurisprudence, undertaken a successful criticism of the opinion of the Massachusetts court, a part of which is given in a quotation in the note below.¹ It cannot be doubted that a recognition of the objections advanced by the Massachusetts courts, and by the English courts, in the case of affirmative relief in the suit for specific performance, would involve the application of the same objections to the admissibility of parol evidence to all cases where the contract is required by the Statute of Frauds to be in writing, and the parties have in reducing it to writing departed from the intention of the parties, either through some accident, mistake, or fraud. A simpler and more truthful attitude would be, to concede that the letter of the statute is violated by the introduction of the parol evidence in any case where the Statute of Frauds requires the contract to be in writing; but whether the relief be by way of defense or affirmative, or whether it be cancellation, reformation, or specific performance, this departure from the letter of the statute is justified by the inequitable consequences of following the statute.

kinds of agreements without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. (*Higginson v. Clowes*, 15 Ves. 516; 1 V. & B. 524; *Squire v. Campbell*, 1 My. & Cr. 459, 480.) But rectification by making the contract include obligations of a subject-matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there was no writing at all. Such rectification, where the enlarged operation includes that which is within the Statute of Frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud." Opinion of Justice Wells, in *Glass v. Hurlbert*, 102 Mass. 24. See, to same effect, *Elder v. Elder*, 10 Me. 80, *per* Weston, J.; *Osborne v. Phelps*, 19 Conn. 63; *Miller v. Chetwood*, 1 Green Ch. 99; *Dennis v. Dennis*, 4 Rich. Eq. 307; *Westbrook v. Harbeson*, 2 McCord Eq. 112; *Climmer v. Hovey*, 15 Mich. 18; *Whittaker v. Vanschoiack*, 5 Oreg. 113; *Best v. Stow*, 2 Sandf. Ch. 298.

¹ "A fatal objection to the whole theory is that it proves too much; if accepted as a true principle of equity, it necessarily destroys *uno flatu* several branches of the jurisdiction which are among its most familiar and salutary instance of relief. This theory is not in its essence directed against the remedy of specific performance, but against that of reformation; the act which these courts find to be so impossible in the construction of a contract by parol evidence is not the enforcement of a contract after it is constructed. The theory, therefore, militates against the

remedy of reformation as such in all its phases, and as distinct from the subsequent remedy of enforcement. It also seems, notwithstanding the ingenious and very refined distinctions drawn by the Massachusetts court, to militate no less against the remedy of rescission. In short, if this theory be accepted, it must nullify the well-settled doctrine which permits a plaintiff to reform a written contract which, through fraud or mistake, does not express the real intent of the parties as shown by their prior parol agreement; and which permits a defendant to vary an agreement and enforce it as varied. It is well settled that both of these proceedings may be had; and neither the English nor the American courts have suggested the limitation that they can be resorted to where the written instrument includes too much, and the relief consists in narrowing its operation. But each of these proceedings is in appearance a violation of the Statute of Frauds, and is certainly prohibited by the principles of the theory which I am examining. Each of them is, in fact, the establishing by parol a contract which the statute says can only be established by writing. Nor can I see any essential distinction between the remedy of reformation in these instances and that of rescission when the party, in order to lay the foundation for the rescission, is obliged to show by parol evidence a departure in the written instrument from the intent as verbally agreed. The party proves by parol evidence that there was a verbal contract broader than the written one, and because the written one thus varies from this agreement, it is set aside. The gist of the proceeding lies not in the nature of the remedy, whether it be rescission or reformation, but in the establishment by parol evidence of a contract which embraces more than the written instrument does, and in thus doing what it is said the statute forbids." 2 Pomeroy Eq. Jur. 338, note 3, § 867.

CHAPTER XII.

ACTUAL FRAUD.

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§ 202. **Definition and general statement.—Kinds of fraud.**—The term *fraud* is used by the authorities for the purpose of indicating the cases in which courts of law and equity afford relief against the enforcement of agreements of all sorts, on the ground that through some misstatement or act of commission or omission of one party, the other party has been misled, or induced to assume obligations to his disadvantage, which he would not otherwise have entered into. The courts especially refrain from any minute or exact definition of fraud in general; and have confined themselves to general explanations of the character of the acts which would constitute fraud, in order, possibly, to prevent any escape from liability for fraud by a reliance upon the letter of some more or less defective definition. Fraud is multiform, but it may be generally described by a reference to general characteristics. Fraud is defined by Mr. Pomeroy to include “all willful or intentional acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.”¹ A fraud is to be distinguished from cases of mistake, which have been explained in the preceding chapter, in that while both proceed from a mental condition, in the case of mistake this mental condition is the result of ignorance or misapprehension of the party who asks for relief from the mistake. This mental condition may or may not be participated in by both parties to the transaction. But in the case of fraud, the mental condition of both

¹ 2 Pomeroy Eq. Jur., § 873.

parties is necessarily concerned; in the case of one of the parties that mental condition being an intention to do something, the consequence of which is pronounced by a court to be inequitable on account of the wrongful influence thus exercised over the mind and conduct of the other party. Fraud is also willful or intentional; mistakes are necessarily unintentional.

Fraud is defined, in the first instance, as either actual or constructive. Actual fraud, as its name implies, would include all sorts of acts intentionally done for the purpose of influencing the actions of another, and producing an impression upon the minds of the other parties, concerning their interests in the transactions, which is false and to their own detriment. The untruth of the impression produced upon the mind of the party intended to be influenced is a necessary element in the case of actual fraud.¹ On the other hand, constructive fraud is a term which is employed by courts of equity for the purpose of including all those transactions of multiform character, which equity pronounces to be inequitable, and to which it ascribes consequences upon the rights and interests of the parties to the transactions, similar to those which follow the commission of the actual fraud. The moral element may or may not be present in the case of constructive fraud, and the proportion of wrongfulness will vary with each case.² The subject of constructive fraud will be discussed in the next succeeding chapter.

Actual fraud can be subdivided into two kinds, according to the character of the acts which produce the wrongful impression upon the mind of the other party, viz.: It may be an affirmative act, or act of omission, as where it is a false representation or *suggestio falsi*; or an act of omission, such as a fraudulent concealment, a *suppressio veri*. These two classes of actual fraud, and their essential elements, will now be explained in detail.

§ 203. **Material misrepresentation of facts.**—In determining the requisites of actual fraud, it must first be observed that there must be a misrepresentation of fact.³ Legal fraud cannot be predicated, as a general rule, of a misrepresentation of the law. Ignorance of the law excuses no one; and since everyone is presumed to know the law, it

¹ 2 Pomeroy Eq. Jur., § 873, 875.

² See 2 Pomeroy, § 922.

³ Suessenguth v. Bingenheimer, 40 Wis. 370; Gifford v. Carvill, 29 Cal. 589; Pike v. Fay, 101 Mass. 134, 137; Cooper v. Lovering, 106 Id. 77, 79; Taylor v. Fleet, 1 Barb. 471; Oberlander v. Spiess, 45 N. Y. 175; New Brunswick, &c. Ry. v. Conybeare, 9 H. L. Cas. 711; 1 De G. F. & J. 578; Doggett v. Emerson, 3 Story, 700; Hough v. Richardson, 3 Id. 659; Daniel v. Mitchell, 1 Id. 173; Hammatt v. Emerson, 27 Me. 308; Stone v. Denny, 4 Met. 151; Hazard v. Irwin, 18 Pick. 95; Bowman v. Caruthers, 40 Ind. 90; Babcock v. Case, 61 Pa. St. 427; Thorn v. Helmer, 4 Abb.

App. Dec. 408; Morris Canal Co. v. Emmett, 9 Paige, 168; Stebbins v. Eddy, 4 Mason, 414; Winston v. Gwathmey, 8 B. Mon. 19; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; Verplanck v. Van Buren, 76 Id. 247; Dambmann v. Schulting, 75 Id. 55, 61; Beardsley v. Duntley, 69 Id. 577; Perkins v. Partridge, 30 N. J. Eq. 82; Leutz v. Earnhart, 12 Heisk. 711; Derrick v. Lamar Ins. Co., 74 Ill. 404; McShane v. Hazelhurst, 50 Md. 107; Cowles v. Watson, 14 Hun, 41; Slaughter's Adm'r. v. Gerson, 13 Wall. 379; McAleer v. Horsey, 35 Md. 439; Printup v. Fort, 40 Ga. 276.

would be a contradiction to hold that the party, to whom the misrepresentation was made, was misled thereby.¹

In the great majority of cases of misrepresentation, it consists of language written or spoken; but that is not necessary. For a misrepresentation may be produced by conduct alone, or by acts entered into or done for the purpose of producing wrong impressions and influencing another's conduct to his own detriment.² In the next place, the misrepresentation must be of a material fact, *i. e.*, it must have a material bearing upon the transaction in hand. If the representations do not concern the parties to the transaction as such, or only in an immaterial degree, they will not taint the transaction with fraud.³ But a distinction is made by the authorities between mere expressions of opinion of the parties, concerning the value or qualifications of the subject of the sale, and positive representations concerning them, holding that the former are common and well understood attempts by appreciation and depreciation of the goods to make a good bargain, and which do not mislead the more or less experienced tradesmen, and hence do not constitute a legal fraud, although the other party should happen to be misled.⁴ There is, however, no logical distinction between the two, where the intention is to deceive;

¹ *Fish v. Cleland*, 33 Ill. 238; *Dailey v. Jassup*, 72 Mo. 144; *Clem v. New Castle, &c.*, 9 Ind. 488; *Rose v. Hurley*, 39 Ind. 77, 83; *Clodfelter v. Hulett*, 72 Ind. 137, 143; *Upton v. Trelbilcock*, 91 U. S. 45, 50; *Rawson v. Harger*, 48 Iowa, 269; *Dillman v. Nadlehofer*, 119 Ill. 567; *Insurance Co. v. Reed*, 33 Ohio St. 283; see *Tabor v. Mich. Mut. Ins. Co.*, 40 Mich. 331. But inasmuch as one is not expected to know foreign laws and private acts, any misrepresentation as to them would be fraudulent. *King v. Doolittle*, 1 Head, (Tenn.), 17.

² *Lovell v. Hicks*, 2 Y. & C. Exch. 46; *McCall v. Davis*, 56 Pa. St. (6 P. F. Sm.) 431; *Kilmer v. Smith*, 77 N. Y. 236; *Hay v. Star Ins. Co.*, 77 Id. 235; *Rider v. Powell*, 28 Id. 310.

³ *Nolan v. Cain*, 3 Allen, 263; *Brown v. Tuttle*, 66 Barb. 169; *Mason v. Raplee*, 66 Barb. 180; *Swikehard v. Russell*, 66 Barb. 560; *Bower v. Fern*, 90 Pa. St. 359; *Hall v. Johnson*, 41 Mich. 286; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Noel v. Horton*, 50 Iowa, 687; *Frenzel v. Miller*, 37 Ind. 1, 17; *Miller v. Young*, 33 Ill. 355; *Hanna v. Sayburn*, 84 Ill. 533; *Higgins v. Bicknell*, 82 Ill. 502; *Race v. Weston*, 86 Ill. 91; *Melindy v. Keen*, 89 Ill. 395; *Smith v. Brittenham*, 98 Ill. 188; *Bradley v. Luce*, 99 Ill. 234; *Schwa'acker v. Riddle*, 99 Ill. 343; *Mather v. Robinson*, 47 Iowa, 403; *Dawson v. Graham*, 48 Iowa, 378; *Meyers v. Funk*, 56 Iowa, 52; *Winter v. Baudel*, 30 Ark. 362; *Cooper v. Merritt*, 30 Ark. 586; *Lapp v. Firstbrook*, 24 Up. Can. C. P. 239; *Sanders v. Lyon*, 2 McArthur, 452; *Smith v. Richards*, 13 Pet. 26; *Gordon v. Butler*, 106 U. S. 553; *Teague v. Irwin*, 127 Mass. 217; *Blair v. Laffin*, 127 Mass. 518; *Com. v. Jackson*, 132 Mass. 16; *Smith v. Countryman*,

30 N. Y. 655; *Rice v. Manley* 66 N. Y. 82; *Dufany v. Ferguson*, 66 N. Y. 482; *Miller v. Barber*, 66 N. Y. 558; *Wilcox v. Henderson*, 64 Ala. 535; *Welshbillig v. Dienhart*, 65 Ind. 94; *Jones v. Hathaway*, 77 Ind. 14; *Elsass v. Moore's Hill Inst.*, 77 Ind. 72; *Stevens v. Rainwater*, 4 Mo. App. 292.

⁴ *Homer v. Perkins*, 124 Mass. 431; *Somers v. Richards*, 46 Vt. 170; *Van Epps v. Harrison*, 5 Hill, 63; *Buschman v. Cold*, 52 Md. 202, 207; *Sledge v. Scott*, 56 Ala. 202; *Merwin v. Arbuckle*, 81 Ill. 501; *Schramm v. O'Conner*, 98 Ill. 539; *Dawson v. Graham*, 48 Iowa, 378; *Stevens v. Rainwater*, 4 Mo. App. 292; *Samson v. Lord*, 13 How. 198; *Gordon v. Butler*, 105 U. S. 553; *First Nat. Bank v. Yocum*, 11 Neb. 328; *People v. Jacobs*, 35 Mich. 36; *Kennedy v. Richardson*, 70 Ind. 534; *Cagney v. Cuson*, 77 Ind. 497; *Wilcox v. Henderson*, 64 Ala. 535, 541; *Sledge v. Scott*, 56 Ala. 202; *State v. Phifer*, 65 N. C. 321, 326; *Uhlér v. Semple*, 20 N. J. Eq. 288; *Long v. Woodman*, 58 Me. 49; *Holbrook v. Conner* 60 Me. 578; *Medbury v. Watson*, 6 Met. 246, 259; *Vessey v. Dalton*, 3 Allen, 380; *Mooney v. Miller*, 102 Mass. 220; *Cooper v. Lovering*, 106 Mass. 79; *Yeagin v. Irwin*, 127 Mass. 217; *Poland v. Brownell*, 131 Mass. 138. In *Graffenstein v. Epstein*, 23 Kans. 443, the court says: "A misrepresentation as to the market value of an article of general commerce, made falsely and fraudulently by one party to induce a sale, and relied upon by the other, will not avoid a contract, therefore, when there are no circumstances making it the special duty of the one party to communicate the knowledge he possesses, and none giving him the peculiar means of ascertaining such market price.

and, if a distinction is at all possible, it must rest upon the variance in the habits of society, the one species of deception being common and more or less condoned by commercial custom, while the other is less common and is stoutly condemned by public opinion.¹ It has also been held that a mere statement of one's intention cannot be a misrepresentation sufficient to amount to a fraud, for the reason that such a statement would be merely an expression of an opinion, instead of a statement of fact.² But it must not be understood, from this statement, that a representation of a future intention will never constitute fraud; for the authorities are clear and explicit in their opinion that a statement of an intention may be a fraud, and must be treated as a fraud, whenever it is absolute in form, and expressly made for the purpose of influencing the conduct of another, and also so made that it creates an affirmative obligation on the part of the one who gives expression to the intention. It must also be remembered, that the mere reference to a future event may be just as good and as explicit a statement of fact as such a statement would be where the reference is to a fact existing at the present time. These cases must not be confounded with the statement of what the party intends to do in the future.⁴ In a subsequent paragraph, striking examples are given of cases of intention which are held to be fraudulent.

§ 204. **Material misrepresentation by the seller.**—Fraud is multifarious, and it would be both tedious and impossible to give exhaustive illustrations of it. It must suffice to present characteristic examples, from which the reader may determine the practical application of the general principles already set forth in the preceding paragraphs. It has thus been held to be material misrepresentations, establishing the charge of fraud in the sale of goods, where the vendor sells a note, which he knows to have been paid;⁵ where he misrepresents the amount of the previous sales of a patented article, which he is offering to sell;⁷ where he misrepresents the profits of his business;⁸ where he states falsely that the property he was selling was free from

¹ See Tiedeman's "Unwritten Constitution of the United States," p. 10.

² *Citizens' Bk. v. First Nat. Bk. of N. O.*, L. R. 6 H. L. 352; *Jordan v. Money*, 5 H. L. Cas. 185; *Long v. Woodman*, 58 Me. 49, 52; *Grove v. Hodges*, 55 Pa. St. (5 P. F. Sm.) 504, 519; *Gordon v. Parnlee*, 2 Allen, 212; *Peduck v. Porter*, 5 Allen, 324; *Mooney v. Miller*, 102 Mass. 217.

³ *Payne v. Mortimer*, 1 Giff. 118; 4 De G. & J. 447; *Skidmore v. Bradford*, L. R. 8 Eq. 134; *Caton v. Caton*, L. R. 2 H. L. 127, 142; *Ainslie v. Medlycott*, 9 Ves. 13, 21, *per* Sir Wm. Grant; *Gale v. Lindo*, 1 Vern. 475; *Maunsell v. White*, 4 H. L. Cas. 1039, 1056, *per* Lord Cranworth; 1 Jo. & Lat. 539, 557; *Bold v. Hutchinson*, 20 Beav. 250; 5 De G. M. & G. 558; *Loxley v. Heath*, 27 Beav. 523; 1 De G. F. & J. 489; *Saunders v. Cramer*, 3 Dr. & War. 87.

⁴ *Piggott v. Stratton*, 1 De G. F. & J. 33, 49, *per* Lord Ch. Campbell; *Plumer v. Lord*, 9 Allen,

455; *Kimball v. Aetna Ins. Co.* 9 *Id.* 540; *Langdon v. Doud*, 10 *Id.* 433, 437; *Andrews v. Lyons*, 11 *Id.* 349; *Turner v. Coffin*, 12 *Id.* 401; *Fall Riv. Nat. Bk. v. Buffington*, 97 Mass. 498; *Hawes v. Marchant*, 1 Curtis, 136; *Lobdell v. Baker*, 3 Met. 469; *Osgood v. Nichols*, 5 Gray, 420; *Audenried v. Betteley*, 5 Allen, 384; *Vilbard v. Roderick*, 51 Barb. 616; *Brookman v. Metcalf*, 4 Rob. (N. Y.) 568; *Vanderpool v. Brake*, 28 Ind. 130; *Ridgway v. Morrison*, *Id.* 201; *Davidson v. Young*, 38 Ill. 145; *Chouteau v. Goddin*, 39 Mo. 229, and cases in last note.

⁵ *See post*, § 208.

⁶ *Neff v. Clute*, 12 Barb. 466; *Sibley v. Hulbert*, 15 Gray, 509.

⁷ *Crossland v. Hail*, 33 N. J. Eq. 111; *Miller v. Barber*, 66 N. Y. 558; *Somers v. Richards*, 46 Vt. 170.

⁸ *Taylor v. Saurman*, 110 Pa. St. 3.

incumbrances;¹ where the vendor of a note states that the makers were "wealthy and responsible men,"² where the seller states that a farm yielded a certain quantity of hay;³ where he sells property when it does not really exist;⁴ where he states that railroad bonds are secured by first mortgage.⁵

§ 205. **Special frauds in auction sales.**—The owner of goods, on putting them up for sale at auction, may reserve the right to establish in advance the minimum price at which the goods may be sold;⁶ or he may announce to the by-standers or otherwise make public the fact that he will employ an agent to bid on the property for him, in order to prevent a sacrifice.⁷ And some of the cases go the length of holding that the employment of one bidder in good faith for the purpose of preventing a sacrifice, would not be a fraud on the other bidders, although, seemingly, it is not announced or made public.⁸ The old English chancery rule permitted the employment of one bidder;⁹ but the matter is now regulated by statute in England, and the employment of even one bidder clandestinely is considered to be a fraud on the buyer.¹⁰ And this seems now to be the generally accepted rule, whether there is a statutory modification or not.¹¹ But it has always been held to be a fraud, where two or more bidders are employed by the vendor, for the purpose of creating an appearance of competition;¹² or in any case where the employment of a bidder is done for the fraudulent purpose of giving to the property a fictitious value, and this is especially the rule where the sale was advertised to be made "without reserve," etc.³ The distinction between the employment of one bidder

¹ *Ward v. Weman*, 17 Wend. 193; *Haight v. Hoyt*, 19 N. Y. 464; *Masson v. Dovet*, 1 Denio, 69.

² *Alexander v. Dennis*, 9 Port. 174

³ *Coon v. Atwell*, 46 N. H. 510; *Martin v. Jordan*, 60 Me. 531.

⁴ *Wordell v. Fosdick*, 13 Johns. 325.

⁵ *Clark v. Edgar*, 84 Mo. 106.

⁶ *Steele v. Ellmaker*, 11 S. & R. 86; *Bush v. Cole*, 28 N. Y. 261; *Warlow v. Harrison*, 29 L. J. Q. B. 14; *Wolfe v. Luyster*, 1 Hall, 146.

⁷ *Dimmock v. Hallett*, L. R. Ch. 21; *Staines v. Shore*, 16 Pa. St. 200; *Mainprice v. Westley*, 6 Best. & S. 420.

⁸ *Phippen v. Strickney*, 3 Met. 387; *Steele v. Ellmaker*, 11 S. & R. 86; *Moncrieff v. Goldsborough*, 4 Har. & McH. 282; *Woods v. Hall*, 1 Dev. Eq. 411; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Latham v. Morrow*, 6 B. Mon. 630; *Lee v. Lee*, 19 Mo. 420; *Veazie v. Williams*, 3 Story, 622; s. c., 8 How. 134; *Walsh v. Barton*, 24 Ohio St. 28; *Reynolds v. Dechaumls*, 24 Tex. 174; *Pennock's Appeal*, 14 Pa. St. 446; *Wolfe v. Luyster*, 1 Hall, 146.

⁹ *Green v. Banerstock*, 14 C. B. 304; *Flint v. Woodin*, 9 Harc. 618.

¹⁰ *Mortimer v. Bell*, L. R. 1 Ch. 10; *Heatley v. Newton*, L. R. 19 Ch. D. 326.

¹¹ *Smith v. Clarke*, 12 Ves. 477; *Woodward v. Miller*, 2 Coll. 279; *Woods v. Hall*, 1 Dev. Eq. 415; *Towle v. Leavitt*, 23 N. H. 350; *Trusts v.*

Delaplaine, 3 E. D. Smith, 219; *Staines v. Shore*, 16 Pa. St. 200; *Faucett v. Currier*, 115 Mass. 20; *Williams v. Bradley*, 7 Heisk. 54. This rule is approved by *Chan. Kent*, in 2 Com. 538, 539 (5th ed.); *Thornett v. Haines*, 15 M. & W. 367, 372, *per Parke*, B.

¹² *Baham v. Bach*, 13 La. 287; *Jenkins v. Hogg*, 2 Const. (S. C.) 821; *Tomlinson v. Savage*, 6 Ired. Eq. 430; *Troughton v. Johnson*, 2 Hayw. 28; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Nat. Bk. of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Davis v. Petway*, 3 Head, 667; *Williams v. Bradley*, 7 Heisk. 54; *Wicker v. Hoppock*, 6 Wall. 94; *Veazie v. Williams*, 8 How. (U. S.) 134; 3 Story, 611, 622; *Robinson v. Wall*, 10 Beav. 61; 2 Phil. 372; *Mortimer v. Bell*, L. R. 1 Ch. 10; *Dimmock v. Hallett*, L. R. 2 Ch. 21; *Wood v. Hall*, 1 Dev. Eq. 415; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Thornett v. Haines*, 15 M. & W. 367, 372, *per Parke*, B.

¹³ *Curtis v. Aspinwall*, 114 Mass. 187; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Woods v. Hall*, 1 Dev. Eq. 411; *Baham v. Bach*, 13 La. 287; *Fisher v. Hersey*, 17 Hun, 370; *Tomlinson v. Savage*, 6 Ired. Eq. 430; *Donaldson v. McRoy*, 1 Browne, 346; *Peck v. List*, 23 W. Va. 338; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Fowle v. Leavitt*, 23 N. H. 360; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Wolfe v. Luyster*, 1 Hall, 146;

for the purpose of preventing a sacrifice of the property, and the employment of one for the purpose of giving the property a fictitious and unreal value, is very fine, and must be ascertained, as it seems to me, solely by the degree to which the fictitious bidder is employed, it being fraudulent if the price of the goods is thereby pushed up above their true market value. The same rule as to puffing applies to all other kinds of sales, including sheriff's sales.¹

But in order that the sale may be rescinded by the buyer, on account of puffing or by-bidding, it is held that the buyer must have been influenced by it to bid more than he had previously determined to do,² and the preceding bid must not have been genuine.³

The auctioneer may also commit a fraud by having a private signal with any bidder for communicating bids;⁴ or by giving any other advantage to one bidder over the others;⁵ or by advertising the goods to belong to one party; when they were the property of someone else.⁶

But the auctioneer will be justified in refusing to accept bids from a minor;⁷ from irresponsible persons in general;⁸ or from anyone else, if done in good faith or on justifiable grounds.⁹

§ 206. **Fraudulent devices of buyers.**—The fraudulent devices of buyers may assume a variety of forms; but the more common consist of misrepresentations of the credit and financial standing of the buyer¹⁰ and of his identity or business connections with other men;¹¹ of forged recommendations of others;¹² and the transfer, in the payment of the price, of worthless securities,¹³ counterfeit money,¹⁴ stolen goods,¹⁵ or of checks, which will not be honored on account of the want of funds.¹⁶

Pennock's Appeal, 14 Pa. St. 446; *Staines v. Shore*, 16 Pa. St. 200; *Yerkes v. Wilson*, 81 Pa. St. 9; *Moncrieff v. Goldsborough*, 4 Har. & McH. 282; *McDowell v. Sims*, 6 Ired. Eq. 278; *Latham v. Morrow*, 6 B. Mon. 630; *Darst v. Thomas*, 87 Ill. 222; *Miller v. Baynard*, 2 Houst. 559; *Veazie v. Williams*, 8 How. (U. S.) 134; 3 Story, 611, 622; *Thornett v. Haines*, 15 M. & W. 367 and cases cited; *Robinson v. Wall*, 2 Phil. 372, 375; *per* Lord Cottenham.

¹ *Donaldson v. McRoy*, 1 Browne, 346; *Lee v. Lee*, 19 Mo. 420; *Dimmock v. Hallett*, L. R. 2 Ch. 21, 29.

² *Jennings v. Hart*, 1 Russ. & Ches. 15; *Veazie v. Williams*, 3 Story, 611; *Tomlinson v. Savage*, 6 Ired. Eq. 530.

³ *National Bank v. Sprague*, 20 N. J. Eq. 159, 165; *Veazie v. Williams*, 3 Story, 611; but see *Curtis v. Aspinwall*, 114 Mass. 187, 199.

⁴ *Conover v. Walling*, 15 N. J. Eq. 173

⁵ *Thomas v. Kerr*, 3 Bush, 619; *Pattison v. Josselyn*, 43 Miss. 373; *Conover v. Walling*, 15 N. J. Eq. 173.

⁶ *Thomas v. Kerr*, 3 Bush, 619.

⁷ *Kinney v. Showdy*, 1 Hill, 544.

⁸ *Hobbs v. Beaver*, 2 Ind. 142; *Den v. Zellers*, 2 Halst. 153.

⁹ *Holder v. Jackson*, 11 Up. Can. C. P. 543.

¹⁰ *Luckey v. Roberts*, 25 Conn. 486; *Cary v. Hotailing*, 1 Hill, 311; *Olmstead v. Hotailing*, 1

Hill, 317; *Van Neste v. Conover*, 20 Barb. 547; *Hunter v. Hudson River Iron Co.*, 20 Barb. 494; *Eaton v. Avery*, 83 N. Y. 31; *Naugatuck Cutlery Co. v. Babcock*, 23 Hun, 481; *Devoe v. Brandt*, 53 N. Y. 462; *Gregory v. Schoenell*, 55 Ind. 101; *Lyon v. Briggs*, 14 R. I. 222; *Cain v. Dickinson*, 60 N. H. 371; *Genesee Co. Sav. Bank v. Mich. Barge Co.*, 52 Mich. 164; *Cochran v. Stewart*, 21 Minn. 435; *Williams v. Given*, 6 Gratt. 268.

¹¹ *Barker v. Dinsmore*, 72 Pa. St. 427; *Kingsford v. Merry*, 1 H. & N. 503; *McCrillis v. Allen*, 57 Vt. 505; *Aborn v. Merchants' Dispatch Co.*, 135 Mass. 283; *Radliffe v. Dallinger*, 141 Mass. 1; *Alexander v. Swackhamer*, 105 Ind. 81; *Hardman v. Booth*, 2 L. J. (N. S.) Ex. 105.

¹² *Mowrey v. Walsh*, 8 Cow. 238.

¹³ *Mansing v. Albee*, 11 Allen, 520.

¹⁴ *Arnott v. Cloudas*, 4 Dana, 300; *Green v. Humphrey*, 50 Pa. St. 212; *Cochran v. Stewart*, 21 Minn. 435; *White v. Garden*, 10 C. B. 919; *Harner v. Fisher*, 58 Pa. St. 453; *Williams v. Given*, 6 Gratt. 268.

¹⁵ *Titcomb v. Wood*, 38 Me. 563; *Arendale v. Morgan*, 5 Neced, 703; *Lee v. Portwood*, 41 Miss. 109.

¹⁶ *Hawse v. Crowe, Ryan & M.* 414; *Hodgson v. Barrett*, 33 Ohio St. 63, *Bristol v. Wilsmore*, 1 B. & C. 514.

The fraud may also consist of a misrepresentation as to the age of the buyer, and a subsequent repudiation of the sale on the ground of the buyer's infancy.¹ It would be a fraud to allow the seller to rely upon the recommendations of third persons, which contain some false representation concerning the buyer;² and so, also, to secure goods through an insolvent buyer from the vendor of the goods by making false representations of his credit and financial standing.³

The fraudulent misrepresentations of the buyer may be made by himself directly to the seller, or indirectly to him through communications to the third persons in general, as well as through the mercantile agencies, whose business it is to furnish to their regular subscribers information concerning the financial standing of merchants. In every such case, the fraud of the buyer is sufficient to avoid the sale. But it is held that the misrepresentations must be shown to have been made with the intention to commit a fraud upon the seller or some other person.⁴ But whether the misrepresentation is made directly or indirectly to the seller, in order that it may constitute a fraud on him, it must be made by the buyer with the intention of influencing the seller's conduct, either in particular, or in general, in common with all other potential sellers.⁵

Fraud may, likewise, be committed on the seller by dissuading others from bidding at an auction by false representations concerning the conduct of the seller of the goods, or the condition of the goods. This is as much a fraud on the seller, as if he had been influenced by false representations to sell, when he would not otherwise have parted with his goods. For example, it is a fraud where the buyer dissuades others from bidding on the property by misstating the amount of the incumbrance;⁶ by paying them for withholding their bids;⁷ by requesting such non-participation as a personal favor to the buyer,⁸ or because the seller had wronged the buyer in withholding the property from him.⁹ Although the sale will not be avoided, because the buyer dissuaded others from bidding at an execution sale; by truthfully telling them that he was bidding in the interest of the debtor;¹⁰ yet it

¹ *Badger v. Phinney*, 15 Mass. 359; *Huge v. Gallans*, 10 Phila. 618; *Wallace v. Morse*, 5 Hill, 391; *Fitts v. Hall*, 9 N. H. 441; but see *contra*, *Johnson v. Pie*, 1 Keb. 913; 1 Lev. 189; *Price v. Hewitt*, 8 Exch. 148; *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422. And see *Studwell v. Sharpster*, 64 N. Y. 449; *Burley v. Russell*, 10 N. H. 184; *Conrad v. Lane*, 26 Minn. 289; *Merriam v. Cunningham*, 11 Cush. 40, where it is held that if an infant is sued at common law on his contract, it is not a good replication to the defense of infancy to allege that the plaintiff was induced to make the contract by the infant's fraudulent misrepresentation of his age.

² *Fitzsimmons v. Joslin*, 21 Vt. 129; *Ladd v. Lord*, 36 Vt. 194.

³ *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*,

3 Taunt. 274; *Thomas v. Davenport*, 2 Smith's Lead. Cas. 347; *Meyer v. Amidon*, 23 Hun, 553; see *State v. Schulein*, 45 Mo. 521; *Phelan v. Crosby*, 2 Gill, 462.

⁴ *Deickerhoff v. Brown*, 21 Md. Rep. 583; *Lindauer v. Hay*, 61 Iowa, 636; *Victor v. Henlein*, 33 Hun, 549.

⁵ *Hill v. Curley*, 8 Hun, 636; *Van Kleeck v. Leroy*, 37 Barb. 544.

⁶ *Jackson v. Morter*, 82 Pa. St. 291.

⁷ *Morris v. Woodward*, 25 N. J. Eq. 32; *Slingluff v. Eckel*, 24 Pa. St. 472; *Gardiner v. Morse*, 25 Me. 140.

⁸ *Gardiner v. Tucker*, 6 R. I. 551.

⁹ *Fuller v. Abrahams*, 3 B. & B. 116; *People v. Lord*, 6 Hun, 390; *Jackson v. Morter*, 82 Pa. St. 291; *Raynes v. Crowder*, 14 Up. Can. C. P. 111.

¹⁰ *Dick v. Cooper*, 24 Pa. St. 217.

would, of course, be a fraud if the representation of the interest in the debtor was false.¹ And this leads us to the consideration of the general subject of—

§ 207. **Combinations of bidders.**—The general proposition is that, whatever may be the mode of chilling or stifling competition among bidders at a sale, any combination of bidders for that purpose would be a fraud upon the seller, sufficient to avoid the sale at the latter's instance.² On the other hand, it is held to be permissible for bidders to combine for the purchase of the entire lot of goods offered for sale, and a subsequent division among them of the goods so purchased by their agent, where no one of them would want to purchase the whole lot. The combination, in such a case, is not for the purpose of depressing the price, but to enable a purchase to be made, which is impossible except in combination.³ And, in the case of sales on execution, particularly, the presumption of law is that a combination of bidders is not for any fraudulent purpose of depressing the price, but rather for the lawful purpose of securing a purchase that is otherwise beyond their reach.⁴ But if the bidders who enter into the combination do not share in the division of the goods which are purchased, then the combination is presumed to have been made for the fraudulent purpose of depressing the price to the injury of the seller, and the sale may be avoided.⁵

§ 208. **Fraudulent intent not to pay.**—When one proposes to buy goods, he makes an express or, at any rate, an implied promise to pay the price. If, therefore, he has no intention whatever of paying for

¹ *Salter v. Maxwell*, 6 Wall. 268; *Cocks v. Izard*, 7 Wall. 559.

² *Jones v. Portsmouth, & C. R. R. Co.*, 32 N. H. 544; *Edsall v. Hamburg M. Co.*, 1 Halst. Ch. 658; *Hamburg M. Co. v. Edsall*, 1 Halst. Ch. 249; *Pattison v. Joselyn*, 43 Miss. 373; *Stockton v. Owings*, Litt. Sel. Cas. 256; *Seymour v. M. & C. T. Co.*, 10 Ohio, 476; *Stewart v. Nelson*, 25 Mo. 309; *Stewart v. Severance*, 43 Mo. 322; *White Crow v. White King*, 3 Kans. 276; *Forelander v. Hinks*, 6 Ind. 448; *Fleming v. Hutchinson*, 36 Iowa, 519; *Arnold v. Cord*, 16 Ind. 177; *Vantrees v. Hyatt*, 5 Ind. 487; *Griffith v. Judge*, 49 Mo. 536; *Miltenerberger v. Morrison*, 39 Mo. 71; *Wooton v. Hinkle*, 20 Mo. 290; *Martin v. Blight*, 4 J. J. Marsh. 491; *Mills v. Rogers*, 2 Litt. 217; *Carson v. Law*, 2 Rich. Eq. 296; *Hamilton v. Hamilton*, 2 Rich. Eq. 355.

³ *Smith v. Greenlee*, 2 Dev. 126; *Phippen v. Strickney*, 3 Met. 387; *Dexter v. Shepherd*, 117 Mass. 480; *Maire v. Garrison*, 83 N. Y. 14; *Small v. Jones*, 1 Watts & S. 128; *McMinn. v. Phipps*, 3 Sneed, 196; *Switzer v. Skiles*, 3 Glim. 529; *Kearney v. Taylor*, 15 How. 519; *Crooke v. Dairs*, 5 Grant, (Ont.) 317; *Brown v. Fisher*, 9 Grant, (Ont.) 423; *Slater v. Maxwell*, 6 Wall. 288; *Jenkins v. Frink*, 30 Cal. 586; *Allen v. Stephanes*, 18 Tex. 658; *Dick v. Cooper*, 24 Pa. St. 217; *National Bank v. Sprague*, 20 N. J. Eq.

159; *Wolfe v. Luyster*, 1 Hall, 146; *Gardiner v. Morse*, 25 Me. 140.

⁴ *Brisbane v. Adams*, 3 N. Y. 129; *Young v. Snyder*, 3 Grant Cas. 151; *Young v. Smith*, 10 R. Mon. 293; *Switzer v. Skiles*, 3 Glim. 529; *Jenkins v. Frink*, 30 Cal. 586; *Stewart v. Severance*, 43 Mo. 322; *Buckner v. Chambliss*, 30 Ga. 652; *Bradley v. Kingsley*, 43 N. Y. 534.

⁵ *Newman v. Meek*, 1 Freem. Ch. 441; *Gardiner v. Morse*, 25 Me. 140; *Phippen v. Strickney*, 3 Met. 387; *Troup v. Wood*, 4 Johns. Ch. 228; *Wilbur v. Howe*, 8 Johns. 444; *Meech v. Bennett, Hill & D.* 192; *Gulich v. Ward*, 5 Halst. 87; *Slingluff v. Eckel*, 24 Pa. St. 472; *Martin v. Rantell*, 5 Rich. 541; *Johnson v. La Motte*, 6 Rich. Eq. 347; *Dudley v. Little*, 2 Ohio, 505; *Hook v. Turner*, 22 Mo. 333; *Pratt v. Oliver*, 1 McLean, 295; *Cocks v. Izard*, 7 Wall. 559; *Loyd v. Malone*, 23 Ill. 43; *Wooton v. Hinkle*, 20 Mo. 290; *Haynes v. Crutchfield*, 7 Ala. 189; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Woods v. Hudson*, 5 Munf. 423; *Dick v. Lindsay*, 2 Grant Cas. 431; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Thompson v. Davis*, 13 Johns. 112; *Doolin v. Ward*, 6 Johns. 194; *Jones v. Caswell*, 3 Johns. Cas. 29; *Fenner v. Tucker*, 6 R. I. 551; *Pike v. Balch*, 38 Me. 202; *Rodgers v. Rodgers*, 13 Grant, (Ont.) 143; *James v. Fulrad*, 5 Tex. 512; *Farr v. Simms*, Rich. Eq. 122.

the goods, he has made in effect, if not in fact, a material misrepresentation, in reliance upon the truth of which the seller has parted, or has agreed to part, with his goods. But, whether it is considered a material misrepresentation or not, the great preponderance of authority in this country pronounces a sale fraudulent, in which the buyer had formed a preconceived intention not to pay for the goods. The sale may for this reason be avoided by the seller.¹

But while the existence and knowledge, or the early anticipation, of insolvency by the buyer, and the absence of any reasonable expectation of ability to pay, are facts which tend to prove the fraudulent intent not to pay for the goods—it may be the principal fact²—they are not sufficient (alone) to prove this fraudulent intent.³ But if they are accompanied by other facts, such as an immediate sale of the goods at a greatly reduced price, or a transfer of them to some other creditor, or the secretion of the property, as soon as it is received, and the like, which tend to prove a preconceived plan to accumulate some money before a suspension of business, the jury can infer, from such a combi-

¹ *Donaldson v. Farwell*, 93 U. S. 631; *Carnahan v. Bailey*, 28 Fed. Rep. 519; *Thompson v. Taylor*, 15 Phila. 250; *Redington v. Roberts*, 25 Vt. 694; *Rowley v. Bigelow*, 12 Pick. 307; *Dow v. Sanborn*, 3 Allen 182; *Thompson v. Rose*, 16 Conn. 81; *Mulliken v. Millar*, 12 R. I. 296; *Ash v. Putnam*, 1 Hill, 302; *Cary v. Hotelling*, 1 Hill, 311; *Meacham v. Collignor*, 7 Daly, 402; *Schufeldt v. Schnitzler*, 21 Hun, 462; *Buckley v. Archer*, 21 Barb. 585; *Nichols v. Pinner*, 18 N. Y. 295; 23 N. Y. 265; *Paddon v. Taylor*, 44 N. Y. 371; *Wright v. Brown*, 67 N. Y. 1; *Mears v. Waples*, 3 Houst. 581; 4 Houst. 62; *Peters v. Hilles*, 48 Md. 506; *Loel v. Flash*, 66 Ala. 526; *Des Farges v. Pugh*, 93 N. C. 31; *Lane v. Robinson*, 18 B. Mon. 623; *Bidault v. Wales*, 19 Mo. 36; 20 Mo. 546; *Taylor v. Mississippi Mills*, (Ark.) 1 So. Rep. 283; *Talcott v. Henderson*, 31 Ohio St. 162; *Shipman v. Seymour*, 40 Mich. 283; *Kloppenstien v. Mulcahy*, 4 Nev. 296; *Bell v. Ellis*, 33 Cal. 620; *Seligman v. Kalkman*, 8 Cal. 207; *Allen v. Hartfield*, 76 Ill. 358; *Oswego Starch Factory v. Lendoum*, 57 Iowa, 573; *Rice v. Cutter*, 17 Wis. 362; *Fox v. Webster*, 46 Mo. 181; *Baldwin v. Franklin*, 8 Lea. 67; *Wood v. Yeatman*, 15 B. Mon. 271; *Wilson v. White*, 80 N. C. 280; *Dellone v. Hull*, 47 Md. 112; *Powell v. Bradlee*, 9 Gill & J. 220; *Stoutenborough v. Kokie*, 15 N. J. Eq. 33; *Devoe v. Brant*, 53 N. Y. 462; *Hennequin v. Naylor*, 24 N. Y. 239; *Hall v. Naylor*, 18 N. Y. 588; *Bernard v. Campbell*, 65 Barb. 286; *Mitchell v. Worden*, 20 Barb. 253; *Byrd v. Hall*, 2 Keyes, 646; *Bigelow v. Heaton*, 4 Hill, 44; *King v. Phillips*, 8 Bosw. 603; *Ayres v. French*, 41 Conn. 142, 153; *Kline v. Baker*, 99 Mass. 253; *Wiggin v. Day*, 9 Gray, 97; *Stewart v. Emerson*, 52 N. H. 301; *Burrill v. Stevens*, 73 Me. 395; *Hanchett v. Mansfield*, 16 Ill. App. 407; *Catlin v. Warren*, 16 Ill. App. 418; *Lee v. Simmons*, 65 Wis. 523; *Parker v. Byrnes*, 1 Low. C. C. 539; *Davis v. Stewart*, 8 Fed. Rep. 803;

Ferguson v. Carrington, 9 B. & C. 59; *Davis v. McWhirter*, 40 Up. Can. Q. B. 598; *Biggs v. Barry*, 2 Curt. (U. S.) 262.

² *Hennequin v. Naylor*, 24 N. Y. 139; *Talcott v. Henderson*, 31 Ohio St. 162; *Thompson v. Rose*, 16 Conn. 71.

³ *Cross v. Peters*, 1 Greenl. 378; *Redington v. Roberts*, 25 Vt. 694; *Morrill v. Blackman*, 42 Conn. 324; *Lloyd v. Brewster*, 4 Paige, 537; *Johnson v. Monell*, 2 Abb. App. 470; *Byrd v. Hall*, 2 Keyes, 646; *Hennequin v. Naylor*, 24 N. Y. 139; *Biddle v. Black*, 99 Pa. St. 380; *Powell v. Bradlee*, 9 Gill & J. 220; *Talcott v. Henderson*, 31 Ohio St. 162; *Garbutt v. Bank*, 22 Wis. 384; *Conyers v. Ennis*, 2 Mason, 236; *Ex parte Whittaker*, L. R. 10 Ch. 446; *Burrill v. Stevens*, 73 Me. 395; *Schufeldt v. Schnitzler*, 21 Hun, 462; *Wright v. Brown*, 67 Hun, 4; *Kloppenstien v. Mulcahy*, 4 Nev. 296; *Belding v. Frankland*, 8 Lea. 67; *Nichols v. Pinner*, 18 N. Y. 295; *Ontario Copper Co. v. Lightning-rod Co.*, 29 Up. Can. C. P. 491; *Briggs v. Barry*, 2 Curt. C. C. 259; *Shipmen v. Seymour*, 40 Mich. 274; *Klein v. Rector*, 57 Miss. 538; *Mears v. Waples*, 3 Houst. 581; 4 Houst. 62; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Fish v. Payne*, 14 N. Y. 586; 7 Hun, 586; *Ellison v. Bernstein*, 60 How. Pr. 145; *Andrew v. Dieterich*, 14 Wend. 31; *Rowley v. Bigelow*, 12 Pick. 307; *Hodgeden v. Hubbard*, 18 Vt. 504; *Bell v. Ellis*, 33 Cal. 620; *Bidault v. Wales*, 19 Mo. 36; 20 Mo. 547; *Morris v. Talcott*, 96 N. Y. 100; *Morrison v. Shuster*, 1 Mackey, 190; *Dalton v. Thurston*, 3 N. E. Rep. 383; *Kelsey v. Harrison*, 29 Kans. 143. But see, *contra*, *Davis v. Stewart*, 3 McCrary C. C. 174; 8 Fed. Rep. 803, where it has been held under the bankruptcy law that the purchaser of goods, when one knows himself to be insolvent, and that he has no reasonable expectations of ability to pay, is fraudulent, at least as between the seller and the buyer's assignee in bankruptcy.

nation of facts, that the buyer had a preconceived design not to pay for the goods, and hence the sale was fraudulent.¹

The intention not to pay must be absolute, in order to taint the sale with fraud. It is not fraudulent, if the buyer simply had the intention not to pay at the time agreed upon, and in accordance with the terms of the contract, if he honestly intended to pay at some other time.² And the intention not to pay must be adopted prior to the sale, in order to make the sale fraudulent. If it be not a predetermined intention not to pay, but one which was taken up after the sale had been made; while it is fraudulent, it cannot have a retrospective effect and thus taint the contract of sale. The title to the goods cannot, on account of this subsequent determination not to pay, be recovered by an avoidance of the contract of sale.³ But it has been held that this fraudulent intention not to pay will avoid the sale, if it is made at any time before the sale is completed by a delivery of the goods.⁴

In Pennsylvania, however, it is held that there must be some further proof of an intention to deceive, in order to avoid the sale, than the concealment of the buyer's insolvency and his intention not to pay. It is required that there must be "artifice intended and fitted to deceive."⁵

§ 209. **Seller's expression of opinion.—Dealer's talk.—His statements as to value and price.**—The general rule, heretofore given,⁶ that mere expressions of opinion do not constitute a material misrepresentation, finds a special application to questions concerning the seller's fraud. For vendors of goods are very generally in the habit of indulging in more or less extravagant praise of their goods, unduly extolling their merits, as to value and quality. Where their statements are of a general nature, there cannot be much doubt that their use will furnish no ground for the charge of fraud.⁷ But when the vendor descends to exaggeration or misstatement of special facts or qualities, the authorities are divided. For example, it is held by some of the authorities that a willful misstatement of the

¹ *Wiggins v. Day*, 9 Gray, 97; *Des Farges v. Pugh*, 93 N. C. 31; *Parker v. Byrnes*, 1 Low. C. C. 539, 542; *Davis v. McWhirter*, 8 Up. Can. Q. B. 598; *Wilson v. White*, 80 N. C. 280; *Jordan v. Osgood*, 109 Mass. 462; *Hennequin v. Naylor*, 24 N. Y. 139; *Talcott v. Henderson*, 31 Ohio St. 162; *Thompson v. Rose*, 16 Conn. 71; *Lee v. Simmons*, 65 Wis. 523.

² *Bidault v. Woles*, 20 Mo. 546; *Mitchell v. Worden*, 20 Barb. 253; *Buckley v. Artcher*, 21 Barb. 585.

³ *Burrill v. Stevens*, 73 Me. 395; *Briggs v. Barry*, 2 Curt. C. C. 259; *Rowley v. Bigelow*, 12 Pick. 307; *Parker v. Byrnes*, 1 How. 539; *Cross v. Peters*, 1 Greenl. 378; see, also, *Des Farges v. Pugh*, 93 N. C. 31; *Lee v. Simmons*, 65 Wis. 523; *Taylor v. Mississippi Mills*, 1 So. Rep. 283, citing *Ex parte Whittaker*, L. R. 10 Ch. App. 446; *Biggs v. Barry*, 2 Curt. C. C. 259; *Hoffman v. Noble*, 6 Met. 68; *Nichols v. Pinner*, 18 N. Y. 295; *Bridgeford v. Adams*, 45 Ark. 136; *Merritt*

v. Robinson, 35 Ark. 483; *Cross v. Peters*, 1 Greenl. 376; *Stewart v. Emerson*, 52 N. H. 301; *Donaldson v. Farwell*, 93 U. S. 631.

⁴ *Belding v. Frankland*, 8 Lea. 67; 41 Am. Rep. 630; *Pike v. Wieting*, 49 Barb. 314. But see, *contra*, *Burrill v. Stevens*, 73 Me. 395.

⁵ *Smith v. Smith*, 21 Pa. St. 367; *Backentoss v. Speicer*, 31 Pa. St. 324; see *Hamer v. Fisher*, 58 Pa. St. 453; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Wilson v. White*, 80 N. C. 280; *Bell v. Ellis*, 33 Cal. 620; *Kline v. Baker*, 99 Mass. 253.

⁶ See *ante*, § 203.

⁷ *Mowlan v. Cain*, 3 Allen, 563; *Miller v. Young*, 36 Ill. 354; *Chester v. Comstock*, 6 Rob. 1; *Anderson v. Hill*, 12 Smed. & M. 679; *Atwood v. Small*, 6 Ct. & F. 232; *Ormod v. Huth*, 14 M. & W. 664; *Vernon v. Keys*, 12 East, 637; *Com. v. Jackson*, 132 Mass. 16; *Bishop v. Small*, 63 Me. 14; *Hemmer v. Cooper*, 8 Allen, 334; *Cooper v. Lovering*, 106 Mass. 79; *Holbrook v. Connor*, 60 Me. 578; *State v. Paul*, 69 Me. 215.

cost of the goods, or of the price that has been offered for them, for the purpose of enhancing the value of the goods, is not a fraud.¹ And it has been held to be no fraud for a seller to misstate the appraised value of the goods which he is selling.² But on the other hand, other courts have held such specific misrepresentation of value of the goods to be a fraud on the buyer which would avoid the sales.³ It has been held to be a fraud,⁴ and likewise not a fraud,⁵ for the vendor of commercial paper to state falsely that the parties to the paper are financially responsible. It was held to be a fraud for the vendor, in the sale of a business, to represent that it is profitable;⁶ whereas it was held to be no fraud for the statement to be made by the seller that the subject-matter of the sale was good oil land.⁷ Fraudulent promises of the vendor to do something in the future for the vendee, as well as fraudulent representations as to what the vendee could do with the property, are held not to constitute fraud.⁸ On the other hand, a representation that an old stock of goods was "fresh and new," was held to be fraudulent.⁹ In another case, it was held to be doubtful whether the statement that a horse was "sound and kind" was a fraudulent affirmation of a fact or an irresponsible expression of an opinion.¹⁰

In all these cases of doubt, it is clearly a question of fact for the jury to determine, avowedly dependent on the intention and understanding of the parties,¹¹ but, in my judgment, chiefly dependent upon the practices and moral perception of the particular jury.

¹ *Holbrook v. Connor*, 60 Me. 578; *Bishop v. Small*, 63 Me. 12; *Willard v. Randall*, 65 Me. 81; *Chrysler v. Canaday*, 90 N. Y. 272; *Merrian v. Arbuckle*, 81 Ill. 501; *Righter v. Roller*, 31 Ark. 170; *Wolcott v. Mount*, 38 N. J. L. 196; *Mooney v. Miller*, 102 Mass. 217; *Cooper v. Lovering*, 106 Mass. 79; *Brown v. Leach*, 107 Mass. 364; *Comer v. Perkins*, 124 Mass. 431; *Veasey v. Dayton*, 3 Allen, 381; *Hemmer v. Cooper*, 8 Allen, 334; *Gordon v. Parmlee*, 12 Allen, 212; *Brown v. Castles*, 11 Cush. 350; *Medbury v. Watson*, 6 Met. 259; *Tuck v. Downing*, 76 Ill. 71; *Noetting v. Wright*, 72 Id. 390.

² *Bourr v. Davis*, 76 Me. 223.

³ *Van Epps v. Harrison*, 5 Hill, 63; *Page v. Parker*, 43 N. H. 369; *Weadher v. Phillips*, 39 Hun, 1; *Sandford v. Handy*, 23 Wend. 269, where the misrepresentations were of the price which third persons had paid or offered for the goods. *Medbury v. Watson*, 6 Met. 246; *Manning v. Albee*, 11 Allen, 322; *Ives v. Carter*, 24 Conn. 403; *Simar v. Canaday*, 53 N. Y. 306; *Kenner v. Harding*, 85 Ill. 264; *McClelland v. Scott*, 24 Wis. 81; *Miller v. Barber*, 66 N. Y. 558; *Cowles v. Watson*, 14 Hun, 41; *Somer v. Richards*, 46 Vt. 170; *Martin v. Jordan*, 60 Me. 531; *Coon v. Atwell*, 46 N. H. 510; *McAleer v. Horsey*, 35 Md. 439; *Reid v. Flippen*, 47 Ga. 273; *Morehead v. Eades*, 3 Bush, 121; *Sieveking v. Litzler*, 31 Ind. 17; *Harvey v. Smith*, 17 Id. 272; *Davis v. Jackson*, 23 Id. 233;

McFadden v. Robinson, 35 Id. 24; *Allin v. Millison*, 72 Ill. 201; *Neil v. Cummings*, 75 Id. 170; *Faribault v. Sater*, 13 Minn. 223; *Gifford v. Carvill*, 29 Cal. 589; *Cruess v. Fessler*, 39 Id. 336; *Jordan v. Volkenning*, 72 N. Y. 300, 306; *Perkins v. Partridge*, 30 N. J. Eq. 82; *Leutz v. Earnhart*, 12 Heisk. 711; *Derrick v. Lamar Ins. Co.* 74 Ill. 404; *Foxworth v. Bullock*, 41 Miss. 457; but see *Suessenguth v. Bingenheimer*, 40 Wis. 370; *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Atwood v. Small*, 6 Cl. & Fin. 232; *Wakeman v. Dailey*, 51 N. Y. 27; *Shaeffer v. Sleade*, 7 Blackf. 178; *Schramm v. O'Connor*, 98 Ill. 539.

⁴ *Alexander v. Dennis*, 9 Porter, 174.

⁵ *Belcher v. Costello*, 122 Mass. 188.

⁶ *Cruess v. Fessler*, 39 Cal. 336; *Somer v. Richards*, 46 Vt. 170; *Miller v. Barber*, 66 N. Y. 558; *Crossland v. Hall*, 33 N. J. Eq. 111.

⁷ *Watts v. Cummings*, 59 Pa. St. 84.

⁸ *Long v. Woodman*, 58 Me. 52; *Gordon v. Parmlee*, 2 Allen, 212; *Peduck v. Porter*, 5 Allen, 324; *Mooney v. Miller*, 102 Mass. 217.

⁹ *Jackson v. Collins*, 39 Mich. 557.

¹⁰ *Commonwealth v. Jackson*, 132 Mass. 16.

¹¹ *Morse v. Shaw*, 124 Mass. 59; *Commonwealth v. Jackson*, 132 Mass. 16; *State v. Tomlin*, 29 N. J. L. 13; *Bradley v. Luce*, 99 Ill. 234; *Sharp v. Ponce*, 74 Me. 470; *State v. Heffner*, 84 N. C. 751; *Bigler v. Flickinger*, 55 Pa. St. 279; *Sledge v. Scott*, 56 Ala. 208; *Homer v. Perkins*, 124 Mass. 431.

§ 210. **Expressions of opinion by buyer.**—The buyer's statements of fact are also divided into irresponsible expressions of opinion and fraudulent misrepresentations of facts. It is not always possible to draw the line very clearly between the two, but it may be stated, generally, that when the statement is very general in its terms, and in no way specific, or is so common that no one of ordinary prudence is misled thereby, it is called a mere expression of opinion; and although it may be false, it does not avoid the sale which ensues.¹

§ 211. **When concealment is fraudulent.**—As a general rule, the law does not require the parties to a contract to supply each other with information concerning the subject-matter of the contract. *Caveat emptor* is the cardinal rule of the law of sales. The vendor and vendee are said to treat with each other at arm's length; and unless the parties have mutually agreed to a modification of the ordinary relation existing between them, and placed themselves under obligation to give information, it is no fraud for one of the parties to conceal any material fact from the other, provided he does nothing to mislead the other party, or to prevent or render more difficult his acquisition of the knowledge.² It is only when the one party merely keeps silent, that he does not commit any legal fraud upon the other. If the silence amounts to a positive concealment of a material fact, as where there are attempts to draw the attention of the other party from that fact, or to cover it up from view, then the silence becomes equivalent to a misrepresentation, and gives the taint of fraud to the transaction.³ It would also be a fraud, where one, in response to an inquiry, voluntarily made a statement, which was true, as far as it went, but which would be placed in a different light, if a suppressed fact had been stated. In such cases, the fact stated is made to produce a false impression, in consequence of the concealment of another material fact.⁴

It is likewise a fraud for one to suppress a fact, if he is under an obligation to disclose it, on account of being in a fiduciary relation to the other party.⁵

¹ See *Belcher v. Costello*, 122 Mass. 189; *Van Epps v. Harrison*, 5 Hill, 63; *Ellis v. Andrews*, 56 N. Y. 83; *Watts v. Cummings*, 59 Pa. St. 84, in which false expressions of the buyer's financial standing were considered not fraudulent. On the other hand, see *McClelland v. Scott*, 24 Wis. 81; *Simar v. Canada*, 53 N. Y. 298; *Morse v. Shaw*, 124 Mass. 59; *Homer v. Perkins*, 124 431; *Stubbs v. Johnson*, 127 Mass. 219; so, also, to be a fraud for one falsely to say, "that is all I will give," and the like. *Humphrey v. Haskell*, 7 Allen, 498; *Vernon v. Keyes*, 12 East, 638; 4 Taunt. 488.

² *Laidlow v. Organ*, 2 Wheat. 178; *Kintzing v. McElrath*, 5 Pa. St. 467; *Butler's Appeal*, 26 Pa. St. 63, 66; *Blydenburgh v. Welch*, Baldw. (U. S.) 331; *Perry v. Johnston*, 59 Ala. 648; *People's Bank v. Bogert*, 81 N. Y. 101, 108.

³ *Matthews v. Bliss*, 22 Pick. 48, 52; *Smith v. Countryman*, 30 N. Y. 655, 681; *Roseman v. Conovan*, 43 Cal. 118; *Jackson v. Collins*, 39 Mich. 557, 661; *Savage v. Stevens*, 126 Mass. 207; but see *Grafenstein v. Epstein*, 23 Kans. 443.

⁴ *Peck v. Gurney*, L. R. 6 H. L. 403; *Smith v. Chadwick*, L. R. 20 Ch. D. 58; *Phillips v. Foxall*, L. R. 7 Q. B. 679; *Lee v. Jones*, 17 C. B., n. s., 506; *Arkwright v. Newbold*, L. R. 17 Ch. D. 817; *Devoe v. Brandt*, 53 N. Y. 462; see, also, *Brown v. Montgomery*, 20 N. Y. 287; *Armstrong v. Huffstutler*, 19 Ala. 51; *Turner v. Huggins*, 14 Ark. 21; *Pease v. McClelland*, 2 Bond, 42; *Marsh v. Webber*, 13 Minn. 109; *Stevens v. Orman*, 10 Fla. 9; *Hanson v. Edgerly*, 29 N. H. 343.

⁵ *Hanson v. Edgerly*, 29 N. H. 343; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Howard v. Gould*, 28

§ 212. **Seller's concealment or silence, when a fraud.**—The general rule is that the seller's silence, when he knows that the buyer is exaggerating the value or qualities of the goods, is not a fraud. And this is certainly the general rule where the buyer has equal facilities with the seller, for discovering the defects in the goods. The seller is not obliged to point out the defects, if they can be discovered by the buyer with reasonable diligence. The rule *caveat emptor* is applied here with all its force.¹ And it is held to be no fraud for the vendor to omit, unintentionally, to disclose defects which would not be discovered so readily by the buyer; the intention to deceive being a necessary element of fraud.² But if he intentionally withholds information of the existence of defects, which are not equally within the ken of the buyer, as where poison has been spilled upon fodder,³ or where animals are sold for breeding purposes, when the vendor knows they are impotent;⁴ it is undoubtedly a fraud.

In order that the seller's silence may not constitute a fraud, he must do nothing to conceal these defects from the buyer, or to induce him to be less vigilant in his examination of the goods.⁵ It will also be a fraud to fail to point out defects in cases in which the usage of trade requires the seller to disclose them,⁷ or where the vendor tacitly agrees to make them known, by permitting the buyer to repose confidence in the vendor's supposed intention to disclose such defects.⁸

Id. 523; *Paddock v. Strobbridge*, 29 *Id.* 470; *Bank of Republic v. Baxter*, 31 *Id.* 101; *Brown v. Montgomery*, 20 N. Y. 287; *Schiffer v. Dietz*, 83 *Id.* 300; *Hadley v. Clinton, & Co.*, 13 Ohio St. 502; *Livingston v. Peru Iron Co.*, 2 Paige, 390; *Bunch v. Sheldon*, 14 Barb. 66; *Nichols v. Pinner*, 18 N. Y. 295; 23 *Id.* 264; *Hennequin v. Naylor*, 24 *Id.* 139; *Hall v. Naylor*, 18 *Id.* 588; *Allen v. Addington*, 7 Wend. 9, 20; *People's Bk. v. Bogart*, 81 N. Y. 101; *Roseman v. Canovan*, 43 Cal. 110, 117; *Drake v. Collins*, 5 How. (Miss.) 253; *Bowman v. Bates*, 2 Bibb, 47; *Rawdon v. Blatchford*, 1 Sandf. 344; *Holmes' Appeal*, 77 Pa. St. (27 P. F. Sm.) 50; *Swimm v. Bush*, 23 Mich. 99; *Snelson v. Franklin*, 6 Munf. 210; *McNeil v. Baird*, 6 Munf. 316; *Emmons v. Moore*, 85 Ill. 304; *Damerson v. Jamison*, 4 Mo. App. 299; *Connelly v. Fisher*, 3 Tenn. Ch. 382; *Young v. Hughes*, 32 N. J. Eq. 372; *McMichael v. Kilmer*, 76 *Id.* 36, 44; *Dambmann v. Schulting*, 75 *Id.* 55, 61; *Goninan v. Stephenson*, 24 Wis. 75; *Hastings v. O'Donnell*, 40 Cal. 148.

¹ *Hart v. Holcombe*, 32 N. H. 185; *Teasey v. Dalton*, 3 Allen, 380; *Lyle v. Bird*, 3 Jones, (N. C.) 222; *Port v. Williams*, 6 Ind. 219; *Hough v. Richardson*, 3 Story, 659; *Brown v. Leach*, 107 Mass. 364; *Stephens v. Orman*, 16 Fla. 9; *Rocchi v. Schwabacker*, 33 La. An. 1364; *Brown v. Castles*, 11 Cush. 350; *Dickinson v. Lee*, 102 Mass. 559; *Homer v. Perkins*, 124 Mass. 431; *People's Bk. v. Bogart*, 81 N. Y. 101; *Smith v. Countryman*, 30 *Id.* 655; *Hanson v. Edgerly*, 29 N. H. 343; *Fisher v. Budlong*, 10 R. I. 525; *Kintzing v. McElrath*, 5 Barr. 467; *Hadley v.*

Clinton, & Co., 13 Ohio St. 502; *Frenzel v. Miller*, 37 Ind. 1; *Williams v. Spurr*, 24 Mich. 335; *Mitchell v. McDougall*, 62 Ill. 498; *Law v. Grant*, 37 Wis. 548; *Laidlow v. Organ*, 2 Wheat. 178; *Hastings v. O'Donnell*, 40 Cal. 148; *Wilde v. Gibson*, 1 H. L. Cas. 605.

² *Stevens v. Fuller*, 8 N. H. 463; *Hanson v. Edgerly*, 29 N. H. 343; *Kintzing v. McElrath*, 5 Pa. St. 467; *Harris v. Tyson*, 24 Pa. St. 347; *Laidlow v. Organ*, 2 Wheat. 178; *Howard v. Gould*, 28 Vt. 523; *Fisher v. Budlong*, 10 R. I. 527.

³ *French v. Vining*, 102 Mass. 135; see, also, to same effect, *Paddock v. Strobbridge*, 29 Vt. 471; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530; *Duval v. Medtart*, 4 H. & J. 14; *Beninger v. Corwin*, 24 N. J. L. 257; *Dowing v. Dearborn*, 77 Me. 457; *Hough v. Evans*, 4 McCord, 169; *Cardwell v. McClellan*, 3 Sneed, 150; *Stevens v. Fuller*, 8 N. H. 463; *Prentiss v. Russ*, 16 Me. 30; *Milliken v. Chapman*, 75 Me. 322; *Cornelius v. Molloy*, 1 Pa. St. 293; *Hadley v. Clinton, & Co.*, 13 Ohio St. 502; *Cecil v. Spurger*, 32 Mo. 462.

⁴ *Maynard v. Maynard*, 49 Vt. 297.

⁵ *Paddock v. Strobbridge*, 29 Vt. 420; *Maynard v. Maynard*, 49 Vt. 297; *Croyle v. Moses*, 90 Pa. St. 450; *Beninger v. Corwin*, 24 N. J. L. 257; *Cassell v. Herron*, 5 Clarke, 250.

⁶ *Benjamin on Sales*, § 430.

⁷ *Horsfall v. Thomas*, 1 Hurt. & C. 90; *Smith v. Hughes*, L. R. 9 Q. B. 597; *Jones v. Bowden*, 4 Taunt. 847.

⁸ *Snelson v. Franklin*, 6 Munf. 210; *McNeil v. Baird*, *Id.* 316; *Halls v. Thompson*, 1 Sm. &

But it is not a fraud, not to disclose defects, in any case where the buyer positively relies upon his own judgment after his examination of the goods, and does not evince any desire to refer to the seller's opinion or statements.¹ It is also not a fraud on the buyer, to conceal facts, where the goods are expressly sold "with all their faults."²

§ 213. **Concealment of material facts by the buyer.**—The buyer is no more required, than is the seller, to disclose facts within his knowledge, which would materially affect the negotiations of the sale of the goods; such as those which would enhance the price of the goods,³ or which relate to the solvency of the buyer,⁴ and the like. The buyer is not obliged to disclose facts within his knowledge, unless he assumes an obligation to furnish information.⁵

But the buyer must scrupulously abstain from any statements or actions, which are calculated to disarm suspicions, and to mislead on account of being half-truths. In any such case, the combination of silence and misleading action or word is equivalent to an actual misrepresentation of a material fact, and will taint the sale with fraud.⁶

§ 214. **Intention to influence the conduct of another.**—It is an essential requisite of actual fraud, in law and in equity, that whatever may be the form of the representation—that is, whether an affirma-

Mar. 443; Roseman v. Conovan, 43 Cal. 110; Schiffer v. Deitz, 83 N. Y. 300; Howell v. Bidlecom, 62 Barb. 131; Clark v. Bamer, 2 Lans. 67; Bank of Republic v. Baxter, 31 Vt. 101; Howard v. Gould, 28 Id. 523; Fitzsimmons v. Joslin, 21 Id. 129; Hanson v. Edgerly, 29 N. H. 343; Wilde v. Gibson, 1 H. L. Cas. 605; Brown v. Montgomery, 20 N. Y. 287; People's Bk. v. Bogart, 81 Id. 101; Rawdon v. Blatchford, 1 Sandf. Ch. 344; Paddock v. Stockbridge, 29 Vt. 470, 477; Holmes' Appeal, 77 Pa. St. 50.

¹ Pattison v. Jenks, 33 Ind. 87; Stephens v. Orman, 10 Fla. 9; Howell v. Riddlecorn, 62 Barb. 131.

² Pearce v. Blackwell, 12 Ired. 49; Pickening v. Dawson, 4 Taunt. 779; Freeman v. Baker, 1 Ad. & E. 508; Hanson v. Edgerly, 29 N. H. 343; Ward v. Hobbs, L. R. 2 Q. B. D. 331; s. c., L. R. 3 Q. B. D. 150; Gossler v. Eagle Sugar Ref., 103 Mass. 331; Smith v. Andrews, 3 Ired. 6; Henshaw v. Robins, 9 Met. 83, 90; Taylor v. Fleet, 4 Barb. 102; Whitney v. Boardman, 118 Mass. 247, 248; Baywater v. Richardson, 1 Ad. & E. 508; Baylehole v. Walters, 3 Camp. 154.

³ Laidlow v. Organ, 2 Wheat. 178; Harris v. Tyson, 24 Pa. St. 347; Kentzing v. McElrath, 5 Pa. St. 467; Matthews v. Bliss, 22 Pick. 48; Smith v. Beatty, 2 Ired. Eq. 456; Butler's Appeal, 26 Pa. St. 63; Fox v. Mackreth, 2 Bro. Ch. 420; Goninan v. Stephenson, 24 Wis. 75; Cleland v. Fish, 43 Ill. 282; Wright v. Brown, 67 N. Y. 1; Anonymous, 67 Id. 598; Livingston v. Peru Iron Co., 2 Paige, 390; Harris v. Tyson, 12 Harris, (24 Pa. St.) 347; Drake v. Collins, 5 How. (Miss.) 253; Williams v. Spurr, 24 Mich. 355; Law v. Grant, 37 Wis. 548; see, however, per contra, Bowman v. Bates, 2 Bibb, 47; Williams v. Beazley, 3 J. J. Marsh. 578.

⁴ Cross v. Peters, 1 Greenl. 378; Redington v. Roberts, 25 Vt. 694; Morrill v. Blackman, 42 Conn. 324; Lloyd v. Brewster, 4 Paige, 537; Johnson v. Monell, 2 Abb. App. 470; Byrd v. Hall, 2 Keyes, 646; Hennequin v. Naylor, 24 N. Y. 139; Biddle v. Black, 99 Pa. St. 380; Powell v. Bradlee, 9 Gill & J. 220; Talcott v. Henderson, 31 Ohio St. 162; Garbutt v. Bank, 23 Wis. 384; Conyiss v. Ennis, 2 Mason, 236; *Ex parte* Whittaker, L. R. 10 Ch. 446; Burrill v. Stevens, 73 Me. 395; Schufeldt v. Schnitzler, 21 Hun, 462; Wright v. Brown, 67 Hun, 4; Klopenstein v. Mulcahy, 4 Nev. 296; Belding v. Frankland, 8 Lea. 67; Nichols v. Pinner, 18 N. Y. 295; Ontario Copper Co. v. Lightning-rod Co., 29 Up. Can. C. P. 491; Biggs v. Barry, 2 Curt. C. C. 259; Shipman v. Seymour, 40 Mich. 274; Klein v. Rector, 57 Miss. 538; Mears v. Waples, 3 Houst. 531; 4 Houst. 62; Rodman v. Thalheimer, 75 Pa. St. 232; Fish v. Payne, 7 Hun, 586; s. c., 14 N. Y. 586; Ellison v. Bernstein, 60 How. Pr. 145; Andrew v. Dieterich, 14 Wend. 31; Rowley v. Bigelow, 12 Pick. 307; Hodgeden v. Hubbard, 18 Vt. 504.

⁵ Dambmann v. Schulting, 75 N. Y. 55, 63; see Carpenter v. Danforth, 52 Barb. 581; Fisher v. Bodlong, 10 R. I. 525; Board of Tippecanoe Co. v. Reynolds, 44 Ind. 509.

⁶ Turner v. Harvey, Jacob, 178; Bench v. Sheldon, 14 Barb. 66; Prescott v. Wright, 4 Gray, 461; Paul v. Hadley, 23 Barb. 521; Dambmann v. Schulting, 75 N. Y. 62; Smith v. Countryman, 39 N. Y. 655, 681; Howard v. Gould, 28 Vt. 523; Hadley v. Clinton Co., 13 Ohio St. 502; but see Vernon v. Keys, 12 East, 632; 4 Taunt. 488.

tive misrepresentation or concealment of a material fact—it must have been made or done with the intention of inducing another to enter into a contract or to assume some obligation, which he probably otherwise would not have assented to.¹ The misrepresentation must, therefore, precede or be contemporaneous with any actions for the conclusion of a bargain.²

It is not always necessary, however, to show affirmatively that the parties intended to influence the conduct of another. That intention will be presumed, whenever a representation is made either prior to or in connection with the given transaction, and is of such a nature and has such a connection with the transaction in question, as reasonably to support the presumption, that the other party would be influenced thereby, and was in fact so influenced. In such a case, the courts will presume that the false representation or impression was made or produced, with the intention of influencing the conduct of the other party. The design or intention will be inferred from the consequences of the act of misrepresentation.³ But it is not necessary that the party making the misrepresentation should be proven or presumed to have the intention of influencing the conduct of *any particular* person. He may or may not have intended to influence some one particular person; that is not necessary to the charge of fraud. If the party makes the misrepresentation to the world in general, and expects it to influence some one or more of those who read the announcement, and the fact is established that the ultimate party to the transaction was in fact influenced by the misrepresentation so announced, the intention to influence his conduct is sufficiently made out to support the charge of fraud. Thus, for example, all misrepresentations or concealments of material facts in circulars and prospectus and other general announcements, which are so frequently advertised and distributed, and are made with the intention of influencing anyone who may be induced to read them and to act upon them, this general intention to influence anyone who proves himself to be susceptible to the influence is all that the law requires to support the charge of fraud.⁴

§ 215. **When and how far fraudulent intent is necessary in actual fraud.**—Another important question is, how far the intention to

¹ *Smith v. Robertson*, 23 Ala. 312; *Oswald v. McGehee*, 28 Miss. 340; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Bowman v. Caruthers*, 40 Ind. 90; *Tyler v. Black*, 13 How. (U. S.) 230; *Hough v. Richardson*, 3 Story, 659; *Smith v. Babcock*, 2 Wood. & Min. 246; *Pratt v. Philbrook*, 33 Me. 17; *Harding v. Randall*, 15 Me. 332; *Hunt v. Moore*, 2 Barr. 105; *Joice v. Taylor*, 6 Gill & J. 54; *McAleer v. Horsey*, 35 Md. 439; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Lanier v. Hill*, 25 Ala. 554; *Eaton C. & B. Co. v. Avery*, 83 N. Y. 31; *Rohrschneider v. Knickerbocker Ins. Co.*, 76 *Id.* 216; *Verplank v. Van Buren*, *Id.* 247; *Smith v. Richards*, 13 Pet. 26.

² *Harris v. Kemble*, 1 Sim. 111, 122, *per* Sir John Leach.

³ *Conybeare v. New Brunswick, &c. Co.*, 1 De G. F. & J. 578; 9 H. L. Cas. 711; *Attwood v. Small*, 6 Cl. & Fin. 232; *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101; 5 Eq. 485; *Western Bk. of Scotland v. Addie*, L. R. 1 H. L. Sc. App. 145; *Traill v. Baring*, 4 De G. J. & S. 318, 326, 328; *Rawlins v. Wickham*, 3 De G. & J. 304.

⁴ *Paddock v. Fletcher*, 42 Vt. 389; *Rohrschneider v. Knickerbocker Ins. Co.*, 76 N. Y. 216; *Phelps v. Wait*, 30 N. Y. 78; *Bruff v. Mali*, 36 N. Y. 200; *McClelland v. Scott*, 24 Wis. 81; *Kisch v. Cent. Ry. of Venezuela*, 3 De G. J. & S. 122; L. R. 2 H. L. 99; *Reese River Min. Co. v. Smith*, L. R. 4 H. L. 64; *New Brunswick, &c. Ry. v. Mugeridge*, 1 Dr. & Sm. 363; *Peek v. Gurney*, L. R. 6 H. L. 377.

deceive is necessary to the definition of fraud. It is a well-established rule that an innocent misrepresentation, to which no moral blame is attached, is not a fraud, however much damage it may have caused,¹ although such a misrepresentation might constitute a mistake of fact, or a failure of consideration, and thus avoid a contract;² or it might constitute a breach of a warranty.³ Yet it would not be right to go to the opposite extreme and hold that the positive intention to deceive another is a necessary element of actual fraud. There can be no question, of course, that where the intention to deceive is present, the fraud has been committed.⁴ But there are many cases in which there is no positive intention to deceive, and yet the false statement is so made that the party making it cannot claim to be without blame.

But it is to be observed that there is no ground for the charge of fraud, only when the false statement is made innocently and without blame. The reckless statement of what one does not know to be true, for the purpose of influencing the actions of others, is reprehensible under the law, and is actual fraud; for the moral wrong of making false statements negligently, is akin to an actual intention to deceive. Under those circumstances, the law conclusively presumes that the utterer of false statements intended to deceive. If, however, one has reasonable grounds for believing his statements to be true, although they are false, he has made an innocent mistake, for which he cannot be held responsible. It is only when he makes statements, which he

¹ *Cowley v. Smith*, 46 N. J. L. 380; *Weeks v. Burton*, 7 Vt. 67; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Brown v. Castles*, 11 Cush. 348-351; *King v. Eagle Mills*, 10 Allen, 548; *French v. Vining*, 102 Mass. 132; *Fisher v. Mellen*, 103 Mass. 503; *Cooper v. Lovering*, 106 Mass. 78; *Beach v. Bemis*, 107 Mass. 498; *Boyd v. Browne*, 6 Barr. 310; *Kimball v. Moreland*, 559 A. 164; *Josselyn v. Edwards*, 57 Ind. 212; *Seller v. Clelland*, 2 Col. 532; *French v. Skead*, 24 Grant's Ch. (Ont.) 179; *Seller v. Clark*, 7 Cranch, 69; *Righter v. Roller*, 31 Ark. 170; *Tone v. Wilson*, 62 Ill. 529; *Merwin v. Arbuckle*, 81 Ill. 501; *St. Louis, &c. R. Co. v. Rice*, 85 Ill. 406; *Wharf v. Roberts*, 88 Ill. 426; *Dilworth v. Bradner*, 85 Pa. St. 490; *Frisbie v. Fitzsimmons*, 3 Hun, 674; *Marshall v. Fowler*, 7 Hun, 237; *Wetseott v. Ainsworth*, 9 Hun, 53; *Morehouse v. Yeager*, 9 Jones & S. 135; *Barrett v. Barrett*, 66 Barb. 205; *Babcock v. Libbey*, 53 How. Pr. 255; *Young v. Covell*, 8 Johns, 25; *Stilt v. Little*, 63 N. Y. 427; *Tryon v. Whitmarsh*, 1 Met. 1; *Page v. Bent*, 2 Met. 371; *Stone v. Denny*, 4 Met. 151, 155; *Pettigrew v. Chellis*, 4 N. H. 95; *Hanson v. Edgerly*, 29 N. H. 343; *Page v. Parker*, 40 N. H. 47, 69; *McDonald v. Trafton*, 15 Me. 225.

² *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Grim v. Byrd*, 32 Gratt. 293, 300; *Pendarvis v. Gray*, 41 Tex. 326; *Lopes v. Robinson*, 54 Tex. 510; *Allen v. Hart*, 72 Ill. 106; *Thorne v. Prentiss*, 83 Ill. 99; *Rupp v. Jarrett*, 94 Ill. 475, 479; *Smith v. Richards*, 13 Pet. 26.

³ *Tiedeman on Sales*, § 193.

⁴ *Wampler v. Wampler*, 30 Gratt. 454; *Laidlow v. Organ*, 2 Wheat. 178, 195; *Smith v. Richards*, 13 Pet. 26, 36; *Frenzel v. Miller*, 37 Ind. 1; *Bankhead v. Alloway*, 6 Coldw. 58, 75; *Cowley v. Smith*, 46 N. J. L. 380; *Weeks v. Burton*, 7 Vt. 67; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Brown v. Castles*, 11 Cush. 348-351; *King v. Eagle Mills*, 10 Allen, 548; *French v. Vining*, 102 Mass. 132; *Fisher v. Mellen*, 103 Mass. 503; *Cooper v. Lovering*, 106 Mass. 78; *Beach v. Bemis*, 107 Mass. 498; *Boyd v. Browne*, 6 Barr. 310; *Josselyn v. Edwards*, 57 Ind. 212; *Seller v. Clelland*, 2 Col. 532; *French v. Skead*, 24 Grant's Ch. (Ont.) 179; *Russell v. Clark*, 7 Cranch, 69; *Righter v. Roller*, 31 Ark. 170; *Tone v. Wilson*, 62 Ill. 529; *Merwin v. Arbuckle*, 81 Ill. 501; *St. Louis, &c. R. Co. v. Rice*, 85 Ill. 406; *Wharf v. Roberts*, 88 Ill. 426; *Dilworth v. Bradner*, 85 Pa. St. 238; *Duff v. Williams*, 85 Pa. St. 490; *Frisbie v. Fitzsimmons*, 3 Hun, 674; *Marshall v. Fowler*, 7 Hun, 237; *Wetseott v. Ainsworth*, 9 Hun, 53; *Morehouse v. Yeager*, 9 Jones & S. 135; *Barrett v. Barrett*, 66 Barb. 205; *Babcock v. Libbey*, 53 How. Pr. 255; *Young v. Covell*, 8 Johns. 25; *Stilt v. Little*, 63 N. Y. 427; *Tryon v. Whitmarsh*, 1 Met. 1; *Page v. Bent*, 2 Met. 371; *Stone v. Denny*, 4 Met. 151, 155; *Pettigrew v. Chellis*, 4 N. H. 95; *Hanson v. Edgerly*, 29 N. H. 343; *Page v. Parker*, 40 N. H. 47, 69; *McDonald v. Trafton*, 15 Me. 225.

knows to be false,¹ or has no reasonable grounds for believing to be true,² that he is guilty of fraud.

Some of the cases, as in the preceding note, hold the party making the false statement liable, where there has been no intention to deceive, whenever it is shown that he had no reasonable ground for believing it to be true. But in many of the equity cases, the rule is said to be settled upon broader lines, from which is omitted entirely the qualification "that there are no reasonable grounds for the persons believing a statement to be true." These cases are said to lay down the rule that fraud will be proven to have been committed, whenever there has been a definite statement of what is untrue by one who has no knowledge at all concerning the truth of the untrue statement. It is held in all such cases, that the effects are the same as where the assertion is made by one who knows it to be untrue.³ It is difficult to see any special ground for distinction between the cases where one makes a statement without having any knowledge as to its truth or falsity, and those in which the statements are made without any reasonable ground for believing them to be true. Whatever distinction can be made between the two cases, it would seem that the practical results would be the same in all of them. To these cases may be added two others, in which the charge of fraud may be considered as sustained, although the original intention to deceive may not be present: *First*, where the false statement of fact is made by one who believes it to be true, but under circumstances which impose upon him the duty of knowing the truth; such a misrepresentation would be fraudulent, although he may be able to show some reasonable ground for believing the truth of his statement. He is charged with a positive duty of knowing the truth and he is estopped from claiming exemption from liability on the

¹ *Daniel v. Mitchell*, 1 Story, 172; *Warner v. Daniels*, 1 Wood & M. 90; *Hammatt v. Emerson*, 27 Me. 308; *Stone v. Denny*, 4 Met. 151; *Hazard v. Irwin*, 18 Pick. 95; *Twitchell v. Bridge*, 42 Vt. 68; *Cabot v. Christie*, Vt. 121; *Fisher v. Mellen*, 103 Mass. 503; *Jennings v. Broughton*, 5 De G. M. & G. 126, 130; *Haight v. Hayt*, 19 N. Y. 464; *White v. Merritt*, 7 Id. 352; *Doggett v. Emerson*, 3 Story, 700; *Hough v. Richardson*, Id. 659.

² *Hammatt v. Emerson*, 27 Me. 308; *Page v. Bent*, 2 Met. 371; *Stone v. Denny*, 4 Met. 451; *Burgess v. Wilkinson*, 13 R. I. 646; *Grim v. Byrd*, 33 Gratt. 293; *Mitchell v. Zimmerman*, 4 Tex. 75; *Graham v. Mowlin*, 54 Ind. 389; *Hough v. Richardson*, 3 Story, 691; *Doggett v. Emerson*, 3 Story, 733; *Hammond v. Pennock*, 61 N. Y. 145; *Blackman v. Johnson*, 35 Ala. 259; *Sledge v. Scott*, 56 Ala. 203; *Einstein v. Marshall*, 58 Ala. 153; *Allen v. Hart*, 72 Ill. 104; *Bower v. Fenn*, 90 Pa. St. 359; *Rawson v. Harger*, 48 Iowa, 269; *Clark v. Rolls*, 58 Iowa, 201; *Parmlee v. Adolph*, 28 Ohio St. 10; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Foard v. McComb*, 18 Bush, 723; *Gunby v. Sluter*, 44 Md. 237;

Fisher v. Mellen, 103 Mass. 506; *Savage v. Stevens*, 12 Mass. 207; *Hazard v. Irwin*, 18 Pick. 95.

³ *Sharp v. Mayor*, 40 Barb. 256; *Twitchell v. Bridge*, 42 Vt. 68; *Beebe v. Knapp*, 28 Mich. 53; *Stone v. Covell*, 29 Id. 359; *Frenzel v. Miller*, 37 Ind. 1; *Graves v. Lebanon Bk.*, 10 Bush, 23; *Bankhead v. Alloway*, 6 Coldw. 56; *Thompson v. Lee*, 31 Ala. 292; *Elder v. Allison*, 45 Ga. 13; *Glasscock v. Minor*, 11 Mo. 655; *Converse v. Blumrich*, 14 Mich. 109, 123; *Allen v. Hart*, 72 Ill. 104; *Wilcox v. Iowa W. Univ.*, 32 Iowa, 367; *Hammond v. Pennock*, 61 N. Y. 145, 151, 152; *Hawkins v. Palmer*, 57 Id. 664; *Smith v. Richards*, 13 Pet. 26; *Hough v. Richardson*, 3 Story, 659; *Hammatt v. Emerson*, 27 Me. 308, 326; *Smith v. Mitchell*, 6 Ga. 458; *Reese v. Wyman*, 9 Ga. 430, 439; *Thompson v. Lee*, 31 Ala. 292; *Oswald v. McGehee*, 28 Miss. 340; *Mitchell v. Zimmerman*, 4 Tex. 75; *York v. Gregg*, 9 Id. 85; *Buford v. Caldwell*, 3 Mo. 477; *Harding v. Randall*, 15 Me. 332; *Hazard v. Irwin*, 18 Pick. 95; *Stone v. Denny*, 4 Met. 151; *Marsh v. Falker*, 40 N. Y. 562; *Bennett v. Judson*, 21 Id. 238; *Craig v. Ward*, 36 Barb. 377; *Taymon v. Mitchell*, 1 Md. Ch. 496.

ground of the honesty of his purpose.¹ *Secondly*, where one makes an untrue statement, under the honest mistake of believing in its truth, and he should afterwards discover the falsity of the statement, and then permit the other party to continue in error, while he retains the benefit of the false statement, and it is possible for the party to be restored to their original condition, he is charged in equity with the liability of a fraud, in consequence of his subsequent misconduct, although the original misrepresentation would not of itself support the charge of fraud.²

§ 216. **Misrepresentation or concealment as a defense in action of specific performances.**—It has been very generally held, that in all actions for the specific performance of a contract, the court will deny its extraordinary relief to the plaintiff, where the defendant shows that a misrepresentation has been made by the plaintiff or his agent in respect to material facts, and that he, the defendant, has been thereby influenced to his damage. The proof of the fact that the defendant has been misled will itself, and without any proof of a fraudulent intent to deceive or moral blame in making the misrepresentation, constitute a sufficient defense to the action for specific performance.³ But these cases come so near to the cases of mistakes that it is very difficult to distinguish between the two, except that in these cases, as in the cases of actual fraud, there is an intention to influence the conduct of another. The ground for this extreme view, in respect to the effect of misrepresentations in the case of actions for specific performance, is to be found in the fact, that the equitable remedy of specific performance will only be granted in cases where every suspicion of inequity is absent. So, also, is it unnecessary, in order to establish a good defense to the action for specific performance on the ground of the concealment of a material fact, to show that the concealment was made intentionally and fraudulently. If the fact is established that there has been a concealment of a material fact, although it may not have been the result of a fraudulent intent, yet a court of equity will refuse to enforce the contract against the defendant who has been misled by such concealment.⁴

§ 217. **Reliance upon representation.—Deceit must be successful.**—It is also necessary, to constitute ground for the charge of fraud, that the deceit should be successful, in that the party intended

¹ *Smith v. Reese River M. Co.*, L. R. 2 Eq. 264, 269; *Price v. Macaulay*, 2 De G. M. & G. 339, 345; *Ayre's Case*, 25 Beav. 513, 522; *Rawlins v. Wickham*, 3 De G. & J. 304, 313, 316; *Pulsford v. Richards*, 17 Beav. 87, 94; *Swan v. North Br. & Co. Co.*, 2 H. & C. 175, 183; *Babcock v. Case*, 61 Pa. St. (11 P. F. Sm.) 427, 430.

² *Reynell v. Sprye*, 1 De G. M. & G. 660, 709, *per* Lord Cranworth; *Traill v. Baring*, 4 De G. J. & S. 318, 329, 330, *per* Turner, L. J.; *Underhill v. Horwood*, 10 Ves. 209, 225.

³ *Price v. Macaulay*, 2 De G. M. & G. 339;

Bacon v. Bronson, 7 Johns. Ch. 194; *Harnett v. Baker*, L. R. 20 Eq. 50; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Leyland v. Illingsworth*, 2 De G. F. & J. 248, 252, 254; *Swimm v. Bush*, 23 Mich. 99; *Holmes' Appeal*, 77 Pa. St. (27 P. F. Sm.) 50; *In re Banister*, L. R. 12 Ch. D. 131, 142; *Dyer v. Hargrave*, 10 Ves. 506.

⁴ *Drysdale v. Mace*, 5 De G. M. & G. 103; *Lucas v. James*, 7 Hare, 410; *Shirley v. Stratton*, 1 Bro. Ch. 440; *Ellard v. Lord Llandaff*, 1 Ball & B. 241; *Meddeford v. Austwick*, 1 Sim. 89.

to be influenced actually relied upon the misrepresentation. If the other party did not rely upon the misrepresentation, but was induced by other considerations to make the contract, then he was deceived; and he could not afterwards secure a release from the contract on the ground of fraud in the negotiation, for he was not defrauded. It would, at the most, be only an attempt to defraud, which might be made punishable as a criminal offense, but could not be made the subject of a civil action.¹ But it seems to be the presumption of law that if a material misrepresentation is made, the other party relied upon it in the execution of the contract; and this presumption must be rebutted, in order that the party making the representation may be relieved from liability for fraud.² It is, however, not necessary for the fraudulent misrepresentation or concealment to constitute the sole inducement to the transaction. If the other party was in part influenced by the fraud, and in part by other misrepresentations, that would be sufficient to support the charge of a successful fraud.³

§ 218. **Parties must be justified in relying upon misrepresentations.**—In connection with the proof of actual reliance upon the fraud of the party who is intended to be influenced, it is necessary to show that such a party is justified in relying upon the misrepresentation. The general rule is that, where one has made a misrepresentation as to a material fact with the intention of influencing the conduct of another; and the fact was one which was within the knowledge of the party making the misrepresentation, or it was within his power to acquire the information concerning such a fact; and the representation is made to one who does not in fact know of the falsity of the statement: the party to whom the representation is made has a right to rely upon such statement; he is not bound to make any inquiry or examination into the circumstances on his own behalf. It is not permitted of one making such a misstatement, with the intention of influencing the conduct of another, to claim exemption from liability from

¹ *Gregory v. Schoenell*, 55 Ind. 101; *Roseman v. Canovan*, 43 Cal. 110; *Long v. Warren*, 68 N. Y. 426; *Chester v. Comstock*, 40 N. Y. 575 n; *Taylor v. Guest*, 58 N. Y. 262; *Laidlow v. Organ*, 2 Wheat. 178, 195; *Bryan v. Hitchcock*, 43 Mo. 537; *Kloppenstein v. Mulcahy*, 4 Nev. 296; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Wampler v. Wampler*, 30 Gratt. 454; *McShane v. Hazlehurst*, 50 Md. 107; *McBean v. Fox*, 1 Ill. App. 177; *Taylor v. Fleet*, 1 Barb. 471, 475; *Morris Canal Co. v. Emmett*, 9 Paige, 168; *Masterton v. Beers*, 1 Sweeney, 406; 6 Robert. 368; *Levick v. Brotherline*, 74 Pa. St. (24 P. F. Sm.) 149, 157; *Percival v. Harger*, 40 Iowa, 286; *Hough v. Richardson*, 3 Story, 656; *Daniel v. Mitchell*, 1 Id. 172; *Prescott v. Wright*, 4 Gray, 461.

² *Holbrook v. Bust*, 22 Pick. 546; *Fishback v. Miller*, 15 Nev. 428; but see *Taylor v. Guest*, 58 N. Y. 262; *Merriam v. Pine City Lumber Co.*,

23 Minn. 314; *Jackson v. Collins*, 39 Mich. 557; *Sims v. Eiland*, 57 Miss. 607; *Watts v. Cummings*, Pa. St. 84; *Brandon v. Forest Co.*, Pa. St. 187; *Spalding v. Hedges*, 2 Barr. 240; *Morehead v. Eades*, 3 Bush, 121; *Drake v. Latham*, 50 Ill. 270; *Fish v. Cleland*, 33 Id. 238; *Banta v. Palmer*, 47 Id. 99; *David v. Park*, 103 Mass. 501; *Bradbury v. Bardin*, 35 Conn. 577; *Batdorf v. Albert*, 50 Pa. St. 59; *Holmes' Appeal*, 77 Pa. St. (27 P. F. Sm.) 50; *Swimm v. Bush*, 23 Mich. 99; *Beardsley v. Duntley*, 69 N. Y. 577; *Wilkin v. Barnard*, 61 Id. 628; *McShane v. Hazlehurst*, 50 Md. 107; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Farebrother v. Gibson*, 1 De G. & J. 602; *Cook v. Waugh*, 2 Giff. 201; *Johnson v. Smart*, Id. 151; *Boynnton v. Hazelboom*, 14 Allen, 107; *Best v. Stow*, 2 Sand. Ch. 298.

³ *Reynell v. Sprye*, 1 De G. M. & G. 660, 708, 709; *Addington v. Allen*, 11 Wend. 374.

his misrepresentation, by objecting to the reliance placed by the other party upon the truth of his statement. The other party had a right to rely upon the statements made to him; and the party making them can only secure exemption from liability by showing that the party who was intended to be influenced did not actually rely upon the misrepresentation.¹ But this is a case only where the representations are in respect to facts, as contrasted with representations as to opinions and commendations and the like, which have already been explained to be insufficient to support the charge of fraud.² It is also held that the representation must be more or less reasonable in character, in order that one may be justified in relying upon it. If the statement was not reasonable in character, or was so vague and general in its terms as not to convey any certain meaning, it would be impossible to support the charge of fraud.³ But where one, instead of relying upon the information given him, proceeds to make an inquiry for himself, and either actually acquires information to the contrary; or he has started upon an investigation for himself, which if diligently pursued would have brought him to an acquaintance with the truth; he is then charged with constructive notice of all the facts or information which he might have obtained, had he pursued the inquiry to the end; he cannot, after having started his own investigation, claim that he did not learn the truth.⁴ For the same reason, it was held that where one has made a personal examination of the subject-matter of a sale, or even where he has simply seen the subject-matter concerning

¹ *Watts v. Cummings*, Pa. St. 84; *Brandon v. Forest Co.* *Id.* 187; *Spalding v. Hedges*, 2 Barr. 240; *Morehead v. Eades*, 3 Bush, 121; *Drake v. Latham*, 50 Ill. 270; *Fish v. Cleland*, 33 *Id.* 238; *Banta v. Palmer*, 47 *Id.* 99; *David v. Park*, 103 Mass. 501; *Bradbury v. Bardin*, 35 Conn. 577; *Batdorf v. Albert*, 59 Pa. St. 59; *Holmes' Appeal*, 77 Pa. St. (27 P. F. Sm.) 50; *Swinn v. Bush*, 23 Mich. 99; *Beardsley v. Duntley*, 69 N. Y. 577; *Wilkin v. Barnard*, 61 *Id.* 628; *McShane v. Hazlehurst*, 50 Md. 107; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Farebrother v. Gibson*, 1 De G. & J. 602; *Cook v. Waugh*, 2 Giff. 201; *Johnson v. Smart* *Id.* 151; *Boynnton v. Hazelboom*, 14 Allen 107; *Rest v. Stow*, 2 Sand. Ch. 298; *Holbrook v. Bust*, 22 Pick. 546; *Fishback v. Miller*, 15 Nev. 428; but see *Taylor v. Guest*, 58 N. Y. 262; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Jackson v. Collins*, 39 Mich. 557; *Sims v. Eiland*, 57 Miss. 607.

² *Brown v. Leach*, 107 Mass. 364; *Clark v. Everhart*, 63 Pa. St. (13 P. F. Sm.) 347; *Winters' Appeal*, 61 *Id.* (11 *Id.*) 307; *Tindall v. Harkinson*, 19 Ga. 448; *Glasscock v. Minor*, 11 Mo. 655; *Wright v. Gully*, 28 *Id.* 475; *Hough v. Richardson*, 3 Story, 659; *Pratt v. Philbrook*, 33 Me. 17; *Homer v. Perkins*, 124 Mass. 431; *Somers v. Richards*, 46 Vt. 170; *Van Epps v. Harrison*, 5 Hill, 63; *Buschman v. Cold*, 52 Md. 202, 207; *Sledge v. Scott*, 56 Ala. 202; *Merwin v. Arbuckle*, 81 Ill. 501; *Scramm v. O'Conner*, 98 Ill. 538;

Dawson v. Graham, 48 Iowa, 378; *Stevens v. Rainwater*, 4 Mo. App. 292; *Samson v. Lord*, 13 How. 198; *Gordon v. Butler*, 105 U. S. 553; *First Nat. Bank v. Yocum*, 11 Neb. 328; *People v. Jacobs*, 32 Mich. 36; *Kennedy v. Richardson*, 70 Ind. 534; *Cagney v. Cuson*, 67 Ind. 497; *Wilcox v. Henderson*, 6 Ala. 535, 541; *State v. Phifer*, 65 N. C. 321, 326; *Uhler v. Semple*, 20 N. J. Eq. 288; *Long v. Woodman*, 58 Me. 49; *Holbrook v. Conner*, 60 Me. 578; *Medbury v. Watson*, 6 Met. 246, 259; *Vesey v. Dalton*, 3 Allen, 380; *Mooney v. Miller*, 102 Mass. 220; *Cooper v. Lovering*, 106 Mass. 79; *Yeagin v. Irwin*, 127 Mass. 217; *Poland v. Brownell*, 131 Mass. 138; *Grafenstein v. Epstein*, 23 Kans. 443.

³ *Trover v. Newcome*, 3 Meriv. 704, *per* Sir Wm. Grant; *Irving v. Thomas*, 18 Me. 418, 424, *per* Shipley, J.; *Savage v. Jackson*, 19 Ga. 305; *Halls v. Thompson*, 1 Sm. & Mar. 443.

⁴ *David v. Park*, 103 Mass. 501; *Spalding v. Hedges*, 2 Barr. 240; *Batdorf v. Albert*, 59 Pa. St. 59; *Watts v. Cummings*, 59 *Id.* 84; *Brandon v. Forest Co.*, 59 *Id.* 187; *Fish v. Cleland*, 33 Ill. 238; *Banta v. Palmer*, 47 *Id.* 99; *Brown v. Leach*, 107 Mass. 364; *Rockafellow v. Baker*, 41 Pa. St. 319; *Clark v. Everhart*, 63 Pa. St. (13 P. F. Sm.) 347; *Wright v. Gully*, 28 Ind. 475; *Glasscock v. Minor*, 11 Mo. 655; *Tindall v. Harkinson*, 19 Ga. 448; *Wilkin v. Barnard*, 61 N. Y. 628; *Morehead v. Eades*, 3 Bush, 121; *Pratt v. Philbrook*, 33 Me. 17.

which the false statements are made, and the false statements are in respect to a patent defect which will be plainly observed by anyone who has seen the subject-matter of the contract, the presumption of law becomes conclusive that he did become acquainted with the falsity of the vendor's statement, and he is not permitted to deny that he did become so informed; for he is not in that case permitted to rely upon the falsity of the statement of the other party.¹ But in the general cases of misrepresentation of a material fact, it is unquestionable that the party who is intended to be influenced is entitled to rely upon such false statement, without making any examination for himself, even though the party making the false statement advises the other party to make an examination for himself. Such a word of caution or advice cannot control or limit the liability of the party who makes the false statement, with the intention of influencing the conduct of another.² One's liability on his positive misrepresentations is not at all affected by the agreement that the sale of the thing should be made "with all its faults;" while the sale of goods "with all their faults" will prevent the claim of fraud where the buyer simply conceals the defects.³ If the vendor makes a positive misrepresentation of a fact, in the course of such a sale, he is liable for fraud.⁴

§ 219. **Damage to party deceived.**—The gist of the charge of fraud is, that the plaintiff has been deceived to his own damage by the misrepresentation of the defendant. It is not simply deception, but deception *plus* consequential damage. Hence, if the party deceived has suffered no damage, he has no cause of action against the other party.⁵

¹ *Hough v. Richardson*, 3 Story, 659; *Veasey v. Dalton*, 3 Allen, 380; *Winter's Appeal*, 61 Pa. St. (11 P. F. Sm.) 307; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Mooney v. Miller*, 102 Mass. 220; *Crooks v. Davis*, 6 Grant, (Ont.) 317; *McRae v. Vroom*, 17 Grant, (Ont.) 357; *Coates v. Bacon*, 21 Grant, (Ont.) 21; *Newell v. Horn*, 49 N. H. 422; *Turman v. Tufts*, 8 Jones & S. 284; *Sparman v. Keim*, 12 Jones & S. 163; *Long v. Warren*, 68 N. Y. 426; *Hess v. Young*, 59 Ind. 379; *Hustin v. McCloskey*, 76 Ind. 38; *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Crown v. Cuningfer*, 66 Ala. 590; *Brown v. Castides*, 11 Cush. 348; *Prescott v. Wright*, 4 Gray, 461; *Cooper v. Lovering*, 106 Mass. 76, 79; *Dickinson v. Lee*, 106 Mass. 557; *Poland v. Brownell*, 131 Mass. 138; *Chamberlain v. Rankin*, 49 Vt. 133; *Randall v. Farnum*, 52 Vt. 539.

² *Russell v. Branham*, 8 Blackf. 277; *Prescott v. Wright*, 4 Gray, 461; *Reynell v. Sprye*, 1 De G. M. & G. 660, 709, 710, *per* Lord Cranworth.

³ *Pearce v. Blackwell*, 12 Ired. 49; *Freeman v. Baker*, 1 Ad. & E. 508; *Hanson v. Edgerly*, 29 N. H. 343; *Ward v. Hobbs*, L. R. 2 Q. B. D. 331; *s. c.*, L. R. 3 Q. B. D. 150; *Gossler v. Eagle Sugar Ref.*, 130 Mass. 331; *Smith v. Andrews*, 3 Ired. 6; *Henshaw v. Robins*, 9 Met. 83, 90; *Taylor v. Fleet*, 4 Barb. 102; *Whitney v. Boardman*, 118 Mass. 247, 248.

⁴ *Schneider v. Heath*, 3 Camp. 506; *Early v. Garrett*, 9 B. & C. 928; *Harris v. Kemble*, 1 Sim. 111, 120; 5 Bligh, N. s., 730.

⁵ *Weaver v. Wallace*, 9 N. J. L. 251; *Sledge v. Scott*, 56 Ala. 206; *Neidefer v. Chastain*, 71 Ind. 363; *Morrison v. Lods*, 39 Cal. 385; *Phipps v. Buckman*, 30 Pa. St. 402; *Castlemann v. Griffin*, 13 Wis. 535; *Fisher v. Mellen*, 103 Mass. 505; *Page v. Bent*, 2 Met. 374; *Stiles v. White*, 11 Met. 356; *Milliken v. Thorndike*, 103 Mass. 385; *Hanson v. Edgerly*, 29 N. H. 357; *Hart v. Tallmadge*, 2 Day, (Conn.) 382; *Young v. Hall*, 4 Ga. 95; *Bartlett v. Blaine*, 83 Ill. 25; *Hughes v. Sloan*, 2 Ark. 146; *McMaster v. Geddes*, 19 Up. Can. Q. B. 216; *Hagee v. Crossman*, 31 Ind. 223; *Weatherford v. Fishback*, 3 Scam. (Ill.) 170; *White v. Wheaton*, 3 Sedden, 352; *Newell v. Horn*, 45 N. H. 422; *Randall v. Hazleton*, 12 Allen, 414; *Medbury v. Watson*, 6 Met. 246; *Adams v. Paige*, 7 Pick. 542; *First Nat. Bank v. Yocum*, 14 Neb. 328; *Wiley v. Howard*, 15 Ind. 169; *Weist v. Grant*, 71 Pa. St. 95; *Fuller v. Hodgden*, 25 Me. 248; *Marr's Appeal*, 78 Pa. St. (28 P. F. Sm.) 66; *Abbey v. Dewey*, 1 Casey, 413; *Lindsey v. Lindsey*, 34 Miss. 432; *Branham v. Record*, 42 Ind. 181; *Rogers v. Higgins*, 57 Ill. 244; *Wells v. Millet*, 23 Wis. 64; *Bartlett v. Blaine*, 83 Ill. 25; *McShane v. Hazlehurst*, 50 Md. 107; *Bennett v. Judson*, 21 N. Y. 238; *Clarke*

Thus, it is held to be no fraud to induce a debtor, by false representation, to pay his just debt.¹

§ 220. **Liability of principals, partners, and joint-owners for agent's fraudulent misrepresentations.**—The principal and agent are properly considered, in respect to the rights of third persons who have dealings with them, as one person, and it does not matter which of them commits a fraud in making the contract; the principal will at least be liable so far as to be compelled to make restitution of every thing which he has derived from and under the contract, or pay for the value of the same.² And inasmuch as the agent is the *alter ego* of the principal in relation to all that he does within the scope of his authority, it would follow logically that the principal would be responsible civilly, in an action of deceit, for all the damages which the other party has suffered from the fraud of the agent. This rule applies equally to joint-owners and partners of the property which is bought or sold, and the cases cited apply the principle generally.³ But it has been held, in several recent cases, that the action of deceit will not lie against the innocent principal for the fraud of the agent, unless after learning of the fraud he distinctly approves of and affirms the fraud.⁴ But the weight of American authority is to the effect that the principal is liable for the fraud of the agent, if committed within the agent's apparent authority, even though the fraud is not affirmed and the principal derives no benefit.⁵

v. White, 12 Pet. 178; *Wells v. Waterhouse*, 22 Me. 131; *Taylor v. Guest*, 58 N. Y. 262; *Wuesthoff v. Seymour*, 22 N. J. Eq. (7 C. E. Green) 66.

¹ *Brown v. Blunt*, 72 Me. 415, 421; *Marsh v. Cook*, 32 N. J. Eq. 262; see *Clark v. Tennant*, 5 Neb. 549; *Mo. Valley Land Co. v. Bushnell*, 11 Neb. 192; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Bartlett v. Blaine*, 83 Ill. 25.

² *Veazie v. Williams*, 8 How. 134; *Jewett v. Carter*, 132 Mass. 335; *Lamm v. Port Deposit Ass'n*, 49 Md. 233; *Chester v. Dickerson*, 52 Barb. 350; *Graves v. Spier*, 58 Barb. 349; *Presby v. Parker*, 56 N. H. 409; *Sharp v. Mayor of N. Y.*, 40 Barb. 356; *Hunter v. Hudson River Co.*, 20 Barb. 493; *Concord Bank v. Gregg*, 14 N. H. 331; *Fogg v. Griffin*, 2 Allen, 1; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Mundorff v. Wickersham*, 63 Pa. St. 87; *McClelland v. Scott*, 24 Wis. 81; *Crump v. U. S. Mining Co.*, 7 Gratt. 352, *New York, &c. R. R. Co. v. Shuyler*, 34 N. Y. 30; *Durst v. Burton*, 47 N. Y. 107.

³ *Locke v. Stearns*, 1 Met. 560; *Fitzsimmons v. Joslin*, 21 Vt. 139; *Bennett v. Judson*, 21 N. Y. 239; *Indianapolis, &c. R. R. Co. v. Tyng*, 63 N. Y. 653; *Durant v. Rogers*, 87 Ill. 511; *Elwell v. Chamberlain*, 31 N. Y. 619; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. 479; *Reynolds v. Witte*, 13 S. C. 5; *Wolfe v. Pugh*, 101 Ind. 294; *Law v. Grant*, 37 Wis. 548; *Reed v. Peterson*, 91 Ill. 297; *Craig v. Ward*, 3 Keyes, 387; *Durst v. Burton*, 2 Lans. 137; 47 N. Y. 174; *Griswold v. Haven*, 25 N. Y. 595; *Jeffrey v. Bigelow*, 13 Wend. 518; *White v. Sawyer*, 16 Gray, 586.

⁴ *Kennedy v. McKay*, 43 N. J. L. 288; *Western Bank v. Addie*, L. R. 1 H. L. C. 146; *Udell v. Atherton*, 7 H. & N. 173; see *Krumm v. Beach*, 25 Hun, 293; 86 N. Y. 311; but see *Barrick v. Eng., &c. Bank*, L. R. 2 Ex. 259; *Oakes v. Turquand*, L. R. 2 H. L. 325.

⁵ *North River Bk. v. Aymar*, 3 Hill, 262; *Farmers and Mech. Bk. v. Butchers, &c. Bk.*, 16 N. Y. 125; 14 *Id.* 623; *Griswold v. Haven*, 25 *Id.* 595; *Exchange Bk. v. Monteath*, 26 *Id.* 505; *N. Y. & N. H. R. R. v. Schuyler*, 34 *Id.* 30; *Cutting v. Marlor*, 78 *Id.* 454; *Armour v. Mich. Cent. R. R.*, 65 *Id.* 111, 121-124; but see *Mechanics Bk. v. N. Y. & N. H. R. R.*, 13 *Id.* 599; see further, in support of text, *Root v. Bancroft*, 8 Gray, 619; *Lepper v. Nuttman*, 35 Ind. 384; *Wright v. Finn*, 33 Iowa, 159; *Cummings v. Thompson*, 18 Minn. 246; *Fisher v. Boody*, 1 *Curtis C. C.* 206; *Hester v. Memphis, &c. R. R.*, 32 *Id.* 378; *Mitchell v. Mims*, 8 Tex. 6; *Henderson v. Railroad Co.*, 17 *Id.* 580; *Morton v. Scull*, 23 Ark. 289; *East Tenn. R. R. v. Gammon*, 5 Sneed, 567; *Negey v. Lindsay*, 67 Pa. St. 217; *Mendenhall v. Treadway*, 44 Ind. 131; *Boland v. Whitman*, 33 *Id.* 64; *Shawmut, &c. Co. v. Stevens*, 9 Allen, 332; *Fogg v. Griffin*, 2 *Id.* 1; *Mundorff v. Wickersham*, 63 Pa. St. 87; *Custar v. Titusville, &c. Co.*, 63 *Id.* 381; *Crossman v. Penrose Bdg. Co.*, 2 Casey, 69; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *River v. Plankroad Co.*, 30 Ala. 92; *Bowers v. Johnson*, 10 Sm. & M. 169; *Lawrence v. Hand*, 23 Miss. 103; *Titus v. Great West T. Co.*, 61 N. Y. 237; *Davis v.*

Where the principal directs an agent to make use of a representation which the principal knows to be false, but which the agent supposes to be true, the innocence of the agent will not shield the principal from responsibility for his own fraud.¹

§ 221. Remedies in general for actual fraud.—The principal remedy for fraud is the rescission of the contract. The party defrauded has a right, on discovery of the fraud, to rescind the contract and obtain relief from all liability. But the rescission must extend to the whole contract. The contract cannot be rescinded in part and affirmed in part. The rescission must be entire.² It matters not at what stage of the execution of the contract the fraud was discovered, the contract can be rescinded, provided the parties can be put *in statu quo*.³ The right must be exercised within a reasonable time after the discovery of the fraud. If there is any unreasonable delay the right of rescission is lost.⁴ But no delay, however long, will affect the

Bemis, 40 *Id.* 455 n; Indianapolis, &c. R. R. v. Tyng, 63 *Id.* 653; Hathaway v. Johnson, 55 *Id.* 93; Durst v. Burton, 2 Lans. 137; Graves v. Spier, 58 Barb. 349; Young v. Hughes, 32 N. J. Eq. 372; Van Wyck v. Watters, 81 N. Y. 352; Fishkill Sav. Inst. v. Nat. Bk. of Fishkill, 80 *Id.* 162; Bennett v. Judson, 21 *Id.* 238; Elwell v. Chamberlain, 31 *Id.* 611; Condit v. Baldwin, 21 *Id.* 219; Bell v. Day, 32 *Id.* 165; Smith v. Tracy, 36 *Id.* 79; Estevez v. Purdy, 66 *Id.* 446; Durst v. Burton, 47 *Id.* 167; Allerton v. Allerton, 50 *Id.* 670; Veazie v. Williams, 8 How. (U. S.) 134; Fitzsimmons v. Joslin, 21 Vt. 129; Concord Bk. v. Gregg, 14 N. H. 331; Coddington v. Goddard, 16 Gray, 436; Litchfield Bk. v. Peck, 29 Conn. 384.

¹ Ludgater v. Love, 44 L. T., n. s. 694.

² Miner v. Bradley, 22 Pick. 457; Voorhees v. Earl, 2 Hill, 292; Coolidge v. Brigham, 1 Met. 550; Allen v. Webb, 24 N. H. 278; Luey v. Bundy, 9 N. H. 298; Fullage v. Reville, 3 Hun, 600; Higham v. Harris, 108 Ind. 246; Preston v. Travelers Ins. Co., 58 N. H. 76; Potter v. Titcomb, 22 Me. 300; Farmers Bk. v. Groves, 12 How. (U. S.) 51; Smith v. Brittenham, 98 Ill. 188; Coleman v. Columbia Oil Co., 51 Pa. St. 74, 77; Bruce v. Kelly, 5 Hun, 229, 232.

³ Prentiss v. Russ, 16 Me. 30; Faris v. Ware, 60 Me. 482; Downer v. Smith, 32 Vt. 1; Matteson v. Holt, 45 Vt. 336; Butler v. Northumberland, 50 N. H. 39; Coolidge v. Brigham, 1 Met. 547; Kimball v. Cunningham, 4 Mass. 502; Waters Pat. Heater Co. v. Smith, 120 Mass. 444; Voorhees v. Earl, 2 Hill, 292; Farrell v. Corbett, 4 Hun, 128; Van Liew v. Johnson, 4 Hun, 415; Dows v. Griswold, 4 Hun, 550; Baker v. Lever, 67 N. Y. 304; Croyle v. Moses, 90 Pa. St. 250; Jemison v. Woodruff, 34 Ala. 143; Merritt v. Robinson, 35 Ark. 483; Foulch v. Eckert, 61 Ill. 448; Warren v. Tyler, 81 Ill. 15; Shaw v. Barkart, 17 Ind. 183; Blen v. Bear River, &c. Co., 20 Cal. 602; Cruess v. Fessler, 39 Cal. 336; Morrison v. Logh, 39 Cal. 381; Collins v. Townsend, 58 Cal. 608; Bank v. Woodland v. Hiatt, 58 Cal. 235; Daggett v. Emerson, 3 Story, 700;

Pence v. Langdon, 99 U. S. 578; Cushma v. Forest, 4 Cranch, 37; Chengivo v. Jones, 3 Wash. C. C. 359; Gifford v. Carville, 29 Cal. 589; First Nat. Bank v. Yocum, 11 Neb. 328; Gutling v. Newell, 9 Ind. 572; Hall v. Fullerton, 69 Ill. 448; Buchanan v. Harvey, 12 Ill. 536; Pierce v. Wilson, 34 Ala. 596; Hooper v. Strasburger, 37 Md. 390; Lowry v. McLane, 3 Grant, (Pa.) 333; Anthony v. Day, 52 How. Pr. 35; Wheaton v. Baker, 14 Barb. 494; Kinner v. Kiernan, 2 Lans. 492; Perkins v. Bailey, 99 Mass. 61; King v. Eagle Mills, 10 Allen, 551; Manahan v. Noyes, 52 N. H. 232; Getchell v. Chase, 37 N. H. 110; Gates v. Bliss, 43 Vt. 299; Poor v. Woodburn, 25 Vt. 234; Garland v. Spencer, 46 Me. 528.

⁴ Boughton v. Standish, 48 Vt. 594; Weeks v. Robie, 42 N. H. 316; Ross v. Titterton, 6 Hun, 280; Davis v. Betz, 66 Ala. 206; Hall v. Tullerton, 69 Ill. 443; Rose v. Hurley, 39 Ind. 77; Collins v. Townsend, 58 Cal. 608; Pence v. Langdon, 99 U. S. 578; Bell v. Keepers, 39 Kans. 105; St. John v. Kendrickson, 81 Ill. 350; Gatlign v. Newell, 9 Ind. 572; Parmlee v. Adolph, 28 Ohio St. 10; Hammond v. Pennock, 61 N. Y. 145; Willoughby v. Moulton, 47 N. H. 205; Whitcomb v. Denio, 52 Vt. 382; Matteson v. Holt, 45 Vt. 336; see Kane v. Bloodgood, 7 Johns. Ch. 90; Lansing v. Starr, 2 *Id.* 150; Briggs v. Rice, 130 Mass. 50; Hathaway v. Noble, 55 N. H. 508; Lyme v. Allen, 51 *Id.* 242; Willoughby v. Moulton, 47 *Id.* 205, 208; Weeks v. Robie, 42 *Id.* 316; Badger v. Badger, 2 Wall. 87, 94; Allore v. Jewell, 94 U. S. 506, 512; Sullivan v. Portland R. R., 94 *Id.* 806, 811; Maxwell v. Kennedy, 8 How. (U. S.) 210; Campau v. Van Dyke, 15 Mich. 371; Wilbur v. Flood, 16 *Id.* 40; Weaver v. Carpenter, 42 Iowa, 343; Akery v. Vilas, 21 Wis. 88; Jones v. Smith, 33 Miss. 315; Shaver v. Radley, 4 Johns. Ch. 310; Phillips v. Belden, 2 Edw. Ch. 1; Ward v. Van Bokelen, 1 Paige, 100; Bank of U. S. v. Biddle, 2 Pars. Eq. 31; McDowell v. Goldsmith, 2 Md. Ch. 370; Anderson v. Burwell, 6 Gratt. 406; Field v. Wilson, 6 B. Mon. 479.

defrauded party's right to his remedy, as long as he remains ignorant of the fraud.¹ There must also be a prompt and complete restoration of everything of value which the party defrauded had received under the contract.² If it is of any value to the other party, it must be returned.³ But things which have no value to anyone need not be returned; as for example, worthless securities or counterfeit money.⁴ Nor is a return required of what was necessarily destroyed in the attempt to discover the fraud, as in chemical and other tests of the quality of the goods.⁵

If the parties cannot be restored to the condition in which they were before the execution of the contract, in consequence of the destruction or change in the condition of the property which formed the consideration of the contract, the party defrauded cannot rescind the contract.⁶

It is also necessary that the defrauded parties should do nothing after the discovery of the fraud which would in any way admit the existence and validity of the contract. Such an admission, if clear, will operate as a bar to his right of rescission for fraud.⁷ For example,

¹ *Sherwood v. Sutton*, 5 Mason, 143; *Dogget v. Emerson*, 3 Story, 700; *Michoud v. Girod*, 4 How. (U. S.) 503, 561; *Cota v. Jones*, 8 Pac. Law J., 1044; *Dodge v. Essex Ins. Co.*, 12 Gray, 65; *Phalen v. Clark*, 19 Conn. 421; *Stocks v. Van Leonard*, 8 Ga. 511; *Martin v. Martin*, 35 Ala. 560; *Smith v. Fly*, 24 Tex. 345; *Gibson v. Fifer*, 21 *Id.* 260; *Relf v. Eberly*, 23 Iowa, 467; *Cock v. Van Etten*, 12 Minn. 522; *Meador v. Norton*, 11 Wall. 442; *Township of Boomer v. French*, 40 Iowa, 601; *Humphreys v. Mattoon*, 43 *Id.* 556; *Reed v. Minell*, 30 Ala. 61; *Wilson v. Ivy*, 32 Miss. 233; *Buckner v. Calcote*, 28 *Id.* 432; *Hudson v. Wheeler*, 34 Tex. 256; *Munson v. Hallowell*, 26 *Id.* 475; *Peck v. Bullard*, 2 *Humph.* 41.

² *Norton v. Young*, 3 Greenl. 30; *Sumner v. Parker*, 36 N. H. 449; *Willoughby v. Moulton*, 47 N. H. 205; *Perley v. Balch*, 23 Pick. 286; *Jennings v. Gage*, 13 Ill. 610; *Coolidge v. Brigham*, 1 Met. 550; *Miner v. Bradley*, 22 Pick. 457; *Weeks v. Robie*, 42 N. H. 316; *Cushman v. Marshall*, 21 Me. 122; *Thompson v. Peck*, 115 Ind. 512; *Burton v. Stewart*, 3 Wend. 239; *Collins v. Townsend*, 58 Cal. 615; *Kimball v. Cunningham*, 4 Mass. 502; *Getchell v. Chase*, 37 N. H. 110; *Sanborn v. Batchelder*, 51 N. H. 434; *Gifford v. Carville*, 29 Cal. 592; *Schiffer v. Dietz*, 83 N. Y. 300; *Monahan v. Noyes*, 52 N. H. 232; *Bell v. Keepers*, 39 Kans. 105; *Downer v. Smith*, 32 Vt. 7; *Jemison v. Woodruff*, 34 Ala. 143; *Strong v. Strong*, 102 N. Y. 69; *Shepherd v. Temple*, 3 N. H. 457; *Bacon v. Brown*, 4 Bibb, 91; *Christy v. Cummins*, 2 McLean, 386; *Carter v. Walker*, 2 Rich. 40; *Conner v. Henderson*, 5 Mass. 314; *Shaw v. Barnhart*, 17 Ind. 183; *Haase v. Mitchell*, 58 Ind. 213; *Smith v. Bitterham*, 98 Ill. 188; *Morrison v. Lods*, 39 Cal. 381; *Fitz v. Bynum*, 55 Cal. 459; *Merritt v. Robinson*, 35 Ark. 463; *Rose v. Hurley*, 39 Ind. 77; *Dowes v. Griswold*, 4 Hun, 556; *Farrell v. Corbett*, 4

Hun, 128; *Van Lieuw v. Johnson*, 4 Hun, 415.

³ *Perley v. Balch*, 23 Pick. 283; *Thayer v. Turner*, 8 Met. 552.

⁴ *Brewster v. Burnett*, 125 Mass. 68; *Pence v. Langdon*, 99 U. S. 578; *Smith v. Smith*, 30 Vt. 139; *Royce v. Watrous*, 7 Daly, 87; 73 N. Y. 597; *Hess v. Young*, 59 Ind. 379; *Dickinson v. Hall*, 14 Pick. 217; *Conner v. Henderson*, 15 Mass. 322; *Becker v. Vroman*, 13 Johns. 302; *Taft v. Wildman*, 15 Ohio, 123; *Donelson v. Young*, 1 Meigs, 155; *Shepherd v. Temple*, 3 N. H. 455; *Knapp v. Lee*, 3 Pick. 457; *Perley v. Balch*, 23 Pick. 283.

⁵ *Smith v. Love*, 64 N. C. 439; *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

⁶ *Am. Wine Co. v. Brasher*, 13 Fed. Rep. 603; *Smith v. Butterham*, 98 Ill. 188; *Weeks v. Robie*, 42 N. H. 316; *Butler v. Northumberland*, 50 N. H. 39; *Sanborn v. Batchelder*, 51 N. H. 426; *Monahan v. Noyes*, 52 N. H. 232. But it is held that this distinction or change in the condition of property will not prevent the rescission of the contract, if it is done by the defrauding party, and the defrauded party is willing to accept a partial restoration. *Hammond v. Pennock*, 61 N. Y. 145.

⁷ *Brinley v. Tibbets*, 7 Greenl. 70; *Woodcock v. Bennet*, 1 Cow. 711; *Voorhees v. De Meyer*, 2 Barb. 37; *Masson's Appeal*, 70 Pa. St. (20 P. F. Sm.) 26, 29; *Anthony v. Leftwich*, 3 Rand. 258; *McCorkle v. Brown*, 9 Sm. & Mar. 167; *Gibbs v. Champion*, 3 Ohio, 335; *Pratt v. Carroll*, 8 Cranch, 471; *McMichael v. Kilmer*, 76 N. Y. 36, 46; *Schiffer v. Dietz*, 83 *Id.* 300; *Vernol v. Vernol*, 63 *Id.* 45; *Van Liew v. Johnson*, 4 Hun, 415; *Parsons v. Hughes*, 9 Paige, 591; *Bassett v. Brown*, 105 Mass. 551; *Northrop v. Bushnell*, 38 Conn. 498; *Bobb v. Woodward*, 50 Mo. 95; *Vigers v. Pike*, 8 Cl. & Fin. 562, 630, *per Lord Cottenham*; *Whitney v. Allaire*, 4 Denio, 554.

it would be fatal to his right to rescind, where he had mingled the property with his own or offered it for sale,¹ or in any other way exercised any rights of ownership over the goods.²

Provided the existence of fraud is ultimately established by competent evidence, the right to rescind the contract will not depend upon the defrauded party's absolute knowledge of the fraud. A party may rescind a contract on suspicion of fraud, if these suspicions are subsequently verified.³

The defrauded party may, however, instead of rescinding the contract, affirm it, and then recover for the damages which he has suffered in consequence of the fraud in an action of deceit.⁴ In the case of the buyer's suit for fraud, the difference between the actual and represented value is the usual measure of damages;⁵ but he may recover other consequential damages if such has been sustained.⁶ But the party defrauded cannot employ both remedies; he has only his right of election between them.⁷

§ 222. **Equitable jurisdiction over fraud.**—It will be remembered that there are two grounds for the assumption of jurisdiction of the courts of equity over causes of action: one, where a substantive right is itself of equitable origin; and secondly, where the right is legal, but the legal remedies are inadequate for the protection of the right. This statement furnishes the answer to every inquiry in respect to equitable jurisdiction. Hence, in ascertaining in what cases equity has jurisdiction over actual fraud, it will be found that it will assert this jurisdiction, whenever the particular case of fraud is equitable and not legal, or where the remedy at law is inadequate. The court of law recognizes the right of the defrauded party to rescind the agreement or contract which he has been induced by fraud to enter into; but rescission is not so much an affirmative remedy as an act of repudiation, serving as a defense to any attempted enforcement of the fraudulent contract. The courts of law which do not have equity powers could not go further, and furnish to the defrauded party the protection of a cancellation or surrender of the written instrument which is based upon the fraud; or furnish to him the affirmative remedy of reformation of such a contract, and a subsequent enforcement of the contract as reformed and purged of the fraud. Where the interest of the defrauded party requires either of these two remedies, resort must be had to the courts of equity. Cancellation and reformation are dis-

¹ *Campbell v. Fleming*, 1 Ad. & E. 40.

² *Thurston v. Blanchard*, 22 Pick. 20; *Boorman v. Johnson*, 12 Wend. 508; *Hoadley v. House*, 32 Vt. 129; *Sands v. Taylor*, 5 Johns. 395; *Kimball v. Cunningham*, 4 Mass. 502.

³ *Peterson v. Chicago, &c. R. R. Co.*, 38 Minn. 511.

⁴ *Lindsley v. Ferguson*, 49 N. Y. 623, 625; *Livingston v. Hubbs*, 2 Johns. Ch. 512; *County of Schuylkill v. Copley*, 67 Pa. St. 386; *McHugh v. County of Schuylkill*, 67 *Id.* 391, 396.

⁵ *Durst v. Burton*, 2 Lans. 137; *Stiles v. White*, 11 Met. 356.

⁶ *Walker v. Moore*, 10 Barn. & C. 421; *Clunez v. Pezzy*, 1 Camp. 8; *Page v. Parker*, 40 N. H. 47; *Jeffrey v. Bigelow*, 13 Wend. 518; *Dimmick v. Lockwood*, 10 Wend. 142; *Fox v. McBeth*, 2 Cox, 322.

⁷ *Junkins v. Simpson*, 14 Me. 364; *Weeks v. Robie*, 42 N. H. 316.

tinctively and exclusively equitable remedies.¹ It is also a ground for equitable jurisdiction to secure the cancellation of judgments and other judicial proceedings and injunctions against the prosecution of actions and the endorsement of judgments at law, where they are based upon fraud.² It has also been held that there is concurrent jurisdiction for the purpose of recovering money which has been paid under the influence of a fraud;³ but this is not a general rule, rather an exception; for in some cases the legal remedy for the recovery of money would prove adequate.⁴ It is also a reason for the assumption of jurisdiction by a court of equity, that the interest of the party defrauded cannot be protected except by imposing a constructive trust upon the property which has been acquired by fraud.⁵ Other cases may be added which describe in general the scope and limitation of equitable jurisdiction over cases of fraud.⁶

These general statements must be taken with the understanding, that in very many of the American states, there is no separate equity

¹ *Wampler v. Wampler*, 30 Gratt. 454; *Girard Ins. Co. v. Guerard*, 3 Woods C. C. 427; *Bassett v. Brown*, 100 Mass. 355; *Suter v. Matthews*, 115 *Id.* 253; *Hubbell v. Currier*, 10 Allen, 333; *Miller v. Scammon*, 52 N. H. 609; *Woodman v. Freeman*, 25 Me. 531; *Piscataqua Ins. Co. v. Hill*, 60 *Id.* 178, 183; *Clark v. Robinson*, 58 *Id.* 133, 137; *Williams v. Mitchell*, 30 Ala. 299; *Learned v. Holmes*, 49 Miss. 290; *Boardman v. Jackson*, 119 Mass. 161; *Grand Chute v. Winegar*, 15 Wall. 373; *Insurance Co. v. Bailey*, 13 *Id.* 616; *Jones v. Bolles*, 9 *Id.* 364; *Bank of Bellows Falls v. Rutland, &c. R. R.*, 28 Vt. 470; *Crane v. Bunnell*, 10 Paige, 333; *Russell v. Clark's Ex'rs*, 7 Cranch, 69, 89; *Hardwick v. Forbes' Adm'r*, 1 Bibb, 212; *Waters v. Mattingly*, 1 *Id.* 244; *Blackwell v. Oldham*, 4 Dana, 195; *Warner v. Daniels*, 1 Wood. & M. 90, 112; *Ferson v. Sanger*, *Davies*, 252, 259; *Field v. Herrick*, 5 Ill. App. 54; *Tracy v. Colby*, 55 Cal. 67; *Moore v. Moore*, 56 Cal. 59; *Emigrant Co. v. County of Wright*, 97 U. S. 339; *Fuller v. Percival*, 126 Mass. 381; *Globe Life Ins. Co. v. Reals*, 50 How. Pr. 237; *Glastenbury v. McDonald*, 44 Vt. 450; *Willemijn v. Dunn*, 93 Ill. 511; *Smith v. Griswold*, 6 Oreg. 440; *Bruce v. Kelly*, 5 Hun, 229, 232; *Hackley v. Draper*, 60 *Id.* 88; *Remington, &c. Co. v. O'Dougherty*, 81 N. Y. 474; *Hammond v. Pennock*, 61 *Id.* 145; *Fisher v. Hersey*, 78 *Id.* 387; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Globe, &c. Ins. Co. v. Reals*, 79 N. Y. 202; *Willis v. Sweet*, 49 Wis. 505; *Free v. Buckingham*, 57 N. H. 95; *Ladd v. Rice*, 57 *Id.* 374; *Sommerville v. Donaldson*, 26 Minn. 75; *Poston v. Balch*, 69 Mo. 115; *Huxley v. King*, 40 Mich. 73; *Thompson v. Heywood*, 129 Mass. 401; *Noble v. Hines*, 72 Ind. 12; *Braker v. Kelsey*, 72 *Id.* 51; *Pfeifer v. Snyder*, 72 *Id.* 78; *U. S. Ins. Co. v. Central Nat. Bk.*, 7 Ill. App. 426; *Huff v. Ripley*, 58 Ga. 11; *Ins. Co. v. Bailey*, 13 Wall. 616, 621, 623; *Rawson v. Harger*, 48 Iowa, 269; *Moore v. Holt*, 3 Tenn. Ch. 248; *Tuttle v. Tuttle*, 41 Mich. 211; *Johnson v. Murphy*, 60

Ala. 288; *Noel v. Horton*, 50 Iowa, 687; *Dunaway v. Robertson*, 95 Ill. 419; *Compton v. Bunker Hill Bk.*, 96 *Id.* 301; *Briggs v. Johnson*, 71 Me. 235; *Lavassar v. Washburne*, 50 Wis. 200.

² *Dederer v. Voorhies*, 81 N. Y. 153; *Hunt v. Hunt*, 72 *Id.* 217; *Jordan v. Volkenning*, *Id.* 300; *Ross v. Wood*, 70 *Id.* 8; *Harbaugh v. Hohn*, 52 Ind. 243; *Harris v. Cornell*, 80 Ill. 54; *Doughty v. Doughty*, 27 N. J. Eq. (12 C. E. Green) 315; *Craft v. Thompson*, 51 N. H. 536; *Holland v. Trotter*, 22 Gratt. 136; *Babcock v. McCamant*, 53 Ill. 214; *Graham v. Roberts*, 1 Head, 56, 59; *Sayles v. Mann*, 4 Ill. App. 516; *District, &c. of Algona v. District, &c. of Lott's Creek*, 54 Iowa, 286; *Huxley v. King*, 40 Mich. 73; but see *U. S. v. Throckmorton*, 98 U. S. 61; *Kelly v. Christal*, 81 N. Y. 619; *Robinson v. Wheeler*, 51 N. H. 384; *Cairo, &c. R. R. v. Titus*, 27 N. J. Eq. 102; *Barker v. Rukeyser*, 39 Wis. 590; *Thomason v. Fannin*, 54 Ga. 361; *Grubb v. Kolb*, 55 *Id.* 630; *Cairo, &c. R. R. v. Holbrook*, 92 Ill. 297; and *Stilwell v. Carpenter*, 2 Abb. N. C. 238; *Shepard v. Akers*, 3 Tenn. Ch. 215.

³ *Getty v. Devlin*, 70 N. Y. 504; *Erie R. R. v. Varderbilt*, 5 Hun, 123; *Marlow v. Marlow*, 77 Ill. 633; *Scott v. Scott*, 33 Ga. 102, 104; *Harper v. Whitehead*, 33 *Id.* 138; *Ellis v. Kelly*, 8 Bush, 621, 631.

⁴ *Huff v. Ripley*, 58 Ga. 11; *Frue v. Loring*, 120 Mass. 507; *Ferson v. Sanger*, *Davies*, 252, 259, 261; *Woodman v. Saltonstall*, 7 Cush. 181; *Bassett v. Brown*, 100 Mass. 355; *Suter v. Matthews*, 115 *Id.* 253; *Girard Ins. Co. v. Guerard*, 3 Woods C. C. 427; *Jewett v. Bowman*, 29 N. J. Eq. 174.

⁵ *Bennett v. Austin*, 81 N. Y. 308; *Stephens v. Bd. of Education*, 79 N. Y. 183; *People v. Houghtaling*, 7 Cal. 343, 351; *Watson v. Erb*, 33 Ohio St. 35; *McVey v. McQuality*, 97 Ill. 93.

⁶ *Durant v. Davis*, 10 Heisk. 522; *Struve v. Childs* 63 Ala. 473; *Leupold v. Krause*, 95 Ill. 440; *Dickenson v. Seaver*, 44 Mich. 624; *Grubb's Appeal*, 90 Pa. St. 338; *Williamson v. Carskadenden*, 36 Ohio St. 664.

court or equity jurisdiction; and under the reformed procedure, instituted by the State of New York, and adopted by very many of the American states, all distinctions as to legal and equitable actions have been abolished; and in these states legal and equitable remedies can be obtained in the one civil action. The questions of jurisdiction under such a procedure have lost their practical importance.

CHAPTER XIII.

CONSTRUCTIVE FRAUD.

	SECTION		SECTION
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§ 226. **Definition, essential elements, and classification.**—As has already been explained in the preceding chapter, the one essential element of *actual fraud* is false statement or misrepresentation, intentionally employed for the purpose of obtaining some wrongful advantage over another. *Constructive fraud*, on the other hand, is a term employed to include all those cases of wrongful advantage obtained by one person over another, under circumstances which do not prove that the party obtaining the advantage has been guilty of any willful misrepresentation or untruth; but in consequence of a wrongful advantage obtained, a court of equity considers it inequitable, and affords relief from such undue advantage by the employment of appropriate remedies. These cases are denominated *constructive fraud*, because the particular remedies are the same as if there had been actual fraud. The cases are very numerous, and of a great variety of character, which are thus classified together under the head of constructive fraud. In the English case of *Chesterfield v. Janssen*,¹ Lord Hardwick defined constructive fraud as being divisible into three classes, viz.: *First*, that apparent from the intrinsic nature and subject of the bargain itself; *second*, that presumed from the circumstances and condition of the immediate parties to the transaction; *third*, that which is an imposition on third persons not parties to the transaction. The writers upon equity jurisprudence very generally adopt this clas-

¹ 2 Ves. Sen. 125; 1 Atk. 301; 1 Eq. Lead. Cas. 773 (4th Am. ed.).

sification and discuss the subject of constructive fraud in the way just given. The same policy will be pursued in the present instance.

§ 227. **Constructive fraud arising out of illegal contracts.—**
Equitable jurisdiction for relief in cases of illegal contracts.—
 What is and what is not an illegal contract is a question which is answered alike in law and in equity; whenever a contract is pronounced to be illegal by statute or at common law, because such contracts are against public policy or against good morals, the rule is the same in law and in equity that such a contract cannot support any action whatever, whether the action be for the enforcement of the contract or a return or recovery of property or money, which has been transferred in the execution of such a contract.¹ Where the contract has been voluntarily executed or performed, there is no exception to the rule that a court of equity will refuse to grant its aid to either of the parties for a recovery of the money paid or property delivered; and only in exceptional cases would a court of equity order the cancellation of the conveyance or transfer of such property.² Where the contract is executory in character, the court will, as a general rule, studiously refuse to execute or secure a performance of the contract.³ But a court of equity will render aid in the case of contracts still executory, for the purpose of securing a cancellation of the instrument of indebtedness or memorandum of the contract, whenever the employment of such a remedy will serve the ends of public policy, and prevent a possible enforcement of the illegal contract in consequence of such contract finding its way into the hands of a *bona fide* holder. Thus, a court will very readily decree a cancellation of negotiable instruments, which are based upon illegal considerations, for the reason just explained. The remedy of cancellation is not a recognition of any validity in the contract; it is, rather, the remedy for the prevention of the acquisition of any rights under such contract, and hence serves the purpose of providing more definitely for the avoidance of the illegal contract.⁴

¹ *Harvey v. Varney*, 98 Mass. 118; *Harrington v. Bigelow*, 11 Paige, 349; *Sweet v. Tinslar*, 52 Barb. 271; *Solinger v. Earle*, 82 N. Y. 303; *Marlatt v. Warwick*, 19 N. J. Eq. 439; *Cutler v. Tuttle*, N. J. Eq. 549, 562; *Owens v. Owens*, 23 *Id.* 60; *Roman v. Mali*, 42 Md. 513; *Jones v. Gorman*, 7 *Ired. Eq.* 21; *Logan v. Gigley*, 11 Ga. 243; *Galt v. Jackson*, 9 *Id.* 151; *Adams v. Barrett*, 5 *Id.* 404; *D'Wolf v. Pratt*, 42 Ill. 198; *Bosquet v. Dashwood*, Cas. temp. Talb. 38; *Neville v. Wilkinson*, 1 Bro. Ch. 543, 547; cited *Jac. 67*; *Smith v. White*, L. R. 1 Eq. 626; *Newby v. Sharpe*, L. R. 8 Ch. D. 39; *Sykes v. Beadon*, L. R. 11 *Id.* 170; *York v. Merritt*, 77 N. C. 413; *Shaw v. Carlisle*, 9 *Heisk.* 594; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, 375-379; *Wells v. Smith*, 13 Gray, 207.

² *Solinger v. Earle*, 82 N. Y. 393, 397, 399; *Shaw v. Carlisle*, 9 *Heisk.* 594; *York v. Merritt*, 77 N. C. 213.

³ *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, 1 B. & P. 296; *Sharp v. Taylor*, 2 Phil. 801; *Joy v. Campbell*, 1 Sch. & Lef. 328, 339; *McBlair v. Gibbes*, 17 How. (U. S.) 232, 237; *Brooks v. Martin*, 2 Wall. 70, 81; *Tracy v. Talmage*, 14 N. Y. 162. See, also, cases in preceding note.

⁴ *Batty v. Chester*, 5 Beav. 103; *W— v. B—*, 32 Beav. 574; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Lincoln v. Wright*, 4 De G. & J. 16; *Symes v. Hughes*, L. R. 9 Eq. 475, 479; *Davies v. Otty*, 35 Beav. 208. This is particularly the case where usurious loans in contracts have been settled for by the issue of promissory notes or bills of exchange. *Peters v. Mortimer*, 4 *Edw. Ch.* 279; *Cowles v. Raguett*, 14 *Ohio* 38, 55; *Thomas v. Cronise*, 16 *Id.* 54; see, also, *Chapin v. Drake*, 57 Ill. 295; *Skipwith v. Strother*, 3 *Rand.* 214; *Wynne v. Callander*, 1 *Russ.* 293, 296.

The refusal of a court of equity to interfere with its remedies, for the protection or aid of either of the parties to the illegal contract, as just set forth, is undoubtedly the general rule wherever the parties are *in pari delicto*. Where, however, they are not *in pari delicto*, and the guilt or offense of one of the parties against the law is greater than that of the other; in such cases a court of equity, taking countenance of the inequality of the responsibility of the parties for the violation of the law, will furnish to the less guilty party whatever remedy he may need of an affirmative character to recover of the other what he has paid out or has transferred to him in the performance of the contract. There are two distinct classes of cases in which equity will furnish this extraordinary aid, on the ground of an existing inequality of guilt of the parties to the contract: *First*, where the inequality is found in the nature of the contract itself; as for example, in the case of usurious contracts, where the usury is very often and presumptively effected through the impecunious condition of the borrower and his want of financial credit, which forces him to borrow money at a usurious rate of interest. In such cases, a court of equity will not only refuse to enforce the usurious contract,¹ and secure the surrender and redemption of the securities which he gave for the usurious loan, where the contract still continues to be executory;² but a court of equity will also aid the borrower to recover back the usurious money paid by him in excess of the sum, which he actually borrowed and the lawful interest thereon.³ In granting this affirmative relief, a court of equity will, however, compel a borrower to do what is considered equitable, viz.: the payment of the actual amount of the debt and legal interest; and in the absence of statutes varying the rights of the parties in the case of usurious contracts, this affirmative equitable remedy can only be obtained by the borrower, when he accompanies his prayer for relief with the offer to pay the actual debt contracted and lawful interest. The failure to make such an offer is a ground for refusing relief.⁴ Other cases of inequality of guilt of parties to illegal contracts, in which affirmative remedies are employed by courts of equity in behalf of the less guilty, are found in the note below.⁵

¹ *Spain v. Hamilton*, 1 Wall. 604; *O'Neil v. Cleveland*, 30 N. J. Eq. 273; *Powers v. Chaplain*, 30 N. J. Eq. 17; *Mason v. Gardiner*, 4 Bro. Ch. 436; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Hart v. Goldsmith*, 1 Allen, 145; *Smith v. Robinson*, 10 *Id.* 130; *Union Bk. v. Bell*, 14 Ohio St. 200; *Sporrer v. Eifer*, 1 Heisk. 633, 636; *Kukner v. Butler*, 11 Iowa, 419.

² *Peters v. Mortimer*, 4 Edw. Ch. 279.

³ *Waller v. Dalt*, 1 Ch. Cas. 276; 1 Dick. 8; *Barny v. Beak*, 2 *Id.* 136; *Baker v. Vansommer*, 1 Bro. Ch. 149; *Bosanquett v. Dashwood*, Cas. temp. Talb. 38, 41; *Rawden v. Shadwell*, Amb. 269; *Fanning v. Dunham*, 5 Johns. Ch. 122, 142, 143, 144; *Davis v. Demming*, 12 W. Va. 246; *Morrison v. Miller*, 46 Iowa, 84; *Gantt v. Grindall*, 49 Md. 310.

⁴ *Corby v. Bean*, 44 Mo. 379; *Bissell v. Kel-*

logg, 60 Barb. 617; and see *Cooper v. Tappen*, 4 Wis. 376; *Whitehead v. Peck*, 1 Kelly, 140; *Noble v. Walker*, 32 Ala. 456; *Ruddell v. Ambler*, 18 Ark. 369; *Sporrer v. Eifer*, 1 Heisk. 633, 636; *Alden v. Diossy*, 16 Hun, 311; *Purnell v. Vaughn*, 82 N. C. 134; *Campbell v. Murray*, 62 Ga. 86; *Pickett v. Merch. Nat. Bk.*, 32 Ark. 346; *Morrison v. Miller*, 46 Iowa, 84; *Mason v. Gardiner*, 4 Bro. Ch. 436; *Fanning v. Dunham*, 5 Johns. Ch. 122, 142, 143, 144; *Rogers v. Rathbun*, 1 *Id.* 367; *Williams v. Fitzhugh*, 37 N. Y. 444; *Ballinger v. Edwards*, 4 *Ired. Eq.* 449; *Ware v. Thompson*, 2 Beasley, 66.

⁵ *White v. Franklin Bk.*, 22 Pick. 181, 186; *Lowell v. Boston, &c. R. R.*, 23 *Id.* 24, 32; *Bellamy v. Bellamy*, 6 Flor. 62, 103; *Poston v. Balch*, 69 Mo. 115; *Tracy v. Talmage*, 14 N. Y. 162, 167, *per Selden, J.*; 210, *per Comstock, J.*;

In the second class of cases, the contract does not essentially and necessarily involve the element of inequality of guilt; but such inequality is shown to exist in the particular transaction in consequence of the influence of collateral and incidental circumstances which attend the transaction and affect the relations of the parties. Such circumstances are shown by the various forms of undue influence or imposition.¹

§ 228. **Constructive fraud in the case of sales for an unlawful purpose.**—Where a thing may be put to a lawful, as well as to an unlawful use, it is only illegal to buy or sell the goods for the unlawful purpose. The seller had a right to sell, and the buyer the right to buy them, if they are not intended to be put to the unlawful use. But if they are bought for the purpose of violating the law in the use or further sale of them, the contract of sale is clearly illegal, so far as the buyer is concerned; and he would be denied all right of action on the contract, should the seller refuse to execute the sale.² But the contract may be binding on the buyer, if the goods could have been put to a lawful use, and the seller could not be considered, under the circumstances of the particular case, as a *particeps criminis*. It is very clear that the seller cannot recover on the contract of sale, if he, in any way, participated in the unlawful act of the buyer, by packing and marking the goods in such a way as to enable the buyer more successfully to put the goods to an unlawful use. For example, where the vendor of intoxicating liquors, in a sale of them to one who lives in a state where such sale is illegal, and who intends to sell them in the latter state in violation of the law, disguises by packing and marking the character of the goods so that the buyer can the better succeed in selling them without detection, the sale is illegal, and the vendor cannot recover the price.³ And the same conclusion was reached, when American sardines were put up in boxes with French labels, in order to enable the retail dealer to sell them as French sardines.⁴ The slightest aid or participation in the unlawful use of the goods by the buyer will incriminate the seller.⁵ And some of the authorities hold that the sale will be illegal as to the seller, if it is made by him “with the express purpose,” or “with the intent,”

Curtis v. Leavitt, 15 N. Y. 9; Osborne v. Williams, 18 Ves. 379; W— v. B—, 32 Beav. 574; Prescott v. Norris, 32 N. H. 101.

¹ Solinger v. Earle, 82 N. Y. 393, 397, 399; Phalen v. Clark, 19 Conn. 421; Pinckston v. Brown, 3 Jones Eq. 494; see Erie R. Co. v. Vanderbilt, 5 Hun, 123; Davies v. Otty, 35 Beav. 208; Smith v. Bromley, 2 Dougl. 696; Browning v. Morris, Cowp. 790; Smith v. Cuff, 6 M. & S. 160; Atkinson v. Denby, 7 H. & N. 934; Bosanquett v. Dashwood, Cas. temp. Talb. 38, 40, 41; Bayley v. Williams, 4 Giff. 638.

² Schouler's Personal Prop., §617; see Pringle v. Corporation of Napanee, 43 Up. Can. Q. B. 285; Cowan v. Melbourne, L. R. 2 Ex. 230.

³ Shiff v. Johnson, 57 N. H. 475; Fisher v.

Lord, 63 N. H. 514; Hull v. Ruggles, 56 N. Y. 425; Feineman v. Sachs, 33 Kans. 261; Hill v. Speer, 50 N. H. 253; Holman v. Johnson, Cowp. 348.

⁴ Materne v. Horwitz, 18 Jones & Sp. 41; s. c., 101 N. Y. 469; see Honneger v. Wettstein, 15 J. & S. 125.

⁵ Hubbell v. Flint, 13 Gray, 277; Gaylord v. Soragen, 32 Vt. 110; McIntire v. Parks, 3 Met. 207; Smith v. Godfrey, 28 N. H. 379; Aiken v. Blaisdell, 41 Vt. 656; Arnot v. Pittston Coal Co., 68 N. Y. 558; Banchor v. Mansell, 47 Me. 58; Orcutt v. Nelson, 67 Mass. 536; Tracy v. Talmage, 14 N. Y. 162; President, &c. of Merchants' Bank v. Spaulding, 12 Barb. 302; Kottwitz v. Alexander, 11 Cush. 222.

to enable the vendee to sell or use them in violation of the law, although the seller does not aid the buyer in his violation of the law, except by furnishing him with goods.¹ But the purpose or intent to enable the buyer to violate the law cannot be established except by the fact that the goods sold cannot be reasonably used for any other but an unlawful purpose, as where one manufactures and sells furniture which is suitable only for use in a bar-room or gambling house;² or where he actively aids the buyer in the accomplishment of the unlawful purpose. In the absence of such facts from the case, it is difficult to understand how the seller's purpose or intent to assist the buyer in his violation of the law can be established. This would certainly operate against the presumption to which the seller is entitled, that he intended to sell the goods for the lawful purpose, and not for the unlawful purpose.

There is also a tendency on the part of some of the courts to hold that if the seller sells when he knows that the buyer intends to commit some felony or heinous crime with it, as in the purchase of poisonous drugs for the purpose of killing someone with it,³ or the purchase of horses to be used in the service of rebels against the government,⁴ and the like, he cannot recover the price.⁵ But, notwithstanding these apparent and actual exceptions, the general rule is accepted throughout the United States that mere knowledge of the seller, that the buyer intends to put the goods to an unlawful use, will not make the sale illegal, and consequently prevent the recovery of the price of the goods. The sale will be illegal, as to the buyer, but legal as to the seller.⁶

§ 229. Constructive fraud arising out of inadequacy of consideration.—It is a well-known rule of the law of contracts, that a simple inadequacy of consideration, as long as the consideration remains substantial, will not invalidate the contract either in law or in equity. It is a common law rule, as well as a rule in equity, that a nominal consideration is not sufficient to support an executory con-

¹ *White v. Buss*, 3 Cush. 448; *Galligan v. Fan-nan*, 7 Allen, 255; *Buckman v. Bryan*, 3 Denio, 340; *Webster v. Munger*, 8 Gray, 584; *Davis v. Brownson*, 6 Iowa, 410; *Distilling Co. v. Nutt*, 34 Kans. 724; *Territt v. Bartlett*, 21 Vt. 184; *McConike v. McMann*, 27 Vt. 95.

² See *Tatum v. Kelly*, 25 Ark. 201, for gen-eral discussion of the question.

³ *Langston v. Hughes*, 1 Maule & S. 593.

⁴ *Martin v. McMillan*, 65 N. C. 199; *Hanauer v. Doane*, 12 Wall. 342, 347; see *McGavock v. Puryear*, 6 Coldw. 34.

⁵ *Pearce v. Brooks*, L. R. 1 Ex. 212.

⁶ *Bishop v. Honey*, 34 Tex. 245; *Cheney v. Duke*, 10 G. & J. 11; *Green v. Collins*, 3 Cliff. 494; *McIntire v. Parks*, 3 Met. 207; *Smith v. Godfrey*, 28 N. H. 379; *Wallace v. Lark*, 12 S. C. 578; *Tracy v. Talmage*, 14 N. Y. 162; *Tuttle v. Holland*, 43 Vt. 542; *Webber v. Donnelly*, 33 Mich. 469; *McKinney v. Andrews*, 41 Tex. 363;

Curran v. Downs, 3 Mo. App. 468; *Hedges v. Wallace*, 2 Bush, 442; *Bicknelly v. Sheets*, 24 Ind. 1; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Tedder v. Odom*, 2 Heisk. 68; 4 Heisk. 668; *Michael v. Bacon*, 49 Mo. 474; *Hill v. Spear*, 50 N. H. 253; *McGavock v. Puryear*, 6 Coldw. 34; *Sortwell v. Hughes*, 1 Curtis, 245; *Kreiss v. Seligman*, 8 Barb. 439; *Mahood v. Tealza*, 26 La. Ann. 108; *Hubbard v. Moore*, 24 La. Ann. 591; *Feineman v. Sacks*, 33 Kans. 651; *Holman v. Johnson*, 1 Cowp. 341; *Gaylord v. Soragen*, 32 Vt. 110; but see *Territt v. Bartlett*, 21 Vt. 184; *Roquemore v. Alloway*, 33 Tex. 461; *Milner v. Patton*, 49 Ala. 423; *State v. Blakeman*, 49 Mo. 604; *Alexander v. Lewis*, 47 Tex. 481; *Railey v. Gay*, 20 La. Ann. 158; *McMurtry v. Ramsey*, 25 Ark. 238, 349, 376; *Lewis v. Latham*, 74 N. C. 283; *Steele v. Curle*, 4 Dana, 385; *McConihe v. McManny*, 27 Vt. 95.

tract; but where the consideration is substantial, the inadequacy is not any ground for invalidating the contract, at least in actions at law.¹ All of the earlier cases showed a manifest disposition to hold, that mere inadequacy of consideration would be a justifiable ground for refusing the decree for specific performance of a contract, on the ground that it was an inequitable contract, although such a defense would fail in a request for other remedies in equity.² But these earlier cases have since been repudiated by the courts of equity; and mere inadequacy of consideration is now, in equity as in law, no ground for defense to an existing cause of action, whether the remedy be affirmative or negative.³

But while the mere inadequacy of the consideration is never in itself a ground for avoiding the contract, where that circumstance is not accompanied by other circumstances co-operating to arouse suspicion of a fraud or imposition; yet where such co-operating circumstances are present in the transaction, or where the price paid for the goods or other property is so grossly inadequate that one involuntarily suspects fraudulent imposition as the sole explanation of the compliance with the contract by the party imposed upon; in such cases, a court of equity will cancel the contract, and place the parties *in statu quo*, whether the contracts have been executed or are still executory.* It hardly needs to be stated that, whenever the inadequacy of consideration is sufficient to secure the cancellation of a contract, it will be a good defense in an action for specific performance.⁵

¹ Cummings' Appeal, 67 Pa. St. 404; Shepherd v. Bevin, 9 Gill, 32; Mayo v. Carrington, 19 Gratt. 74; Cribbins v. Markwood, 13 Id. 495; Butler v. Haskell, 4 Desau. 651; Juzan v. Toulmin, 9 Ala. 662; Delsfeld v. Anderson, 7 Sm. & Mar. 630; Steele v. Worthington, 2 Ohio, 182; Weld v. Rees, 48 Ill. 428; Scovill v. Barney, 4 Oreg. 288; Osgood v. Franklin, 2 Johns. Ch. 1, 23; Seymour v. Delancy, 3 Cow. 445; Worth v. Case, 42 N. Y. 362; Shaddle v. Disborough, 30 N. J. Eq. 370; Ready v. Noakes, 29 Id. 497; Wintermute v. Snyder, 2 Green Ch. 489; Weber v. Weitling, 18 N. J. Eq. 441; Harris v. Tyson, 12 Harris, 347, 360; Davidson v. Little, 10 Id. 245, 247; Eyre v. Potter, 15 Id. 42; Barribeau v. Brant, 17 Id. 43; Slater v. Maxwell, 6 Wall. 268, 273; Warner v. Daniels, 1 Wood. & M. 90, 110; Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Id. 62; Bedel v. Loomis, 11 N. H. 74; Lee v. Kirby, 104 Mass. 420, 428; Park v. Johnson, 4 Allen, 259; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Merediths v. Saunders, 2 Dow. 514; Murray v. Palmer, 2 Sch. & Lef. 474, 488; Erwin v. Farham, 12 How. (U. S.) 197.

² Chan. Kent's views, S. C., 3 Cow. 445; see, also, Clitherall v. Ogilvie, 1 Desau. 257; Gasque v. Small, 2 Strobh. Eq. 72; Clement v. Reid, 9 S. & Mar. 535; Tilly v. Peers, cited 10 Ves. 301, *per* Ch. B. Eyre; Day v. Newman, 2 Cox, 77, and cited 10 Ves. 300, *per* Lord Alvanley.

³ Curlin v. Hendricks, 35 Tex. 225; Harrison v. Town, 17 Mo. 237; Cathcart v. Robinson, 5 Pet. 263; Scovill v. Barney, 4 Oreg. 288; Ready

v. Noakes, 29 Id. 497; Rodman v. Zilley, Saxton, 320; Lee v. Kirby, 104 Mass. 420; Western R. R. v. Babcock, 6 Met. 346; Westervelt v. Matheson, 1 Hoff. Ch. 37; Viele v. Troy & B. R. R., 21 Barb. 381; Black v. Cord, 2 Harr. & G. 100; White v. Thompson, 1 Dev. & Bat. Eq. 493; Bower v. Cooper, 2 Hare, 408; Borell v. Dann, 2 Id. 440; Seymour v. Delancy, 3 Cow. 445; Hale v. Wilkinson, 21 Gratt. 75; Booten v. Scheffer, 21 Id. 474; Shaddle v. Disborough, 30 N. J. Eq. 370

⁴ Morris v. Philliber, 30 Mo. 145; Mitchell v. Jones, 50 Id. 438; Kelly v. McGuire, 15 Ark. 555; Deadrick v. Watkins, 8 Humph. 520; Coffee v. Ruffin, 4 Coldw. 487; Tally v. Smith, 1 Id. 290; McCormick v. Malin, 5 Blackf. 509; Knobb v. Lindsay, 5 Ohio, 468; Macoupin Co. v. People, 58 Ill. 191; Madison Co. v. People, 58 Id. 456; Case v. Case, 26 Mich. 484; Byers v. Surget, 19 How. (U. S.) 303; Eyre v. Potter, 15 Id. 42, 60; Veazie v. Williams, 8 Id. 134; Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Vt. 62; Osgood v. Franklin, 2 Johns. Ch. 1, 23; 14 Johns. 527; Dunn v. Chambers, 4 Barb. 376; Worth v. Case, 42 N. Y. 362; Hodgson v. Farrell, 2 McCart. 88; Gifford v. Thorn, 1 Stockt. Ch. 702; Davidson v. Little, 10 Harris, 245; Hamet v. Dundass, 4 Barr, 178; Sime v. Norris, 8 Phila. 84; Green v. Thompson, 2 Ired. Eq. 365; Barnett v. Spratt, 4 Id. 171; Butler v. Haskell, 4 Desau. 651; Juzan v. Toulmin, 9 Ala. 662.

⁵ Eastman v. Plumer, 46 N. H. 464; Graham v. Pancoast, 6 Casey, 89, 97; Powers v. Mayo, 97 Mass. 180, and cases cited in preceding note.

The inadequacy must be existent when the contract was concluded: subsequent diminution in the value of the consideration, through a change of circumstances, would be no ground for avoidance of the contract.¹ But there are cases, however, particularly in the case of actions for specific performance, where the subsequently occurring failure of the value of the consideration is deemed to be a good defense to the enforcement of the contract.² A court will grant the relief on the ground of constructive fraud, whenever such charge can be inferred from the consideration of all the suspicious circumstances; and will not refuse the relief if, standing alone, any one of these suspicious circumstances is not sufficient to support the charge of constructive fraud.³

§ 230. **Constructive fraud inferred from the condition and the relation of the immediate parties to the contract.**—This division of cases of constructive fraud includes two distinct and separate classes of cases: one, in which the constructive fraud is inferred from the mental condition of one or more of the parties to the transaction; and the second includes all those cases, where constructive fraud is presumed, in consequence of the confidential relation existing between the parties. These two classes will be explained presently in succeeding paragraphs.

§ 231. **Constructive fraud arising from the mental incapacity of the party to the transaction.**—The invalidity of a contract, where one of the parties is insane or an infant, is based upon two distinct considerations: one of them being the absence of all mental ability to give the intelligent consent to the contract which is necessary to its validity; as where the party is positively insane and does not know what he is doing, or where the infant is of such a tender age that it is impossible for such child to have any conception whatever of the legal character of his act. In such cases, there is no consent of the party to the contract, no *aggregatio mentium*, and hence no contract. But there are cases, certainly of contracts by infants, where the party cannot be shown to be void of sufficient mental capability to understand the nature of the contract he is making, and yet the law conclusively pre-

¹ Mortimer v. Capper, 1 Bro. Ch. 156; Batty v. Lloyd, 1 Vern. 141; Hale v. Wilkinson, 21 Gratt. 75; Lee v. Kirby, 104 Mass. 420.

² Savile v. Savile, 1 P. Wms. 745; Willard v. Tayloe, 8 Wall. 557; Booten v. Schaffer, 21 Gratt. 474; Whitaker v. Bond, 63 N. C. 290; Hudson v. King, 2 Heisk. 560; McCarty v. Kyle, 4 Coldw. 348.

³ Summers v. Griffiths, 35 Id. 27; Longmate v. Ledger, 2 Griff. 157; Powers v. Hale, 5 Fost. (N. H.) 145; Howard v. Edgell, 17 Vt. 9; Mann v. Betterly, 21 Id. 326; Osgood v. Franklin, 2 Johns. Ch. 1, 24; Hall v. Perkins, 3 Wend. 626; Kloepping v. Seellmacher, 21 N. J. Eq. 328; Clarkson v. Hanway, 2 P. Wms. 203; Newland v. Gaines, 1 Heisk. 720; Benton v. Shreeve, 4

Ind. 66; Modisett v. Johnson, 2 Blackf. 431; McCormick v. Malin, 5 Id. 509; Fish v. Leser, 69 Ill. 394; Cathcart v. Robinson, 5 Pet. 263; Byers v. Burget, 19 How. (U. S.) 303; Harrison v. Town, 17 Mo. 237; Holmes v. Fresh, 9 Mo. 200; Cadwallader v. West, 48 Id. 483; Mitchell v. Jones, 50 Id. 438; Graham v. Pancoast, 6 Casey, 89; Henderson v. Hays, 2 Watts, 148, 151; Campbell v. Spencer, 2 Binn. 133; Todd v. Grove, 33 Md. 188; Brooke v. Berry, 2 Gill, 83; McKinney v. Pinckhard, 2 Leigh, 149; Clitherall v. Ogilvie, 1 Desau. 257; Neeley v. Anderson, 2 Strobb. Eq. 262; Gasque v. Small, Id. 72; Bunch v. Hurst, 3 Desau. 273; Maddox v. Simmons, 31 Ga. 512; Wormack v. Rogers, 9 Id. 60; Blackwilder v. Loveless, 21 Ala. 371.

sumes the contract to be voidable at the instance of the infant. In all such cases, the fundamental thought underlying the invalidation of the contract, is the possibility of such a person being imposed upon by others with more experience in life; and in order that such infant may have ample protection against the great dangers of imposition, which the courts consider them to be exposed to, all such contracts are conclusively presumed to be fraudulent and may be avoided by the infant on the ground of constructive fraud. This is the rule of law, both in law and in equity; and so well known that cases need not be cited in support of the general doctrine.

Insanity is not a fixed and stable condition of the mind: it is changeable and varied in character and extent. And in determining the question of the validity of a contract made by one who is bereft of his reason, the great and difficult question to be determined is, whether the party so afflicted was so far bereft of his mental faculties as that he could not understand the nature of the transaction or hold in his mind the circumstances involved in such transaction long enough to enable him to understand the consequence of his act. In other words, it is a question of fact whether he had sufficient mind to make a contract or not. When that question is answered in the affirmative, a court of law terminates the inquiry, and the contract is declared to be valid and binding; although the party may be shown to have been suffering from a weakness of mind, it matters not what may be the cause or origin of such mental weakness, as long as it is not so serious as to amount to idiocy or lunacy, as just defined.¹ But where this mental weakness is accompanied by inequitable circumstances; as, for example, the inadequacy of consideration; and from the consideration of all the facts of the case the presumption arises, that the party suffering from a mental weakness has been unduly imposed upon, equity will afford equitable relief on the charge of constructive fraud. The constructive fraud is drawn from the consideration of the mental weakness and the inequitable character of the transaction.² And where such mental weakness is combined with inequitable circumstances in the transaction, the

¹ *Thomas v. Sheppard*, 2 McCord Eq. 36; *Oldham v. Oldham*, 5 Jones Eq. 89; *Graham v. Little*, 3 *Id.* 152; *Long v. Long*, 9 Md. 348; *Prewett v. Coopwood*, 30 Miss. 369; *Killian v. Badgett*, 27 Ark. 166; *Darnell v. Rowland*, 30 Ind. 342; *Wray v. Wray*, 32 *Id.* 126; *Gratz v. Cohen*, 11 How. (U. S.) 1, 19; *Harding v. Handy*, 11 Wheat. 103; *Ex parte Allen*, 15 Mass. 58; *Stiner v. Stiner*, 58 Barb. 643; *Hyer v. Little*, 20 N. J. Eq. 443; *Lozear v. Shields*, 23 *Id.* 509; *Alman v. Stout*, 42 Pa. St. 114; *Dean v. Fuller*, 40 *Id.* 474; *Graham v. Pancoast*, 6 Casey, 89; *Nace v. Boyer*, *Id.* 99; *Greer v. Greer*, 9 Gratt. 330, 332; *Rippy v. Gant*, 4 Ired. Eq. 443; *Pickrell v. Morss*, 97 *Id.* 220; *Graham v. Castor*, 55 Ind. 559; *Mulloy v. Ingalls*, 4 Neb. 115; *Cowee v. Carnell*, 75 N. Y. 91, 99, 100; *Paine v. Roberts*, 82 N. C. 451; *Wellemin v. Dunn*, 93 Ill. 511; *Beverley v. Walden*, 20 Gratt. 147; *Mann v. Betterly*, 21 Vt. 326;

Howe v. Howe, 99 Mass. 88; *Pratt v. Barker*, 1 Sim. 1; 4 Russ. 507; *Prideaux v. Lonsdale*, 1 De G. J. & S. 423; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Stone v. Wilberm*, 83 Ill. 105.

² *Brady's Appeal*, 66 Pa. St. 277; *Hunt v. Moore*, 2 Barr. 105; *Highberger v. Stiffer*, 21 Md. 338; *Brogden v. Walker*, 2 Har. & J. 285; *Maddox v. Simmons*, 31 Ga. 512; *Rumph v. Abercrombie*, 12 Ala. 64; *Hill v. McLaurin*, 28 Miss. 288; *Tracey v. Sacket*, 1 Ohio St. 54; *Harding v. Handy*, 11 Wheat. 103; *Waddell v. Lanier*, 62 Ala. 347; *Allore v. Jewell*, 94 U. S. 506; *Bogie v. Bogie*, 41 Wis. 209; *Baintner v. Fults*, 15 Kans. 323; *Harris v. Wamsley*, 41 Iowa, 671; *Mead v. Coombs*, 26 N. J. Eq. 173; *Lavette v. Sage*, 29 Conn. 577; *Whelan v. Whelan*, 3 Cow. 537; *Hutchinson v. Tindall*, 2 Green's Ch. 357; *Hetrick's Appeal*, 58 Pa. St.

burden of proof is also thrown upon the party claiming the right to enforce the contract.¹ The same rule applies, in respect to cases of intoxication of a party to the contract, where such intoxication is not sufficiently serious to deprive the individual of his mental faculties or to produce a condition of insanity, but sufficient to enable others to obtain an advantage which could not have been obtained but for the influence of the liquor.² And where the other party to the transaction has been instrumental in securing or producing the intoxication, the court will very readily grant affirmative relief, if not on the ground of actual fraud, at least of constructive fraud.³

§ 232. **Duress and undue influence.**—Duress is a ground for avoiding contracts, both at law and in equity, and it may be defined to be the procurement of an act which does not flow from the free exercise of will of the party to the contract. Courts of equity will grant relief in all cases of duress, where the court of law would declare the contract void. But a court of equity will go further than a court of law, in determining under what circumstances the will-power of the party to a contract has been interfered with; and will afford relief from the enforcement of a contract whenever, from the facts of the particular case, the conclusion is reached that the party signing the contract did not do so of his own free will, but was forced to do so through the exercise over him of the superior and controlling will of another. This exercise of a controlling will over the actions of another, to the extent of depriving such other person of all voluntary action, is called undue influence, and is declared to exist whenever the circumstances show the absence of the will-power of the party acting or executing a legal instrument. The fact being established, that the act is not the voluntary act of the party to the transaction, a case of undue influence is made out, and a court of equity will grant relief for the purpose of preventing the enforcement of the contract.⁴ Undue influence must

477; *Huguenin v. Baseley*, 14 Ves. 273; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Nottidge v. Prince*, 2 Giff. 246; *Baker v. Monk*, 33 Beav. 419; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Moore v. Moore*, 56 Cal. 89; *Poston v. Balch*, 69 Mo. 115; *White v. White*, 89 Ill. 460.

¹ *Huguenin v. Baseley*, 2 Eq. Lead. Cas. 1156, 1174, 1192, 1242 (4th Am. ed.); *Bogie v. Bogie*, 41 Wis. 209; *Golpin v. Wilson*, 40 Iowa, 90; *Wartemberg v. Spiegel*, 31 Mich. 400; *Whelan v. Whelan*, 3 Cow. 537; *Brice v. Brice*, 5 Barb. 533, 549; *Highberger v. Stoffer*, 21 Md. 338; *Marshall v. Billingsly*, 7 Ind. 250; *Martin v. Martin*, 1 Heisk. 644, 653; *Allore v. Jewell*, 4 Otto, 506; *Longmate v. Ledger*, 2 Giff. 157, 164; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Shakespeare v. Markham*, 72 N. Y. 400; *Cowee v. Cornell*, 75 Id. 91, 99, 100; *Graves v. White*, 4 Baxt. (Tenn.) 38.

² *Johnson v. Phifer*, 6 Neb. 401; *Bates v. Ball*, 72 Ill. 108; *Lavette v. Sage*, 29 Conn. 577; *Maxwell v. Pittenger*, 2 Green's Ch. 156; *Selah* v.

Selah, 23 N. J. Eq. 185; *Clifton v. Davis*, 1 Pars. Eq. 81; *Fetrill v. Fetrill*, 5 Jones Eq. 61; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 231; *Harrison v. Lemon*, 3 Blackf. 51; *Dunn v. Amos*, 14 Wis. 106; *Johnson v. Medlicott*, 3 P. Wms. 131; *Cory v. Cory*, 1 Ves. Sen. 19; *Cooke v. Clayworth*, 18 Ves. 12; *Say v. Barwick*, 1 V. & B. 195; *Shackelton v. Sebree*, 86 Ill. 616; *Schramm v. O'Connor*, 98 Ill. 539.

³ *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Crane v. Conklin*, Saxton, 346; *Prentice v. Achorn*, 2 Paige, 30; *Lavette v. Sage*, 29 Conn. 577; *Callo-way v. Witherspoon*, 5 Ired. Eq. 128; *Freeman v. Dwiggin*, 2 Jones Eq. 162; *Griffith v. Fred. Co. Bk.*, 6 Gill & J. 424; *Phillips v. Moore*, 11 Mo. 600; *Pittenger v. Pittenger*, 2 Green Ch. 156; *Schramm v. O'Connor*, 98 Ill. 539; *Cooke v. Clayworth*, 18 Ves. 12; *Say v. Barwick*, 1 V. & B. 195; *Lightfoot v. Heron*, 3 Y. & C. 586; *Shaw v. Thackray*, 1 Sm. & Giff. 537; *Martin v. Pycroft*, 2 De G. M. & G. 785, 800.

⁴ *Nimmo v. Davis*, 7 Tex. 26; *Needles v. Needles*, 7 Ohio St. 432; *Lowry v. Spear*, 7 Bush,

either be shown to exist in the particular case, as an inference from the circumstances of the case; or it must be implied by law from the relations of the parties to the transaction. In regard to this implication of undue influence, a full discussion will be found in subsequent paragraphs.

Among the circumstances, from which the fact of undue influence may be inferred, is the impecunious condition of the party to the transaction; *i. e.*, whenever one person is shown to be under pecuniary obligations to the other to so serious a degree, that the financial control of the one over the other will deprive the latter of a free exercise of his judgment. Any inadequacy of consideration or inequitable advantage, taken by such a party under such circumstances, will support the charge of constructive fraud and furnish a ground for equitable relief.¹ On the same principle, the courts of law and of equity have pronounced absolutely void all agreements made by a mortgagor, contemporaneously with the execution of the mortgage, for the release of the mortgagor's equity of redemption.² And even in the case of subsequent agreements for the release of such equity of redemption, a court of equity will scrutinize such agreements very closely; and if there is any improper advantage taken of his financial embarrassment, or the transaction is in the slightest degree a hard bargain, the agreement will be annulled and the mortgagor permitted to redeem.³ The illiteracy or dense ignorance of one of the parties is also, in conjunction with the question of inadequacy of the considera-

451; *Meriweather v. Herran*, 8 B. Mon. 162; *Fitch v. Fitch*, 8 Pick. 480; *Varick v. Edwards*, 1 Hoff. Ch. 382; *Power's Appeal*, 63 Pa. St. 443; *Davidson v. Little*, 22 *Id.* 245, 252; *Mastin v. Marlow*, 65 N. C. 695; *Butler v. Haskell*, 4 Desau. 651; *Roberts v. Tunstall*, 4 Hare, 257; *Bromley v. Smith*, 26 Beav. 644; *Jenkins v. Pye*, 12 Pet. 241; *Larrabee v. Larrabee*, 34 Me. 477; *Poor v. Hazleton*, 15 N. H. 564; *Boynnton v. Hubbard*, 7 Mass. 112; *Trull v. Eastman*, 3 Met. 121; *Davis v. Marlborough*, 2 Sw. 108, 154; *Edwards v. Browne*, 2 Coll. 100; *King v. Hamlet*, 4 Sim. 223; 2 My. & K. 456; 3 Cl. & Fin. 218; *Miller v. Cook*, L. R. 10 Eq. 641; *Perfect v. Lane*, 3 De G. F. & J. 369; *Edwards v. Burt*, 2 De G. M. & G. 55; *Savery v. King*, 5 H. L. Cas. 627; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

¹ *Blackwelder v. Loveless*, 21 Ala. 371; *Neilson v. McDonald*, 6 Johns. Ch. 201; *French v. Shoemaker*, 14 Wall. 314; and see 2 Eq. Lead. Cas. 1230 (4th Am. ed.); *Johnson v. Nott*, 1 Vern. 271; *Williams v. Bayley*, L. R. 1 H. L. 200, 218; *Farmer v. Farmer*, 1 H. L. Cas. 724; *Hetrick's Appeal*, 59 Pa. St. 477.

² *Wing v. Cooper*, 37 Vt. 181; *Clark v. Henry*, 2 Cow. 324; *Henry v. Davis*, 7 Johns. Ch. 40; *Waters v. Randall*, 6 Metc. 479; *Bailey v. Bailey*, 5 Gray, 505; *Vanderhaize v. Haques*, 13 N. J. 244; *Oldenbaugh v. Bradford*, 67 Pa. St. 104; *Rankin v. Mortimore*, 7 Watts, 372; *Baxter v. Child*, 39 Me. 110; *Johnston v. Gray*, 16 Serg. & R. 361; *Murphy v. Calley*, 1 Allen, 107; *Clerk*

v. Condit, 18 N. J. Eq. 358; *Batty v. Snook*, 5 Mich. 231; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Eaton v. Whiting*, 3 Pick. 484; *Davis v. Stonestreet*, 4 Ind. 101; *Wynkoop v. Cowing*, 21 Ill. 570; *Robinson v. Farrelly*, 16 Ala. 472; *Cherry v. Bowen*, 4 Sneed, 415; *Lee v. Evans*, 8 Cal. 424; *Pierce v. Robinson*, 13 Cal. 125; *Rogan v. Walker*, 1 Wis. 527; *Plate v. Roe*, 14 Wis. 453; *Willetts v. Burgess*, 34 Ill. 494; *Seton v. Slade*, 7 Ves. 265; *Newcomb v. Bonham*, 1 Vern. 7; *Co. Lit.* 205 a. n. 96; 1 Spence Eq. Jur. 693; *Miami Ex. Co. v. U. S. Bank*, *Wright*, (Ohio) 253; *Youle v. Richards*, 1 N. J. Eq. 534; *McClurkan v. Thompson*, 69 Pa. St. 305.

³ *Russell v. Southard*, 12 How. (U. S.) 139; *Trull v. Skinner*, 17 Pick. 213; *Falls v. Conway Ins. Co.*, 7 Allen, 49; *Harrison v. Trustees*, 12 Mass. 456; *Rice v. Bird*, 4 Pick. 350; *Patterson v. Yeaton*, 47 Me. 308; *Villa v. Rodriguez*, 12 Wall. 323; *Lawrence v. Stratton*, 6 Cush. 163; *Hyndman v. Hyndman*, 19 Vt. 9; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Mason v. Grant*, 21 Me. 160; *Maxfield v. Patchen*, 29 Ill. 42; *Carpenter v. Carpenter*, 70 Ill. 457; *Sheckell v. Hopkins*, 2 Md. Ch. 89; *Marshall v. Stewart*, 17 Ohio, 356; *Wynkoop v. Cowing*, 21 Ill. 570; *Baughner v. Merryman*, 32 Md. 185; *Locke v. Palmer*, 26 Ala. 312; *Shuber v. Stanley*, 52 Ind. 46; *Waters v. Randall*, 6 Metc. 479; *Vennum v. Babcock*, 13 Iowa, 194; *Green v. Butler*, 26 Cal. 602; *Henry v. Davis*, 7 Johns. Ch. 40; *Mills v. Mills*, 26 Conn. 213; *Wright v. Bates*, 13 Vt. 341.

tion, or unfairness of the transaction, considered a just ground for the intervention of equity for setting aside and cancelling such a contract.¹

Sailors have also been considered as a class peculiarly incapable of taking care of themselves, and peculiarly liable to imposition. The fact that a contract of an inequitable character has been made with a sailor will always be a ground for the intervention of a court of equity. The cases cited in support of this doctrine are altogether from the English courts.² And while the absence of American cases may support the suspicion that the rule is otherwise in America, yet probably the real explanation is, that the necessity for equitable intervention for the protection of sailors has been removed by the stringent regulations of Congress for their protection.

Expectant heirs and reversioners are considered as being peculiarly susceptible to imposition, fraud, and undue influence; and particularly in regard to contracts made by them for the purpose of securing the cash value of such expectant interests. Courts of equity scrutinize all such agreements very closely, and will afford affirmative relief in the way of cancellation of such contract or lease, whenever it is shown, to be unfair and the result of taking an undue advantage of the mental condition and pecuniary distress and needs of the expectant heir. The courts rest the claim for relief upon different grounds: some on the ground of undue influence exercised over the expectant heir or reversioner; while in other cases, equity will consider the transaction to be a constructive fraud upon the ancestor or tenant in possession. But whatever may be the correct explanation of the principle underlying these cases, the rule is very well settled, that where an inequitable bargain is the result of the transaction, a court will avoid it by an order for cancellation of the contract.³ In some of the cases, this doctrine of relief to an impecunious expectant heir or reversioner is either rejected altogether or adopted with stricter limitations.⁴ But in all cases of contracts with expectant heirs and reversioners, where a court of equity will grant relief on the ground of undue influence or constructive fraud, it will be granted only upon the condition, that the money actually paid to such heir or reversioner shall first be refunded.⁵

¹ *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Curson v. Belworthy*, 3 H. L. Cas. 742; *Pratt v. Barker*, 1 Sim. 1; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 639; *Cooke v. Lamotte*, 15 Beav. 234; *Cowee v. Cornell*, 75 N. Y. 91, 99, 100; *Lightfoot v. Heron*, 3 Y. & C. 586; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Connely v. Fisher*, 3 Tenn. Ch. 382; *Hawkins v. Hawkins*, 50 Cal. 558; *Fisher v. Leser*, 69 Ill. 394; *Gasque v. Small*, 2 Strobb. Eq. 72; *Baker v. Monk*, 4 De G. J. & S. 388; *Clark v. Malpas*, 4 De G. F. & J. 401.

² *How v. Weldon*, 2 Ves. Sen. 516, 518; *Taylor v. Rochfort*, *Id.* 281; *Baldwin v. Rochford*, 1 Wils. 229.

³ *Fitch v. Fitch*, 8 Pick. 480; *Varick v. Ed-*

wards, 1 Hoff. Ch. 382; *Power's Appeal*, 63 Pa. St. 443; *Davidson v. Little*, 22 *Id.* 245, 252; *Mastin v. Marlow*, 65 N. C. 695; *Butler v. Haskell*, 4 Desau. 651; *Roberts v. Tunstall*, 4 Hare, 257; *Bromley v. Smith*, 26 Beav. 644; *Jenkins v. Pye*, 25 Pet. 241; *Larrabee v. Larrabee*, 34 Me. 477; *Poor v. Hazleton*, 15 N. H. 564; *Boynton v. Hubbard*, 7 Mass. 112; *Trull v. Eastman*, 3 Met. 121; *Nimmo v. Davis*, 7 Tex. 26; *Needles v. Needles*, 7 Ohio St. 432; *Lowry v. Spear*, 7 Bush. 451; *Meriweather v. Herran*, 8 B. Mon. 162.

⁴ *Mayo v. Carrington*, 19 Gratt. 74; *Cribbins v. Markwood*, 13 *Id.* 495; *Parmelee v. Cameron*, 41 N. Y. 392.

⁵ *Croft v. Graham*, 2 De G. J. & S. 155; *Boynton v. Hubbard*, 7 Mass. 112; *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Williams v. Savage Man. Co*

§ 233. **Constructive fraud implied from confidential and fiduciary relations between parties.**—In the examples of undue influence, given in the preceding paragraph, the undue influence or advantage has been obtained from the actual exercise of some superior influence which is shown to exist as a fact, and from which constructive fraud is inferred, if actual fraud is not established. In the present case, the undue influence is itself presumed to exist on account of the fiduciary and confidential relation existing between the parties affected by the transaction, and the consequent relative inequality of the parties in respect to the possession of an independent will and judgment. That is, the fiduciary relation itself furnishes to the party, in whom the confidence is reposed, an opportunity to obtain an undue advantage and influence over the other in transactions involving the repose of confidence, and producing results disadvantageous to the beneficiary, or the party reposing confidence, similar to those which follow actual fraud. In consequence of the great opportunity in such cases to practice actual fraud, the court applies to such cases the doctrine of constructive fraud, and throws upon the party confided in, the burden of proving good faith and the absence of fraud. The cases of constructive fraud arising by implication, may be divided into two classes: The first class includes all those cases in which the party confided in, in his fiduciary capacity, and while performing the duties of a fiduciary, obtains some profit or benefit, or deals with himself to his own benefit, without any knowledge of the fact being communicated to the beneficiary or party reposing confidence. The second class of cases includes all similar transactions or dealings of such fiduciary with the beneficiary and the subject-matter of their agreement or contract, with the knowledge of such beneficiary and his presumed consent. Whether the presumption of constructive fraud exists in any particular case, depends upon its falling within one or the other of these classes.

A trustee or other fiduciary is not permitted, in the performance of his confidential duties and the administration of property placed in his charge, ever to buy such property, where he is charged with its sale, or to sell his own property to himself as trustee, where he is charged with the duty of buying property for the trust estate. Such purchases and sales, when made without the consent or intervention of the beneficiary, will be voidable at the instance of such beneficiary; the trustee in such cases is charged with constructive fraud. This rule is not only applied to cases of ordinary and formal trusts,¹ but it is likewise applied to similar transactions between prin-

Md. Ch. 306; 3 *Id.* 418; but see *Small v. Johnes*, 6 Watts & S. 122; *Seylar v. Carson*, 69 Pa. St. 81; *Tyler v. Yates*, L. R. 11 Eq. 265; 6 Ch. 665.

¹*Jewett v. Miller*, 10 N. Y. 402; *Van Epps v. Van Epps*, 9 Paige, 237; *Fisk v. Sarber*, 6 Watts & S. 18; *Michoud v. Girod*, 4 How. (U. S.) 503; *Dayoue v. Fanning*, 2 Johns. Ch. 252; *Bellamy v. Bellamy*, 6 Flor. 62; *Roberts v. Moseley*, 64

Mo. 507; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, *Id.* 91; *Fox v. Mackreth*, 1 Eq. Lead. Cas. 188, 212, 237 (4th Am. ed.); *Lewis v. Hillman*, 3 H. L. Cas. 607; *Wakeman v. Dodd*, 27 N. J. Eq. 564; *McGinn v. Shaeffer*, 7 Watts, 412; *Mason v. Martin*, 4 Md. 124; *Wasson v. English*, 13 Mo. 176; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Brothers v. Brothers*, 7 Ired. Eq. 150; *McCants v.*

cipal and agent,¹ attorneys and clients,² guardians and wards.³ Where trust property is sold to and bought by the beneficiary, the sale is equally voidable, whether it be made privately or at auction.⁴ The sale is also clearly invalid whether the purchase or sale be made by

Bee, 1 McCord Eq. 383; *James v. James*, 55 Ala. 525; *Narcissa v. Wathan*, 2 B. Mon. 241; *Higgins v. Curtiss*, 32 Ill. 28; *Bush v. Sherman*, 80 *Id.* 160; *Munn v. Burgess*, 70 *Id.* 604; *Schwartz v. Wendell*, *Walker Ch.* 267; *Fulton v. Whitney*, 66 N. Y. 548; *Star Fire Ins. Co. v. Palmer*, 41 N. Y. Supr. Ct. 267; *Woodruff v. Boyden*, 3 Abb. N. C. 29; *De Caters v. Le Ray de Chaumont*, 3 Paige, 178; *Child v. Brace*, 4 *Id.* 309; *Campbell v. Johnston*, 1 Sandf. Ch. 148; *Cram v. Mitchell*, *Id.* 251; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Johnson v. Bennett*, 39 *Id.* 237; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, *Id.* 91; *Scott v. Umbarger*, 41 *Id.* 410; *Union Slate Co. v. Tilton*, 69 Me. 244; *Connolly v. Hammond*, 51 Tex. 635; *Paine v. Irwin*, 16 Hun, 390; *Michoud v. Girod*, 4 How. (U. S.) 503; *Steven v. Beall*, 22 Wall. 329; *Wormley v. Wormley*, 8 Wheat. 421; *Caldwell v. Taggart*, 4 Pet. 190; *Freeman v. Harwood*, 44 Me. 195; *Dyer v. Shurtleff*, 112 Mass. 165; *Brown v. Cowell*, 116 *Id.* 461; *Smith v. Frost*, 79 N. Y. 65.

¹ *Rogers v. Lockett*, 28 Ark. 290; *Grumley v. Webb*, 44 Mo. 444; *Baker v. Whiting*, 1 Story, 218, 241; *Caldwell v. Sigourney*, 19 Conn. 37; *Banks v. Judah*, 8 *Id.* 145; *Marshall v. Joy*, 17 Vt. 546; *Ingle v. Hartman*, 37 Iowa, 274; *Scott v. Freeland*, 7 Sm. & Mar. 409; *Rubidoex v. Parks*, 48 *Id.* 215; *Hardenbergh v. Bacon*, 33 *Id.* 356, 377; *Hunsacker v. Sturges*, 29 *Id.* 142, 145; *Armstrong v. Elliott*, 29 Mich. 485; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Barziza v. Story*, 39 Tex. 354; *Dobson v. Racey*, 8 N. Y. 216; *Bank of Orleans v. Torrey*, 7 Hill, 260; 9 Paige, 649, 662; *Bridenbacker v. Lowell*, 32 Barb. 9; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Van Epps v. Van Epps*, 9 Paige, 237; *Hughes v. Washington*, 72 Ill. 84; *Tewksbury v. Spruance*, 75 *Id.* 187; *Eldridge v. Walkers*, 60 *Id.* 230; *Jeffries v. Wiester*, 2 Sawy. 135; *Wilbur v. Lynde*, 49 Cal. 290; *Neuendorff v. World, & c. Ins. Co.*, 69 N. Y. 389; *Bain v. Brown*, 56 *Id.* 285; *Taussig v. Hart*, 49 *Id.* 301; *Bennett v. Austin*, 81 *Id.* 308; 34 Barb. 276; *Gardner v. Ogden*, 23 *Id.* 327; *Moore v. Moore*, 5 *Id.* 256; *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425; *Ely v. Hanford*, 65 Ill. 287; *Beal v. McKiernan*, 6 La. (O. S.) 407; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; s. c., 71 Am. Dec. 600; *Bischoffsheim v. Baltzer*, 20 Fed. Rep. 890; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Parker v. Vose*, 45 Me. 54; *White v. Ward*, 26 Ark. 445; *Clute v. Barron*, 2 Mich. 192; *Ames v. Port Huron, & c. Co.*, 11 Mich. 146; *Scott v. Mann*, 36 Tex. 157; *Ingle v. Hartmann*, 37 Iowa, 274; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Kerfoot v. Hyman*, 52 Ill. 512; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Remick v. Butterfield*, 31 N. H. 70; *Martin v. Moulton*, 8 N. H. 504; *Bank v. Farmers' L. & T.*

Co., 16 Wis. 609; *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433; *Stewart v. Mather*, 32 Wis. 344; *Taussig v. Hart*, 58 N. Y. 425; *Bain v. Brown*, 56 N. Y. 285; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553.

² *In re Holmes' Estate*, 3 Giff. 337, 345; *Wood v. Downes*, 18 Ves. 120; *Greenfield's Estate*, 2 Harris, 489, 506; and see *Berrien v. McLane*, 1 Hoff. Ch. 421; *Brock v. Barnes*, 40 Barb. 521; *Nesbit v. Lockman*, 34 N. Y. 167; see, also, *Brown v. Kennedy*, 4 De G. J. & S. 217; *Lady Ormond v. Hutchinson*, 13 Ves. 47; *Wells v. Middleton*, 1 Cox, 112; *Montesquieu v. Sandys*, 1 Bach. & B. 312; *Harris v. Tremehere*, 15 Ves. 40.

³ *Gallatin v. Erwin*, 1 Hopk. 48; *White v. Parker*, 8 Barb. 48; *Henrioid v. Neusbaumer*, 69 Mo. 96; *Scott v. Freeland*, 7 Sm. & Mar. 409; *Sullivan v. Blackwell*, 28 Miss. 737; *Meek v. Perry*, 36 *Id.* 190; *Wright v. Arnold*, 14 B. Mon. 513; *Hanna v. Spotts*, 5 *Id.* 362; *Blackmore v. Shelby* 8 Humph. 439; *Williams v. Powell*, 1 Ired. Eq. 460; *Love v. Lea*, 2 Ired. Eq. 627; *Waller v. Armistead* 2 Leigh, 11; and see *Smith v. Davis*, 49 Md. 470; *Walker v. Walker*, 101 Mass. 169; *Gallatin v. Cunningham*, 8 Cow. 361; *Case of Hampton*, 17 S. & R. (Pa.) 144; *Asher v. State*, 88 Ind. 215; *Bourne v. Maybin*, 3 Woods. (C. C.) 724; *Spelman v. Terry*, 74 N. Y. 448; *Lane v. Taylor*, 40 Ind. 495; *Hardy v. Citizens' Bank*, 61 N. H. 34; *Villalonga v. Hicks*, 13 S. Car. 163; *Hunter v. Lawrence*, 11 Gratt. (Va.) 111; *Burwell v. Burwell*, 78 Va. 574; *Wohlscheid v. Bergrath*, 46 Mich. 46.

⁴ *Trustees: Adams v. Swarder*, 2 De G. J. & S. 44; *Sanderson v. Walker*, 13 Ves. 601; *Jewett v. Miller*, 10 N. Y. 492; *Van Epps v. Van Epps*, 9 Paige, 237; *Fisk v. Sarber*, 6 Watts & S. 18; *Ex parte Bennett*, 10 Ves. 381, 393; *Roberts v. Moseley*, 64 Mo. 507; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, *Id.* 91; *Michoud v. Girod*, 4 How. (U. S.) 503; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Bellamy v. Bellamy*, 6 Fla. 62. *Guardians: Redd v. Jones*, 30 Gratt. 123; *Sanders v. Forgasson*, 59 Tenn. 249; *Green v. Green*, 14 N. Y. Supr. Ct. 492; *Walker v. Walker*, 101 Mass. 169; *Bland v. Lloyd*, 24 La. An. 603; but see *Doe v. Hassell*, 68 N. C. 213; *Lee v. Howell*, 69 *Id.* 200; *Small v. Small*, 74 N. Car. 16; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 439; *Wyman v. Hooper*, 2 Gray, (Mass.) 141; *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285; *Bostwick v. Atkins*, 3 N. Y. 53; *Beal v. Harmon*, 38 Mo. 435; *Brockett v. Richardson*, 61 Miss. 766; *Lefever v. Laraway*, 22 Barb. (N. Y.) 168; *Chorpenning's Appeal*, 32 Pa. St. 315; *Hoskins v. Wilson*, 4 Dev. & B. (N. Car.) 245. *Attorneys: Phillips v. Belding*, 2 Edw. Ch. 15; *Reed v. Warner*, 5 Paige, 650; *Casey v. Casey*, 14 Ill. 412; *Sypher v. McHenry*, 18 Iowa, 232; *Church v. Mar. Ins. Co.*, 1 Mason, 341, 344; *Baker v. Whit-*

such trustee, either directly or indirectly through other parties.¹ The trustee, agent, attorney, and guardian are also prohibited from making any profits out of transactions conducted by them in their fiduciary capacity, without the consent of the persons for whom they are acting. Any attempt on their part to make an unauthorized profit out of the transaction, will support the presumption of constructive fraud, and the beneficiary can compel a surrender of such ill-gotten gains.² In all of these cases, actual fraud or undue influence need not be proven as a ground for avoiding the prohibited transaction. The constructive fraud, which furnishes the justification for the avoidance of the sale, or purchase, or the recovery of the profits, is a conclusive presumption, and does not rest upon any intentional or actual fraud.³ And the right of the beneficiary, in the several cases mentioned, to avoid such sale or purchase, on the ground of constructive fraud, can only be defeated by the confirmation or acquiescence in such transaction of the beneficiary.⁴

Where transactions of this sort, resulting in benefits to the fiduciary, are entered into by him with the knowledge and consent of the beneficiary, the transaction is still not free from suspicion; for the existence

ing, 3 Sumn. 475; *Pacific R. R. v. Ketchum*, 101 U. S. 289; *Page v. Stubbs*, 39 Iowa, 537; *Barrett v. Bamber*, 9 Phila. 202; *In re Taylor Orphan Asylum*, 36 Wis. 534; *Taylor v. Boardman*, 24 Mich. 287; *Warren v. Hawkins*, 49 Mo. 137; *Banks v. Judah*, 8 Conn. 145, 146, 147; *Manning v. Hayden*, 5 Sawy. 360; *Bowers v. Virden*, 56 Miss. 595; *Baker v. Humphreys*, 101 U. S. 494; *Henry v. Raiman*, 25 Pa. St. 354; *Zeigler v. Hughes*, 55 Ill. 288; *Harper v. Perry*, 28 Iowa, 57; *Wheeler v. Willard*, 44 Vt. 640; *Case v. Carroll*, 35 N. Y. 385.

¹ *Adams v. Swarder*, 2 De G. J. & S. 44; *Grover v. Hugell*, 3 Russ. 428; *Sanderson v. Wanker*, 13 Ves. 601; *Ex parte Bennett*, 10 *Id.* 381, 393; *Campbell v. Walker*, 5 *Id.* 678.

² *Trustees: Clarke v. Devaux*, 1 S. C. 172, 184; *Smith v. Townshend*, 27 Md. 368; *Spencer & Newbold's Appeal*, 80 Pa. St. 317, 332; *Parshall's Appeal*, 65 *Id.* 224; *Wistar's Appeal*, 54 *Id.* 60; *Diller v. Brubacker*, 52 *Id.* 498; *Lloyd v. Attwood*, 3 De G. & J. 614; *Hamilton v. Wright*, 9 Cl. & Fin. 11, 123-125; *Tatum v. McLellan*, 50 Miss. 1. *Agents: Gillenwaters v. Miller*, 49 Miss. 150; *Taussig v. Hart*, 49 N. Y. 301; *Grunley v. Webb*, 44 Mo. 444; *Leake v. Sutherland*, 25 Ark. 219; *Bunker v. Miles*, 30 Me. 431; *Church v. Sterling*, 16 Conn. 388; *Reed v. Warner*, 5 Paige, 650; *Bruce v. Davenport*, 36 Barb. 349; *Gardner v. Ogden*, 22 N. Y. 327; *Myer's Appeal*, 2 Barr. 463; *Keighler v. Savage Man. Co.*, 12 Md. 383; *Canada v. North*, 14 Mo. 615; *Knabe v. Ternet*, 16 La. An. 13; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Coursin's Appeal*, 79 Pa. St. 220; *Wilson v. Wilson*, 4 Abb. App. Dec. 621; *Clark v. Anderson*, 10 Bush. (Ky.) 99; *Krutz v. Fisher*, 8 Kans. 90; *Mollett v. Days*, 57 Tenn. 431; *Kent v. Priest*, 86 Mo. 476; *Northern Pac. R. Co. v. Kindred*, 14 Fed. Rep. 77; *Leake v. Sutherland*, 25 Ark. 219; *Rhea v. Puryear*, 26 Ark. 344;

White v. Ward, 26 Ark. 445; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Whelan v. McCreary*, 64 Ala. 319; *Mason v. Bauman*, 62 Ill. 76; *Byrd v. Hughes*, 84 Ill. 174; *Ely v. Hanford*, 65 Ill. 267; *Judevine v. Hardwick*, 49 Vt. 180; *Campbell v. Penna. Life Ins. Co.*, 2 Whart. (Pa.) 53; *Bartholomew v. Leach*, 7 Watts, (Pa.) 472; *Morris' Appeal*, 71 Pa. St. 106; *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135; *Stone v. Weiser*, 24 Iowa, 434; *Smith v. Stephenson*, 45 Iowa, 645; *Bell v. Bell*, 3 W. Va. 183; *Moore v. Mandelbaum*, 8 Mich. 433; *Segar v. Edwards*, 11 Leigh, (Va.) 213; *Kerfoot v. Hyman*, 52 Ill. 512; *Barton v. Moss*, 32 Ill. 50; *Nat. Bank v. Seward*, 106 Ind. 261; *Lafferty v. Jelly*, 22 Ind. 471; *Ackenburgh v. McCool*, 36 Ind. 473; *Love v. Hoss*, 62 Ind. 255; *Dutton v. Willner*, 52 N. Y. 312; *Wilson v. Wilson*, 4 Abb. App. Dec. (N. Y.) 621; *Bain v. Brown*, 56 N. Y. 285; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Oliver v. Piatt*, 3 How. (U. S.) 333. *Attorneys: Smith v. Brotherline*, 62 Pa. St. 461; *Wheeler v. Willard*, 44 Vt. 640; *Porter v. Peckham*, 44 Cal. 204; *In re Taylor Orphan Asylum*, 36 Wis. 534; *Bowers v. Virden*, 56 Miss. 595; *Wright v. Walker*, 30 Ark. 44.

³ *Ruckman v. Bergholz*, 37 N. J. L. 437; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Scott v. Free-land*, 15 Miss. 409; s. c., 45 Am. Dec. 310; *Brothers v. Brothers*, 7 Ired. Eq. (N. Car.) 150; *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285; *Mason v. Martin*, 4 Md. 124; *Martin v. Martin*, 12 Ind. 266; *Newcomb v. Brooks*, 16 W. Va. 32.

⁴ *Adams v. Sayre*, 76 Ala. 509; *Eastern Bank v. Taylor*, 41 Ala. 93; *Bassett v. Brown*, 105 Mass. 551; *Wadsworth v. Gay*, 118 Mass. 44; *Uhlich v. Muhlike*, 61 Ill. 499; *Leach v. Fowler*, 22 Ark. 143; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375; *Marsh v. Whitmore*, 21 Wall, (U. S.) 178.

of a confidential relation between the two parties gives rise to the presumption of the existence of an undue influence of the fiduciary over the beneficiary, which is more or less difficult to overcome. The existence of this presumption makes it impossible, as long as it continues, for such transaction to be treated as valid and binding upon the beneficiary; in other words, the confidential relation and the presumption of undue influence arising therefrom forces upon the fiduciary the burden of proving that the transaction was not only made with the consent of the beneficiary, but that he himself acted in the utmost good faith and made disclosures to the beneficiary of all information that was necessary or material to the exercise of an intelligent and independent judgment in the transaction; and that he concealed nothing from such beneficiary which would disclose to him anything of the subject-matter of the transaction which he otherwise would not know of. Where the court is satisfied, from the full presentation of the facts of the particular case, that good faith and honest dealings have been scrupulously observed, and that as a fact no advantage was taken of the beneficiary, then the contract will be held good. But where any suspicion of undue advantage still lingers about the transaction, the court will avoid it at the instance of the beneficiary. The strength of this presumption of undue influence and constructive fraud, in cases of this kind, will vary according to the character of the relation existing between the two parties, and their relative inequality as to independence of judgment, and the existence of similar opportunities for the exercise of undue influence over the beneficiary. Thus, in the case of transactions of this sort between guardians and their wards, made while the confidential relation exists, the transaction is almost absolutely void on account of the comparative mental helplessness of the ward, and the ordinarily extraordinary influence which the guardian has over his ward. And in these cases, it is hardly likely that a transaction, made between such guardian and ward, would ever be considered valid and binding upon the ward, unless it was plainly to the advantage of such ward to confirm the transaction, or third parties were requested to intervene, and did so.¹ In the case of trustees and attorneys, the transactions are open to an inquiry into the fact of good or bad faith, and the strength of the presumption of constructive fraud will also vary with the personality of the individuals in the particular case.² In the case of agents, the exercise of undue

¹ *Gallatin v. Erwin*, 1 Hopk. Ch. 48; *White v. Parker*, 8 Barb. 48, *Henroid v. Neusbaumer*, 69 Mo. 96; *Scott v. Freeland*, 7 Sm. & Mar. 409, *Sullivan v. Blackwell*, 28 Miss. 737; *Meek v. Perry*, 36 *Id.* 190; *Wright v. Arnold*, 14 B. Mon. 513, *Hanna v. Spotts*, 5 *Id.* 362, *Blackwell v. Shelby*, 8 Humph. 439, *Williams v. Powell*, 1 Ired. Eq. 460, *Love v. Lea*, 2 Ired. Eq. 627; *Waller v. Armistead*, 2 Leigh, 11; and see *Smith v. Davis*, 49 Md. 470; *Walker v. Walker*, 101 Mass. 169; *Gallatin v. Cunningham*, 8

Cow. 361; *Mann v. McDonald*, 10 Humph. (Yenn.) 275.

² *Trustees*: *Spencer & Newbold's Appeal*, 80 Pa. St. 317; *Villines v. Norfleet*, 2 Dev. Eq. 167; *Bryan v. Duncan*, 11 Ga. 67; *Kennedy v. Kennedy*, 2 Ala. 571; *Richardson v. Spencer*, 18 B. Mon. 450; *Marshall v. Stephens*, 8 Humph. 159; *Sallee v. Chandler*, 26 Mo. 124; *Downes v. Grazebrook*, 3 Meriv. 200, 208; *Knight v. Majoribanks*, 2 Macn. & G. 10; *Denton v. Donner*, 23 Beav. 285, *Ayliffe v. Murray*, 2

influence over the principal is comparatively a rare occurrence, where such agent does not take the character of a trustee or guardian, or where he is not an attorney at law; and hence, in the case of ordinary agencies, it is not difficult for the agent to show good faith and a full disclosure to the principal of all information which is material to the exercise of an independent judgment in the transaction.¹

The validity of transactions made by the fiduciary in respect to the subject-matter of the trust or agency, applies not only when the single agent or trustee buys or sells to himself, but likewise where one of two agents or trustees buys from or sells to the other any part of the trust property.²

The fiduciary relation need not be a formal one or recognized by law, as involving or creating binding obligations between the parties, in order that the doctrine of constructive fraud may be applied to transactions between the two parties. If, as a matter of fact, a confidential relation exists between the two parties, it is sufficient; as, for example, where one stands *in loco parentis* to another:³ or as a guardian, although not recognized by law as such; as where one lives with a family who took care of him and performed the ordinary duties of a guardian to him.⁴

Atk. 58. *Attorneys*: Porter v. Parmly, 39 N. Y. Supr. Ct. 219; Marsh v. Whitmore, 21 Wall, 178; Jenkins v. Einstein, 3 Biss. 128; Brock v. Barnes, 40 Barb. 521; Smith v. Brotherline, 62 Pa. St. 461; Miles v. Ervin, 1 McCord Eq. 524; Brown v. Bulkley, 1 McCarter, 451; White v. Whaley, 3 Lans. 237; 40 How. Pr. 353; Mott v. Harrington, 12 Vt. 199; Merritt v. Lambert, 10 Paige, 352; 2 Denio, 607; Howell v. Ransom, 11 Paige, 538; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Haight v. Moore, 37 N. Y. Supr. Ct. 161; McMahan v. Smith, 6 Heisk. 167; Trotter v. Smith, 59 Ill. 240; Mason v. Ring, 3 Abb. App. Dec. 210; Zeigler v. Hughes, 55 Ill. 288; Payne v. Avery, 21 Mich. 524; Ryan v. Ashton, 42 Iowa, 365; Broyles v. Arnold, 11 Heisk. 484; Baker v. Humphrey, 11 Otto, 494; Polson v. Young, 37 Iowa, 196; Dunn v. Record, 63 Me. 17; Roman v. Mali, 42 Md. 513; Kislign v. Shaw, 33 Cal. 425; Yeamans v. James, 27 Kans. 195; Rogers v. Marshall, 3 McCrary, (U. S.) 76; Rogers v. Lee Mining Co., 9 Fed. Rep. 721; Lane v. Black, 21 W. Va. 617.

¹ Cleveland Ins. Co. v. Reed, 1 Biss. 180; McMahon v. McGraw, 26 Wis. 614; White v. Ward, 26 Ark. 445; Gillenwaters v. Miller, 49 Miss. 150; Weeks v. Downing, 30 Mich. 4; Uhlich v. Muhlike, 61 Ill. 499; Wilson v. Wilson, 4 Abb. App. Dec. 621; Young v. Hughes, 32 N. J. Eq. 372; Condit v. Blackwell, 22 Id. 481; Comstock v. Comstock, 57 Barb. 453; Norris v. Tayloe, 49 Ill. 17; Green v. Winter, 1 Johns. Ch. 26, 60; Brown v. Post, 1 Hun, 303; Byrd v. Hughes, 84 Ill. 174; Jeffries v. Wiester, 2 Sawy. 135; Wilbur v. Lynde, 49 Cal. 290; Ingle v. Hartman, 37 Iowa, 274; Rubidoex v. Parks, 48 Cal. 215; Walker v. Carrington, 74 Ill. 446; Young v. Hughes, 32 N.

J. Eq. 372; Lewis v. Hillman, 3 H. L. Cas. 607; Wilson v. Wilson, 4 Abb. App. Dec. 621; Farnam v. Brooks, 9 Pick. 212; Marshall v. Joy, 17 Vt. 546; Moore v. Mandlebaum, 8 Mich. 433; Fisher's Appeal, 34 Pa. St. 29; Leake v. Sutherland, 25 Ark. 219; White v. Ward, 26 Ark. 445; Grumley v. Webb, 44 Mo. 444; Gaines v. Allen, 58 Mo. 537; Provost v. Gratz, 6 Wheat. (U. S.) 481; Baker v. Whiting, 3 Sumner, (U. S.) 475; Comstock v. Ames, 1 Abb. App. Dec. (N. Y.) 411; Mott v. Harrington, 12 Vt. 199; Smith v. Townsend, 109 Mass. 500; Mills v. Mills, 26 Conn. 213; Armstrong v. Elliott, 29 Mich. 485; Lafferty v. Jelly, 23 Ind. 471; Ackenburgh v. McCool, 36 Ind. 473; Condit v. Blackwell, 22 N. J. Eq. 481; Cook v. Berlin Woolen Mill Co., 48 Wis. 433; Collins v. Case, 23 Wis. 230; Stewart v. Mather, 32 Wis. 344; Ingle v. Hartman, 37 Iowa, 274; Persch v. Quiggle, 57 Pa. St. 247; Beeson v. Beeson, 9 Pa. St. 279; Bartholomew v. Leach, 7 Watts, (Pa.) 472; Brock v. Barnes, 40 Barb. (N. Y.) 521; Brown v. Post, 1 Hun, (N. Y.) 304; Nesbitt v. Lockman, 34 N. Y. 167; Holdridge v. Gillespie, 2 Johns. Ch. (N. Y.) 30; Reed v. Warner, 5 Paige, (N. Y.) 650; Lawrence v. Maxwell, 6 Lans. (N. Y.) 469; Taussig v. Hart, 49 N. Y. 301.

² Whicheote v. Lawrence, 3 Ves. 740; Cumberland Coal Co. v. Sherman, 30 Barb. 653; Ringgold v. Ringgold, 1 Har. & G. 11.

³ Archer v. Hudson, 7 Beav. 560; Kempson v. Ashbee, L. R. 10 Ch. 15; Graham v. Little, 3 Jones Eq. (N. Car.) 152.

⁴ Revett v. Harvey, 1 S. & S. 502; Allfrey v. Allfrey, 1 Macn. & G. 87, 98; Espey v. Lake, 10 Hare, 260, 262; Beasley v. Magrath, 2 Sch. & Lef. 31; Mulhallen v. Marum, 3 Dr. & War. 317;

The suspicion of undue influence also attaches to transactions made between the parties immediately after the termination of the confidential relation. The length of time afterwards, within which the suspicion will continue, will vary according to the personal elements of the individual case; but as long as the facts of the particular case support the presumption of the continued existence of undue influence of the fiduciary over his beneficiary, so long will any transaction made between them be tainted with the charge of constructive fraud; and such ex-fiduciary must prove affirmatively that no such undue influence existed, and no advantage was taken of the former repose of confidence in him. One common ground for avoiding transactions, made after the termination of the confidential relation, is where such fiduciary enters into a transaction with the beneficiary in respect to the subject-matter of the former trust, and obtains an advantage in such transaction by concealing during the continuance of the confidential relation information then obtained concerning the property and interest of the beneficiary, and subsequently making use of such information to the disadvantage of his former beneficiary. Where that element of concealment is present, the transaction is avoided; but where good faith is shown to exist, the transaction will be valid and be enforced.¹

Parties acting in a fiduciary capacity are also prohibited from assuming duties and obligations to different parties, where such duties are antagonistic to each other and call for the advancement of antagonistic interests. For example, agents cannot act for both vendor and vendee,² except with the consent of the principals;³ with the single

Wiltman's Appeal, 28 Pa. St. 376; Hanna v. Spotts, 5 B. Mon. 362.

¹ *Agents*: Ringo v. Binns, 10 Pet. 269; Rogers v. Lockett, 23 Ark. 290; Krutz v. Fisher, 8 Kans. 90; Fisher v. Krutz, 9 Id. 501; Mahon v. McGraw, 26 Wis. 614; McGar v. Adams, 65 Ala. 106; Fountain Coal Co. v. Phelps, 95 Ind. 271; Bucher v. Bucher, 86 Ill. 377; Walker v. Carlington, 74 Ill. 446; Walker v. Derby, 5 Biss. (U. S.) 134; First Bank v. Bissell, 2 McCrary, (U. S.) 73; Bartholomew v. Leach, 7 Watts, 472; Ellsworth v. Cordrey, 63 Iowa, 675; Bowman v. Officer, 53 Iowa, 640; Franks v. Morris, 9 W. Va. 664; Barton v. Moss, 32 Ill. 50; Matthews v. Light, 32 Me. 305; Huzzard v. Trego, 35 Pa. St. 9; Curtis v. Cisna, 7 Miss. (U. S.) 260. *Guardians*: Kirby v. Taylor, 6 Johns. Ch. 242, 248; Kirby v. Turner, 1 Hopk. 309; Hawkins' Appeal, 32 Pa. St. 263, 265; Cowan's Appeal, 74 Id. 329; Mayer v. Rives, 11 Ala. 760; Meek v. Perry, 36 Miss. 190; Sherry v. Sansberry, 3 Ind. 320; Fish v. Miller, 1 Hoff. Ch. 267; *In re* Van Horne, 7 Paige, 46; Stanlee's Appeal, 8 Barr. 431; Say v. Barnes, 4 Serg. & R. 112; Waller v. Armistead, 2 Leigh, 11; Garvin v. Williams, 44 Mo. 465; Williams v. Powell, 1 Ired. Eq. 460; Womack v. Austin, 1 S. C. 421; Andrews v. Jones, 10 Ala. 400; Johnson v. Johnson, 5 Ala. 90; Richardson v. Linney, 7 B. Mon. 571; Wright v. Arnold, 14 Id. 513; Sullivan v. Blackwell, 28

Miss. 737; Tucke v. Bucholz, 43 Iowa, 415; Ranken v. Patton, 65 Mo. 378; Somes v. Skinner, 16 Mass. 348; Rapalje v. Norsworthy, 1 Sandf. Ch. 399; Gale v. Wells, 12 Barb. 84; Eberts v. Eberts, 55 Pa. St. 110; Hawkins' Appeal, 32 Id. 263; Will's Appeal, 10 Harris, 325, 332; Wickiser v. Cook, 85 Ill. 68.

² *N. Y. Cent. Ins. Co. v. Nat. Protect. Ins. Co.*, 14 N. Y. 85; *Greenwood v. Spring*, 54 Barb. 375; *Draughon v. Quillen*, 23 La. An. 237; *Scribner v. Collar*, 40 Mich. 375; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 468; *Watkins v. Cousell*, 1 E. D. Smith, (N. Y.) 65; *Price v. Keyes*, 62 N. Y. 378; *Pugsley v. Murray*, 4 E. D. Smith, (N. Y.) 245; *Levy v. Loeb*, 85 N. Y. 365; *Bennett v. Kidder*, 5 Daly, (N. Y.) 512; *Raisin v. Clark*, 41 Md. 158; s. c., 20 Am. Rep. 66; *Hinckley v. Arey*, 27 Me. 362; *Meyer v. Hanchett*, 39 Wis. 419; s. c., 43 Wis. 246; *Walworth v. Farmers' Co.*, 16 Wis. 629; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Everhart v. Searle*, 71 Pa. St. 256; *Lloyd v. Colston*, 5 Bush, (Ky.) 587; *Farnsworth v. Heimmer*, 1 Allen, (Mass.) 494; s. c., 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348; *Rice v. Wood*, 113 Mass. 133; *Lynch v. Fallon*, 11 R. I. 311; *Summer v. Charlotte, &c. R. Co.* 78 N. Car. 289; *Mercantile Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408.

³ *Stewart v. Mather*, 32 Wis. 344; *Colwell v. Keystone-Iron Co.*, 36 Mich. 51; *Adams M. Co.*

exception, that auctioneers and brokers have the authority of law to represent both parties to the sale, for the purpose of executing and signing the memorandum of such sale, which is required by the Statute of Frauds.¹ Trustees are prohibited in the same way from representing other parties than their beneficiaries in transactions in which they have antagonistic interests.² Attorneys at law are required by the law to scrupulously avoid entering into engagements which require them to represent and urge conflicting interests; an attorney cannot represent and act as counsel for both parties to a controversy.³

§ 234. **Constructive fraud, how affected by acquiescence and lapse of time.**—The right to avoid a contract, on account of constructive fraud, is conditional upon vigilance in the maintenance of the remedial actions, and absence of all acquiescence in the rights acquired by the other party under the contract or in the transaction. The two grounds for refusal of all equitable relief against constructive fraud are delay and acquiescence. The two grounds are entirely distinct and separate, although either will be sufficient in many cases to bar the right to relief. Delay involves simply the lapse of time after the discovery of the constructive fraud, without resorting to the courts for relief. Although the lapse of time or delay in bringing the action is very often taken as strong evidence of an acquiescence, yet it alone will not always bar the claim of relief. If, however, the delay is unreasonable under the circumstances of the case, the court of equity will refuse to grant the desired relief, in conformity with the equitable maxim "*vigilantibus non dormientibus equitas subvenit.*"⁴ Acquiescence consists of a recognition, by word or deed, of a right of the other party to an enforcement of the contract. Where the party, who otherwise would be entitled to equitable relief, on the ground of constructive fraud, after having full knowledge of the existence of these

v. Senter, 26 Mich. 73; *Helmer v. Krollick*, 38 Mich. 371; *Fitzsimmons v. Southern Ex. Co.*, 40 Ga. 330; *White v. Ward*, 20 Ark. 445; *Smith v. Townsend*, 109 Mass. 500; *Capiner v. Hogan*, 40 Ohio St. 203; *Rolling Stock Co. v. Railroad*, 34 Ohio St. 450; *Alexander v. Northwestern, &c. University*, 57 Ind. 466; *Barry v. Schmidt*, 57 Wis. 172; s. c., 46 Am. Rep. 35; *Meyer v. Hanchett*, 39 Wis. 419; s. c., 43 Am. Rep. 246; *Pugsley v. Murray*, 4 E. D. Smith, (N. Y.) 245; *Rowe v. Stevens*, 53 N. Y. 621; *Joslin v. Cowee*, 52 N. Y. 90; *Bell v. McConnell*, 37 Ohio St. 396.

¹ *Johnson v. Buck*, 35 N. J. L. 338; *Morton v. Dean*, 13 Mete. (Mass.) 385; *Pike v. Balch*, 38 Me. 302; s. c., 61 Am. Dec. 248; *Scott v. Mann*, 36 Tex. 157; *Schlesinger v. Texas, &c. R. Co.*, 87 Mo. 146; *Strong v. Dodds*, 47 Vt. 348; *O'Donnell v. Leeman*, 43 Mo. 158; s. c., 69 Am. Dec. 54; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Pugh v. Chisseldine*, 11 Ohio, 109; s. c., 37 Am. Dec. 414.

² *Ex parte Bennett*, 10 Ves. 381; *Gregory v.*

Gregory, Coop. 201; *North Balt., &c. Ass'n v. Caldwell*, 25 Md. 420.

³ *Hesse v. Briant*, 6 De G. M. & G. 623; *Lee v. Angas*, L. R. 7 Ch. 79 n; *Baker v. Humphrey*, 11 Otto, 494; *Wallace v. Furber*, 62 Ind. 103; *De Celis v. Brunson*, 53 Cal. 372; *Orr v. Tanner*, 12 R. I. 94; *McDonald v. Wagner*, 5 Mo. App. 56.

⁴ *Wedderburn v. Wedderburn*, 4 My. & Cr. 41; 2 Keen, 722; *Bowles v. Stewart*, 1 Sch. & Lef. 209; *Skilbeck v. Hilton*, L. R. 2 Eq. 587; *Musey v. Desbouvrie*, 3 P. Wms. 315; *Salkeld v. Vernon*, 1 Eden, 64; *Bradley v. Chase*, 22 Me. 511; *Parsons v. Hughes*, 9 Paige, 591; *Michoud v. Girod*, 4 How. (U. S.) 503; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; s. c., 20 Md. 117; *Hoffman, &c. Co. v. Cumberland C. Co.*, 16 Id. 456; *Boyd v. Hawkins*, 2 Dev. Eq. 195; *Butler v. Haskell*, 4 Desau. Eq. 651; *McCormick v. Malin*, 5 Blackf. 509; *Williams v. Reed*, 3 Mason, 405; *Eyre v. Burnester*, 10 H. L. Cas. 90, 106; *Mulhallen v. Marum*, 3 Dr. & War. 317; *Dobson v. Racey*, 8 N. Y. 216; *Comstock v. Ames*, 3 Keyes, 357.

grounds for relief, acts with the other party in respect to the subject-matter of the transaction as if the contract was valid and binding, or delays to proceed with his remedy, when he knows that the other party in reliance upon the validity of the contract is assuming obligations, from which he cannot extricate himself without loss. In all such cases there is evidence of an acquiescence by such party in the enforcement of the contract, which would operate as a bar to his subsequent appeal for relief.¹ Where there is acquiescence, as distinguished from mere delay, the length of time lapsing after the discovery of the grant for relief is not very material; and the relief will be denied where there is a positive case of acquiescence, even though there may not be any very long delay. On the other hand, where there is no acquiescence, the right to bar the remedy depends upon the unreasonableness of the delay.² What is an unreasonable delay, is a question depending for its answer upon the facts of the particular case; and there are cases in which relief has been granted, notwithstanding a considerable lapse of time, because under the peculiar circumstances of this case, the delay was not considered unreasonable.³

235. Gifts made between parties in confidential relation to each other.—Where a gift is made *inter vivos* by a beneficiary to the fiduciary, the transaction is subject to the severest suspicion of undue influence, wherever the confidential relation is that of an ordinary trust,⁴ or of attorney and client,⁵ and of guardian and ward.⁶ Where these gifts are made while the confidential relation continues, they are

¹ Ashurst's Appeal, 60 Pa. St. 290; Watt's Appeal, 78 *Id.* 371; Evans' Appeal, 81 *Id.* 278; Burden v. Stein, 27 Ala. 104; Pillow v. Thompson, 20 Tex. 206; Edwards v. Roberts, 5 Sm. & Mar. 544; Ayers v. Mitchell, 3 *Id.* 683; McNaughton v. Partridge, 11 Ohio, 232; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 *Id.* 50; Marsh v. Whitmore, 21 Wall, 178; Odlin v. Gove, 41 N. H. 465; Bassett v. Salisbury, &c. Co., 47 N. H. 426, 439; Peabody v. Flint, 6 Allen, 52; Fuller v. Melrose, 1 *Id.* 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Schiffer v. Dietz, 83 N. Y. 300, 307, 308; Cobb v. Hatfield, 46 *Id.* 533; Tompkins v. Hyatt, 28 *Id.* 347; Lawrence v. Dale, 3 Johns. Ch. 23; More v. Smedburg, 8 Paige, 600; Masson v. Bovet, 1 Denio, 69; Gale v. Nixon, 6 Cow. 444; Crosier v. Acer, 7 Paige, 137; Moffat v. Winslow, 7 *Id.* 124; Saratoga, &c. R. R. Co. v. Rowe, 24 Wend. 74; Bruce v. Davenport, 3 Keyes, 472; Doughty v. Doughty, 3 Halst. Ch. 227; Gray v. Ohio, &c. R. R., 1 Grant Cas. 412; Little v. Price, 1 Md. Ch. 182; Moore v. Reed, 2 Ired. Eq. 580.

² Saratoga, &c. R. R. v. Rowe, 24 Wend. 74; Brown v. Co. of Buena Vista, 5 Otto, 157, 160; Sullivan v. Portland, &c. R. R., 4 *Id.* 806; Grymes v. Sanders, 3 *Id.* 55, 62; Diman v. Providence, &c. R. R., 5 R. I. 130; Lloyd v. Brewster, 4 Paige, 537; Thomas v. Bartow, 48 N. Y. 193, 200.

³ Gresley v. Mousley, 4 De G. & J. 78; Baker

v. Bradley, 7 De G. M. & G. 596; Michoud v. Girod, 4 How. (U. S.) 503, 561.

⁴ Clarke v. Swaile, 2 Eden, 134; Spencer v. Newbold's Appeal, 80 Pa. St. 317; Villines v. Nordeet, 2 Dev. Eq. 167; Bryan v. Duncan, 11 Ga. 67; Kennedy v. Kennedy, 2 Ala. 571; Richardson v. Spencer, 18 B. Mon. 450; Marshall v. Stephens, 8 Humph. 159; Sallee v. Chandler, 26 Mo. 124; Downes v. Grazebrook, 3 Meriv. 200, 208; Knight v. Majoribanks, 2 Macn. & G. 10; Denton v. Donner 23 Beav. 285; Coles v. Trecothick, 9 Ves. 234, 246; Lloyd v. Attwood, 3 De G. & J. 614.

⁵ *In re Holmes' Estate*, 3 Giff. 337, 345; Goddard v. Carlisle, 9 Price, 169; Greenfield's Estate, 2 Harris, 489, 506; and see Berrien v. McLane, 1 Hoff. Ch. 421; Brock v. Barnes, 40 Barb. 521; Nesbit v. Lockman, 34 N. Y. 167; see, also, Hatch v. Hatch, 9 Ves. 292; Lady Ormond v. Hutchinson, 13 Ves. 47; Wolmsey v. Booth, 2 Atk. 40; Harris v. Tremehere, 15 Ves. 40; Wells v. Middleton; 1 Cox, 112; Montesquieu v. Sandys, 1 Bach & B. 312.

⁶ Hawkins' Appeal, 32 Pa. St. 263, 265; Cowan's Appeal, 74 *Id.* 329; Myer v. Rives, 11 Ala. 760; Meek v. Perry, 36 Miss. 190; Sherry v. Sansberry, 3 Ind. 320; Hylton v. Hylton, 2 Ves. Sen. 548; Hatch v. Hatch, 9 Ves. 292, 297; Kirby v. Taylor, 6 Johns. Ch. 242, 248; Kirby v. Turner, 1 Hopk. 309.

void unless some third person intervenes, or the case is so extraordinarily free from suspicious circumstances, that the legal presumption of undue influence, upon an examination of the facts in the case, completely falls to the ground. And, even when the confidential relation has terminated, if only a short time has elapsed since the termination of such confidential relation, the suspicion of undue influence will still attach, and proof positive of good faith and square dealing must be present in order to secure a recognition of its validity by the courts.¹ Where a gift is made to an ordinary agent, the strongest evidence of undue influence will alone suffice. It requires very slight evidence of good faith and voluntary action by a principal in order to make such a gift valid.² Where the question is of the validity of a gift made by a child to a parent, or the transaction, in respect to the strength of the suspicion of undue influence, stands midway between the cases of parents and guardians and those of agents, ordinary evidence of good faith and absence of undue influence will be sufficient to validate the gift.³ The suspicion of undue influence is naturally stronger where the gift is made immediately after the child has arrived at majority, than where it occurs some time afterwards.⁴ Gifts made by aged parents to children are somewhat like gifts to agents, in respect to the strength of the suspicion of undue influence. It is, however, so natural for parents to make gifts of value to their children, that it requires the existence of extraordinary circumstances, in order to support the presumption of undue influence on the part of the child.⁵ The suspicion of undue influence may also arise under peculiar circumstances in the case of gifts made by brothers and sisters to each other.⁶ It has, however, been held that there is no confidential relation *ipso facto* between a son-in-law and his mother-in-law.⁷

Such is the law in respect to the invalidity of gifts *inter vivos* made

¹ See *ante*, § 233.

² *Hunter v. Atkins*, 3 My. & K. 113; *Nicol v. Vaughan*, 1 Cl. & Fin. 495; *Hobday v. Peters*, 28 Beav. 349.

³ *Dalton v. Dalton*, 14 Nev. 419; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Martin v. Martin* 1 Heisk. 644; *Miller v. Simonds*, 5 Mo. App. 33; *Davis v. Dunne*, 46 Iowa, 684; *Bailey v. Woodbury*, 50 Vt. 166; *Ross v. Ross*, 6 Hun, 80; *Bergen v. Udall*, 31 Barb. 9; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Jenkins v. Pye*, 12 Pet. 241, 253; *Taylor v. Taylor*, 8 How. (U. S.) 183, 201; *Casborne v. Barsham*, 2 *Id.* 76; *Hoghton v. Hoghton*, 15 *Id.* 278; *Hartopp v. Hartopp*, 21 *Id.* 259; *Bury v. Openheim*, 26 *Id.* 594; *Berdoo v. Dawson*, 34 *Id.* 603; *Chambers v. Crabbe*, 34 *Id.* 457; *Potts v. Surr*, *Id.* 543.

⁴ *Bergen v. Udall*, 31 Barb. (N. Y.) 9; *Hawkins' Appeal*, 32 Pa. St. 263; *Berkmeyer v. Kellerman*, 32 Ohio St. 239; *Arche v. Hudson*, 7 Beav. 560; *Taylor v. Taylor*, 8 How. (U. S.) 183; *Baldock v. Johnson*, 14 Oregon, 546; *Savery v. King*, 5 H. L. C. 626; *Taylor v. Staples*, 8 R.

I. 170; *Van Donge v. Van Donge*, 23 Mich. 321; *Rider v. Kelso*, 53 Iowa, 367; *Miller v. Simonds*, 72 Mo. 669; *Jacox v. Jacobs*, 40 Mich. 473.

⁵ *Simpler v. Lord*, 28 Ga. 52; *White v. Smith*, 51 Ala. 405; *Gore v. Sumersall*, 5 T. B. Mon. (Ky.) 504; *Griffiths v. Robins*, 3 Madd. 191; compare *Cowee v. Cornell*, 75 N. Y. 91; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537; *Beauland v. Bradley*, 3 Sm. & G. 339; *Millican v. Millican*, 24 Tex. 426; compare *State v. True*, 20 Mo. App. 176; *Dalton v. Dalton*, 14 Nev. 419; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Martin v. Martin*, 1 Heisk. 644; *Highberger v. Stiffier*, 21 Md. 338; *Todd v. Grove*, 33 *Id.* 188; *Comstock v. Comstock*, 57 Barb. 453; *Whelan v. Whelan*, 3 Cow. 537; *Deem v. Phillips*, 5 W. Va. 183; *Liddel's Ex'r v. Starr*, 20 N. J. Eq. 274.

⁶ *Thornton v. Ogden*, 32 N. J. Eq. 723; *Hewitt v. Crane*, 2 Halst. Ch. 159, 631; *Sears v. Shafter*, 6 N. Y. 268; *Boney v. Hollingsworth*, 23 Ala. 690.

⁷ *Fish v. Cleland*, 33 Ill. 238; *Cleland v. Fish*, 43 *Id.* 282.

between parties in confidential relation to each other on the ground of constructive fraud. A different rule prevails in respect to testamentary gifts between the same parties; and in many cases a testamentary gift will be declared valid and binding on a statement of facts, which would make the transaction void if it occurred in a gift *inter vivos*. In cases of gifts made by will, in order that the charge of undue influence may prove to exist, such conduct must be shown on the part of the beneficiary as would prove the fact that the testator's agency in the execution of his will was destroyed and the legatee's will substituted for his own.¹ Importunity will not in itself be sufficient to invalidate the gift; it must amount to a destruction of the testator's free agency.² The existence of a confidential relation between the two parties does not in itself create any legal presumption of undue influence, but is only a circumstance tending to support the fact that such undue influence exists.³ Constructive fraud will, in the case of testamentary gifts, be presumed from the existence of confidential relations between the following persons, similar to that which has just been explained in respect to gifts *inter vivos*, viz.: between a physician and patient,⁴ a spiritual adviser and penitent,⁵ vendor and vendee of lands,⁶ husbands and wives, and persons occupying their position,⁷ partners,⁸ executors and administrators,⁹ and, indeed, all persons who occupy a position of trust and confidence, of influence and dependence in fact, although not, perhaps, in law.¹⁰

¹ *McDaniel v. Crosby*, 19 Ark. 533; *Whitman v. Goodhand*, 26 Md. 95; *Layman v. Conrey*, 60 Md. 286; *Haydock v. Haydock*, 33 N. J. Eq. 494; *Blakey v. Blakey*, 33 Ala. 611; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Mountain v. Bennett*, 1 Cox. 355; *Kinleside v. Harrison*, 2 Phillim. 551; *Gardner v. Gardner*, 22 Wend. 526; *Marx v. McGlynn*, 88 N. Y. 357; *Eckert v. Flowry*, 43 Penn. St. 46; *Roe v. Taylor*, 45 Ill. 485; *Morris v. Stokes*, 21 Ga. 552; *Sutton v. Sutton*, 5 Harring. 459; *Duffield v. Morris*, 3 Harring. 375.

² See *Kinleside v. Harrison*, 2 Phillim. 551, 552, by Sir John Nicholl; *Clark v. Fisher*, 1 Paige, 171; *Davis v. Calvert*, 5 Gill & J. 269; *Baldwin v. Parker*, 99 Mass. 84; *Rollwagen*, 63 N. Y. 504; *Coit v. Patchen*, 77 N. Y. 394; *Tawney v. Long*, 76 Penn. St. 106.

³ *Harvey v. Sullens*, 46 Mo. 147; *Tyler v. Gardiner*, 35 N. Y. 559; *Meek v. Perry*, 36 Miss. 190; *Breed v. Pratt*, 18 Pick. 115; *Bristed v. Weeks*, 5 Redf. 529; *Marx v. McGlynn*, 88 N. Y. 357; 4 Redf. 455, *Id.*; 5 Mo. App. 390; *Welsh In Re*, 1 Redf. 238; *Drake's Appeal*, 45 Conn. 9; *Thompson v. Hawks*, 14 Fed. Rep. 902; 7 Oreg. 7; *Brooks' Estate*, 54 Cal. 471.

⁴ *Crispell v. Dubois*, 4 Barb. 393; *Ingersoll v. Roe*, 65 *Id.* 346; *Cadwallader v. West*, 48 Mo. 483; *Billage v. Southee*, 9 Hare, 594; *Dent v. Bennett*, 4 My. & Cr. 269; *Aherne v. Hogan*, 1 Drury, 310.

⁵ *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66; *Lyon v. Home*, L. R. 6 Eq. 655; *Nottingham v. Prince*, 2 Giff. 246; *Leighton v. Orr*, 44 Iowa, 679; *Greenfield's Estate*, 24 Pa. St. 332.

⁶ *Baker v. Monk*, 4 De G. J. & S. 388; *Clark v. Malpa*, 4 De G. F. & J. 401.

⁷ *Turner v. Turner*, 44 Mo. 535; *Coulson v. Allison*, 9 De G. F. & J. 521; *Corley v. Lord Stafford*, 1 De G. & J. 238; *Nelson v. Stocker*, 4 De G. & J. 458.

⁸ *Maddeford v. Austwick*, 2 My. & K. 279; 1 Sim. 89; *Short v. Stevenson*, 63 Pa. St. 95; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; *Flagg v. Mann*, 2 Sumn. 487; *Wheeler v. Sage*, 1 Wall. 518; *Clements v. Hall*, 2 De G. & J. 178; *Blisset v. Daniel*, 10 Hare, 493, 538; *Bayne v. Ferguson*, 5 Dow. 151; *Rawlings v. Wickham*, 3 De G. & J. 304; *Clegg v. Edmondson*, 8 De G. M. & G. 787, 807.

⁹ *Massie v. Watts*, 6 Cranch, (U. S.) 148; *Baker v. Whiting*, 3 Sumner, (U. S.) 475; *Bradley v. Tarwell*, 1 Holmes, (U. S.) 433; *Michoud v. Girod*, 4 How. (U. S.) 503; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Gardner v. Ogden*, 22 N. Y. 327; s. c., 78 Am. Dec. 192; *People v. Open Board of S. B. Co.*, 92 N. Y. 98; *Ives v. Ashley*, 97 Mass. 198; *Greene v. Haskell*, 5 R. I. 447; *Kruse v. Steffens*, 47 Ill. 112; *Walker v. Palmer*, 24 Ala. 358; *Shannon v. Marmaduke*, 14 Tex. 247; *Staats v. Bergen*, 19 N. J. Eq. 297, 554; *Platt v. Longworth*, 27 Ohio St. 159; *Marshall v. Carson*, 38 N. J. Eq. 250; s. c., 48 Am. Rep. 319; see *Lytle v. Beveridge*, 58 N. Y. 592; *Fulton v. Whitney*, 66 N. Y. 548; *Parkhurst v. Alexander*, 2 Johns. Ch. (N. Y.) 394; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Moore v. Moore*, 5 N. Y. 256.

¹⁰ *Walters v. Bailey*, 2 Y. & C. Ch. 219; *Wake-*

§ 236. **Frauds on creditors.—Transfers without consideration.—Voluntary conveyances.—Transfers for the purpose of hindering or delaying creditors.**—The cases, to which the subject of this paragraph refers, cover all sorts of transfers which are made for defrauding the vendor's creditors. They are to be distinguished from the frauds upon the vendor or vendee by the fact that the fraud upon creditors never affects the validity of the sale as between the parties to the contract. If either of the parties is bound by the contract of sale, both are.¹ And, if there is a valuable consideration to the contract, both parties are liable to each other for a breach of the contract. The existence of this fraud upon the vendor's creditors does not enable the vendor to rescind the sale and recover his property,² which has so far become the property of the vendee as that he may insure it against fire and other risks, and, in case of loss, hold the insurance money against the vendor.³ Nor can the vendee avoid the payment of the consideration of the sale on account of the fraud upon the grantor's creditors,⁴ although if the sale should be avoided by the vendor's creditors, there would be a failure of consideration, which would enable the vendee to recover back the price paid for the goods, or to defend an action by the vendor for the breach of the contract, if he has not paid it.⁵

Questions concerning the frauds upon creditors arise under the statutes 13 Eliz., ch. 5, and 27 Eliz., ch. 4, which have been substantially re-enacted in all the states of this country. The statutes are said to be affirmatory of the common law, at the most only enforcing its principles more stringently.⁶ Whether this be so, is a matter of very little importance, since these statutes are uniform in their terms and have been enacted very generally. The original statute, as well as all copies of it, declare to be void all conveyances of property, both real and

man v. Dodd, 27 N. J. Eq. 564; and see Giddings v. Giddings, 3 Russ. 241; James v. Rumsey, L. R. 11 Ch. D. 398; Tate v. Williamson, L. R. 2 Ch. 55; 1 Eq. 528; Taylor v. Obee, 3 Price, 88.

¹ Harvey v. Varney, 98 Mass. 118; Hill v. Pine River Bank, 45 N. H. 300; Barrows v. Barrows, 9 N. E. Rep. 371; Williams v. Lowe, 4 Humph. 62; Burgett v. Burgett, 1 Ohio, 469; Springer v. Drosch, 32 Ind. 486; Douglass v. Dunlop, 10 Ohio, 162; Walton v. Bonham, 24 Ala. 513; Chapin v. Pease, 10 Conn. 69; Neely v. Wood, 10 Yerg. 486; Sherk v. Endres, 3 W. & S. 255; Ybarra v. Lorenzana, 53 Cal. 197.

² Osborne v. Morse, 7 Johns. 161; Murphy v. Hubert, 16 Pa. St. 50; Telford v. Adams, 6 Watts, 429; Broughton v. Broughton, 4 Rich. 491; Jackson v. Garnsay, 16 Johns. 189. The contract of sale may also be enforced against the vendor's heirs and representatives. Drinkwater v. Drinkwater, 4 Mass. 354; Dearman v. Radcliffe, 5 Ala. 192; Clapp v. Tirrell, 20 Pick. 247; Garner v. Graves, 54 Ind. 188; Reichart v. Castator, 5 Binn. 109; Beebe v.

Saulter, 87 Ill. 519; Stephens v. Harrow, 26 Iowa, 458.

³ Lerow v. Wilmarth, 9 Allen, 385. And the vendee's creditors may also claim the insurance money as against the grantor. Maher v. Swift, 14 Nev. 324.

⁴ Butler v. Moore, 73 Me. 151; Davey v. Kelley, 66 Wis. 457; Carpenter v. McClure, 39 Vt. 9; Findley v. Cooley, 1 Blackf. 262; Gary v. Jacobson, 55 Miss. 204; Bryant v. Mansfield, 22 Me. 360; Dyer v. Homer, 22 Pick. 253; but see Church v. Muir, 33 N. J. L. 320; Niver v. Best, 10 Barb. 369; Neelis v. Clark, 4 Hill, 424.

⁵ Dyer v. Homer, 22 Pick. 253.

⁶ Cadogan v. Kennett, Cowp. 432; 2 Kent Com. 515; Whittlesey v. McMahon, 10 Conn. 141; Avery v. Street, 6 Watts, 248; Hudnal v. Wilder, 4 McCord, 297; Doyle v. Sleeper, 1 Dana, 533; Hamilton v. Russell, 1 Cranch, 316; Meeker v. Wilson, 1 Gall. 419; Adams v. Broughton, 13 Ala. 739; O'Daniel v. Crawford, 4 Dev. 203; Wilt v. Franklin, 1 Binn. 514, 523; Whitmore v. Woodward, 28 Me. 392.

personal, which are not made in good faith and upon a valuable consideration, but upon trust for the benefit of the grantor,¹ or made in any other way for the purpose of hindering, delaying, or defrauding creditors.

The first point to be observed, in determining under the Statute of Elizabeth when a sale is fraudulent as to creditors, is that the law will not imply a sale or transfer of property to be fraudulent if it be based upon a valuable consideration. Such transfers of property are presumed to be *bona fide*. But this presumption is not conclusive. The presence of a valuable consideration in the sale is not at all inconsistent with the fraudulent intent to defraud creditors.² If the sale was actually made with fraudulent intent to defeat the claims of creditors, it may be avoided by them, notwithstanding it is supported by a valuable consideration, if the purchaser was cognizant of the seller's fraudulent intent, and bought the property for the purpose of aiding the seller in his fraudulent design. This would, however, be a case of actual, instead of constructive, fraud.³ But if the purchaser does not participate in the seller's fraud, and pays a valuable consideration for the goods, the sale will not be voidable by the creditors because it was made by the seller for the purpose of defeating the execution of a creditor.⁴ In order that the sale may be avoided, notwithstanding the payment of a valuable consideration, the purchaser must actually know of the fraudulent intent. It is held that it is not sufficient, if he only has reasonable cause to suspect or believe that the seller has such a fraudulent intent.⁵ The vendor's fraudulent intent may be established by any competent testimony. Each case stands upon its own footing, and

¹ Any trust for the benefit of the grantor is a fraud upon the grantor's creditors. *Twyne's Case*, 3 Coke, 80; 1 Smith Lead. Cas. 1; *Franklin v. Clafin*, 49 Md. 24; *Jones v. King*, 86 Ill. 225; *Edwards v. Stinson*, 59 Ga. 443; *Young v. Heermanus*, 66 N. Y. 374.

² *Nugent v. Jacobs*, 103 N. Y. 125; *Roerber v. Bowe*, 26 Hun, 554; *Johnston v. Dick*, 27 Miss. 277; *Peck v. Land*, 2 Kelley, 1; *Billings v. Russell*, 101 N. Y. 226; *Singer v. Jacobs*, 3 McCrary, 638; *Ayers v. Moore*, 2 Stew. 336; *Wadsworth v. Williams*, 100 Mass. 126; *Howe v. Ward*, 4 Greenl. 195.

³ *Kimball v. Thompson*, 4 Cush. 447; *Dalglish v. McCarthy*, 19 Grant's Ch. 578; *Spring Lake Iron Co. v. Waters*, 50 Mich. 13; *Hessing v. McCloskey*, 37 Ill. 341; *Anderson v. Warner*, 5 Bradw. 416; *Green v. Tanner*, 8 Met. 411; *Foster v. Hall*, 12 Pick. 89; *Bridge v. Eggleston*, 14 Mass. 245.

⁴ *Wood v. Dixie*, 7 Q. B. 892; *Riches v. Evans*, 9 C. & P. 940; *Alton v. Harrison*, L. R. 4 Ch. 622; *Boldero v. London Loan & Discount Co.*, 5 Ex. D. 47; *Spencer v. Slater*, L. R. 4 Q. B. D. 13; *Hale v. Metr. Omnibus Co.*, 28 L. J. Ch. 777; *Farish v. McKay*, 5 Up. Can. Q. B. 461; *Hooker v. Jarvis*, 6 Up. Can. Q. B., o. s., 439; *Armstrong v. Moodie*, 6 Up. Can. Q. B., o. s., 538;

Conner v. Miller, 1 Kerr, (N. B.) 302; *Ingraham v. Wheeler*, 6 Conn. 277; *Stacey v. Dershaw*, 7 Hun, 449; *Ford v. Johnston*, 7 Hun, 563; *Archer v. O'Brien*, 7 Hun, 591; *Bostwick v. Burnett*, 74 N. Y. 317; *Francis v. Rankin*, 84 Ill. 169; *Matthews v. Jordan*, 88 Ill. 602; *Gray v. McAllister*, 50 Iowa, 497; *Story v. Agnew*, 2 Bradw. 353; *Mimmo v. Kuykendall*, 85 Ill. 476; *Morris v. Tilson*, 81 Ill. 607; *Dudley v. Danforth*, 61 N. Y. 626; *Hauselt v. Vilmar*, 2 Abb. N. C. 222; *Kinnear v. White*, 2 Kerr, (N. B.) 235; *Hayward v. White*, 2 Kerr, 319; *Doak v. Johnson*, 2 Kerr, 319; *Dalglish v. McCarthy*, 19 Grant, (Ont.) 578; *Clark v. Morrell*, 21 Up. Can. Q. B. 596; *Oriental Bank v. Haskins*, 3 Met. 340; *Wadsworth v. Williams*, 100 Mass. 131; *Clapp v. Tirrell*, 20 Pick. 247; *Verplanck v. Sterry*, 12 Johns. 552; *Wright v. Brandis*, 1 Ind. 336; *Rufing v. Tilton*, 12 Ind. 260; *Hughes v. Monty*, 24 Iowa, 499; *Chapel v. Clapp*, 29 Iowa, 194; *Wright v. Howell*, 35 Iowa, 292; *Carpenter v. Murin*, 42 Barb. 300; *Jackson v. Henry*, 10 Johns. 185; *Somes v. Brewer*, 2 Pick. 184.

⁵ *Carroll v. Hayward*, 124 Mass. 121; *State v. Merritt*, 70 Mo. 275; *Kyle v. Ward*, 1 So. Rep. 468; but see, apparently *contra*, *Lyons v. Hamilton*, 69 Iowa, 47; *Bartles v. Gibson*, 17 Fed. Rep. 293.

the court and jury must examine into the circumstances of the particular case, and determine from them whether the sale was made in good faith or for the purpose of defeating the creditors.¹

Under the term *valuable consideration* is included every thing possessing a pecuniary value, and likewise a promise to marry, as well as actual marriage. Conveyances possessing any one of these considerations are not voluntary.² But, although the valuable consideration must be substantial, in order to protect the purchaser against the claims of the seller's creditors, it need not be adequate.³

If a transfer of property is made without a substantial valuable consideration, while the grantor is in debt, existing creditors can, under certain circumstances at least, avoid the conveyance, and satisfy their demands by proceeding against the property. If the conveyance is to anyone except a child or wife; or, in other words, where there is not even a good consideration passing between the parties, the conveyance is presumptively void as against the existing creditors, *i. e.*, those who were already creditors at the time of the conveyance.⁴ But if the voluntary conveyance is made to a wife and child, and at the time of the conveyance sufficient property was left in the hands of the grantor to amply secure existing creditors, the conveyance will, nevertheless, be presumptively good against the creditors. But if the grantor is insolvent at the time of conveyance, it may be avoided by the existing creditors.⁵ But this presumption, which is properly called constructive fraud, because no actual fraud is required to be established,⁶ is not a conclusive presumption of fraud or bad faith, and it may be rebutted by positive evidence to the contrary.⁷ The existence of a fraudulent intent is a question for the jury, to be determined upon a consideration of all the facts of each case,⁸ and the burden of proof is on the party alleging the fraudulent intent.⁹

Although it is doubtful, according to the authorities, whether sub-

¹ *Hale v. Metr. Omnibus Co.*, 28 L. J. Ch. 777; *Lang v. Stockwell*, 55 N. H. 561; *Solomon v. Moral*, 53 How. Pr. 342; *Cutting v. Jackson*, 56 N. H. 253; *Jones v. Nevers*, 2 Pugs. & Bur. 627.

² *Rodgers v. Langham*, 1 Sid. 133; *Washband v. Washband*, 27 Conn. 424; *Huston v. Cantril*, 11 Leigh, 176; *Rockhill v. Spraggs*, 9 Ind. 32. So taking the goods for a pre-existing debt is a sale for a valuable consideration. *Dudley v. Danforth*, 61 N. Y. 626.

³ *Washband v. Washband*, 27 Conn. 424; *Salmon v. Bennett*, 1 Conn. 525; *Reade v. Livingston*, 3 Johns. Ch. 500; *Mercer v. Mercer*, 29 Iowa, 557; *Doe v. Hurd*, 1 Blackf. 510; *Bullitt v. Taylor*, 34 Miss. 708; *Lerow v. Wilmarth*, 9 Allen, 380; *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199.

⁴ *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Lerow v. Wilmarth*, 9 Allen, 386; *Reade v. Livingston*, 3 Johns. Ch. 500; *Salmon v. Bennett*, 1 Conn. 525; *Washband v. Washband*, 27 Conn. 424; *Doe v. Hurd*, 7 Blackf. 510; *Mercer v. Mercer*,

29 Iowa, 557; *Bullitt v. Taylor*, 34 Miss. 708.

⁵ *Lerow v. Wilmarth*, 9 Allen, 386; *Pomeroy v. Bailey*, 45 N. H. 118; *Van Wyck v. Seward*, 6 Paige, 62; *Baker v. Bliss*, 39 N. Y. 70; *Posten v. Posten*, 4 Whart. 42; *Miller v. Pearce*, 6 Watts & S. 101; *Gridley v. Watson*, 53 Ill. 193; *Bridgford v. Riddell*, 55 Ill. 261; *Pratt v. Meyers*, 56 Ill. 24; *Stewart v. Rogers*, 25 Iowa, 395; *Baldwin v. Tuttle*, 23 Iowa, 74.

⁶ *Reade v. Livingston*, 3 Johns. Ch. 481; *Wadsworth v. Havens*, 3 Wend. 412; *Early v. Owens*, 68 Ala. 171.

⁷ *Lerow v. Wilmarth*, 9 Allen, 386; *Hinde v. Longworth*, 11 Wheat. 199; *Genesee River Bank v. Mead*, 92 N. Y. 637.

⁸ *Jackson v. Mather*, 7 Cow. 301; *Jamison v. King*, 50 Cal. 132; *Harris v. Burns*, 50 Cal. 140; *Clark v. Morrill*, 21 Up. Can. Q. B. 600; Up. Can. Q. B. 561.

⁹ *Elliott v. Stoddard*, 98 Mass. 145; *Erb v. Cole*, 31 Ark. 554; *Morgan v. Olvey*, 53 Ind. 6; *Jewett v. Cook*, 81 Ill. 260; *Tompkins v. Nichols*, 53 Ala. 197.

sequent creditors can claim any benefit from the avoidance of a transfer of property on account of constructive fraud upon creditors, where the action for avoidance is brought by a contemporaneous creditor, there being authority in support of both the affirmative¹ and the negative² sides of the proposition, yet it is settled that the subsequent creditor cannot take the initiative in avoidance of the transfer, unless it has been made with an actual fraudulent intent;³ and the intent must be shown to defraud the subsequent creditors.⁴ When an intent to defraud subsequent creditors is established, the transfer may be avoided by subsequent as well as by existing creditors.⁵ It would thus be a fraud against subsequent creditors for one to transfer property to another without consideration, in anticipation of incurring greater liabilities, or of embarking in an unusually hazardous business or speculation, whereby the available assets of the debtor are appreciably diminished.⁶

In order that, in any case, a sale may be avoided by creditors, it is held that the thing sold must be subjected to levy and sale under execution. The conveyance of property which is exempted from levy under the homestead and exemption law cannot be avoided by creditors for being voluntary, at least according to most of the authorities.⁷ But there are cases which hold to the contrary, viz.: that the voluntary conveyance of a third person without consideration is an act of abandonment, a fraud upon creditors, and the creditors may attach the property in the hands of the grantee.⁸

§ 237. **Preferences by insolvents in transfer of property in payment of debts, when fraudulent.—Voluntary assignments for benefit of creditors.**—In pursuance of the general rule, already explained in the preceding paragraph, viz.: that the transfer of goods by an

¹ *Spirett v. Willow*, 3 De G. J. & S. 293; *Bonazina v. Leed*, 3 Low. Can. 446; *Carter v. Grimshaw*, 49 N. H. 100; *McLane v. Johnson*, 43 Vt. 48; *Bank of Rattensberg*, 7 Grant, (Ont.) 383.

² See *Shand v. Hanley*, 71 N. Y. 319; *Snyder v. Christ*, 39 Pa. St. 499; *Monroe v. Smith*, 79 Pa. St. 459; *Dorley v. McKiernan*, 62 Ala. 34; *Lloyd v. Bruce*, 41 Iowa, 660; *Sanders v. Chandler*, 26 Minn. 273; *Lehmberg v. Biberstein*, 51 Tex. 457; *Harlin v. Maglaughlan*, 90 Pa. St. 293; *Mullen v. Wilson*, 44 Pa. St. 413; *Arrowsmith v. O'Sullivan*, 44 N. Y. Supr. Ct. 573.

³ *Thacher v. Phinney*, 7 Allen, 150; *Beal v. Warren*, 2 Gray, 447; *Trafton v. Hawes*, 102 Mass. 541; *Lormore v. Campbell*, 60 Barb. 62; *Stone v. Myers*, 9 Minn. 311; *Sexton v. Wheaton*, 8 Wheat. 229; *Howe v. Ward*, 4 Greenl. 195.

⁴ *Winchester v. Charter*, 12 Allen, 606; 97 Mass. 106.

⁵ *Marston v. Marston*, 54 Me. 476; *Parkman v. Welch*, 19 Pick. 231; *Coolidge v. Melvin*, 42 N. H. 521; *Redfield v. Buck*, 35 Conn. 329; *Paulk v. Cooke*, 39 Conn. 566; *Van Wyck v. Seward*, 6 Paige, 62; *Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 N. Y. 164; *Williams v. Davis*, 69 Pa. St. 21; *Bridgeford v. Riddle*, 55 Ill. 261;

Herschfeldt v. George, 6 Mich. 466; *Bullitt v. Taylor*, 34 Miss. 740; *Pyatt v. Myers*, 56 Ill. 24.

⁶ *Thacher v. Phinney*, 7 Allen, 146; *Wadsworth v. Williams*, 100 Mass. 126; *Dood v. Adams*, 125 Mass. 398; *Kirksey v. Snedecor*, 60 Ala. 192; *Mattingly v. Nye*, 8 Wall. 370; *Graham v. Railroad Co.*, 102 U. S. 153; *Smith v. Hodges*, 92 U. S. 183; *Sexton v. Wheaton*, 8 Wheat. 229; *Carpenter v. Carpenter*, 25 N. J. Eq. 194; *Day v. Cooley*, 118 Mass. 524; *Winchester v. Charter*, 12 Allen, 606; *Beal v. Warren*, 2 Gray, 447; *Pelham v. Aldrich*, 8 Gray, 515; *Carpenter v. Roe*, 10 N. Y. 227; *Babcock v. Eckler*, 24 N. Y. 623; *Dyger v. Remerschnider*, 32 N. Y. 648.

⁷ *Gassett v. Grant*, 4 Met. 490; *Danforth v. Beattie*, 43 Vt. 138; *Wood v. Chambers*, 20 Tex. 254; *Dreutzer v. Bell*, 11 Wis. 114; see, also, *Winebrenner v. Weisinger*, 3 B. Mon. 223; *Dearman v. Dearman*, 4 Ala. 521; *Planters' Bank v. Henderson*, 4 Humph. 75; *Legro v. Lord*, 10 Me. 161; *Vaughan v. Thompson*, 17 Ill. 78; *Foster v. McGregor*, 11 Vt. 595; *Garrison v. Monaghan*, 33 Pa. St. 232.

⁸ *Currier v. Sutherland*, 54 N. H. 475 (20 Am. Rep. 143).

insolvent is never presumed to be fraudulent, where it is supported by a valuable and substantial consideration, it is very generally held that there is no implied fraud, where a debtor makes a transfer of his property, or a part of it, to one or more creditors, in payment of their claims, to the exclusion of other creditors, who, on account of the want of sufficient assets of the debtor, are thereby left without an equivalent remedy. At common law, this is not only the rule, where the goods are transferred directly to a particular creditor or number of creditors,¹ but also, where the transfer is made to a trustee, in trust for the benefit of a number of creditors, and in satisfaction of their claims, to the exclusion of others.² And, although there are many cases to the contrary, holding that the assignment must be free from conditions, in order to escape being fraudulent,³ it has been held to be lawful for a debtor to stipulate, that the acceptance of a benefit under the assignment by a creditor must be conditional upon his release of the creditor's claim for the remainder of the debt, which is left unpaid, after a *pro rata* division of the property in the hands of the assignee.⁴ It would, however, be a fraud, which would vitiate the whole transaction, if some of the creditors are induced to sign a release under the assignment, in consideration of receiving a secret payment for a part or the whole of the balance, left unpaid by the distribution under the assignment.⁵ It would, also, be fraudulent, in a deed requiring a release of the balance of the debt as a condition precedent to sharing in the benefits of the assignment, to provide for the return of the surplus to the grantor;⁶ whereas, such a provision is unobjectionable in a

¹ King v. Watson, 3 Price, 6; Buffum v. Green, 5 N. H. 71; Wall v. Lakin, 13 Met. 167; Deforest v. Bacon, 2 Conn. 683; Hendricks v. Robinson, 2 Johns. Ch. 308; Grover v. Wakeman, 11 Wend. 194; Wilt v. Franklin, 1 Binn. 502; Bruce v. Smith, 3 Harr. & J. 499; Moffat v. McDowell, 1 McCord Eq. 434; United States v. Bank, 8 Rob. (La.) 262; Fasset v. Traber, 20 Ohio, 540; Marbury v. Brooks, 7 Wheat. 556; Brashear v. West, 7 Pet. 608; Brown v. Minturn, 2 Gall. (U. S.) 557; Ford v. Williams, 3 B. Mon. 550; Stover v. Herrington, 7 Ala. 142; King v. Trice, 3 Ired. Eq. 567; Waters v. Comely, 3 Harr. 117; Leitch v. Hallister, 4 N. Y. 211; Nicoll v. Mumford, 2 Johns. Ch. 529; Bates v. Coe, 10 Conn. 280; Stevens v. Bell, 6 Mass. 339; Johnson v. White-well, 7 Pick. 74; Pickstock v. Lyster, 3 Maule & S. 371.

² Holbird v. Anderson, 5 T. R. 235; Haven v. Richardson, 5 N. H. 113; Ingraham v. Wheeler, 6 Conn. 277; Halsey v. Whitney, 4 Mason, 211; Clark v. Peter, 12 Pet. 178; Tompkins v. Wheeler, 16 Pet. 106; Burd v. Smith, 4 Dall. 85; Murray v. Riggs, 15 Johns. 571; Stevens v. Bell, 6 Mass. 342; Pickstock v. Lyster, 3 Maule & S. 371.

³ Searing v. Brinkerhoff, 5 Johns. Ch. 329; Hyslop v. Clarke, 14 Johns. 459; Ingraham v. Geyer, 13 Mass. 146; Harris v. Sumner, 2 Pick. 129; Wakeman v. Orover, 4 Paige Ch. 23; Arm-

strong v. Byrne, 1 Edw. Ch. 79; Atkinson v. Jordan, 5 Ohio, 178; Johnson v. Farnam, 56 Ga. 144; Robins v. Embry, 1 Sm. & M. 208; Wilde v. Rawlins, 1 Head, 34; Brown v. Knox, 6 Mo. 302; Hafner v. Irwin, 1 Ired. L. 490; Miller v. Conklin, 17 Ga. 430; Mills v. Levy, 2 Edw. Ch. 183; Austin v. Bell, 20 Johns. 412.

⁴ Hatch v. Smith, 5 Mass. 42; Hewlett v. Cutler, 137 Mass. 285; King v. Watson, 3 Price, 6; Skipwith v. Cunningham, 8 Leigh, 271; Small v. Marwood, 9 B. & C. 300; Dockray v. Dockray, 2 R. I. 547; Porter v. Williams, 5 Seld. 142; Allen v. Gardner, 7 R. I. 22; Hindman v. Dill, 11 Ala. 689; Pfeiffer v. Dargan, 14 S. C. 44; Gordon v. Cannon, 18 Gratt. 387; Austin v. Johnson, 7 Humph. 191; Robinson v. Rapelye, 2 Stew. 86; Stewart v. Spencer, 1 Curt. C. O. 157; Keating v. Vaughan, 61 Tex. 518; Ramsdale v. Sigerson, 2 Gill, 78; Ely v. Hair, 16 B. Mon. 203; Grimshaw v. Walker, 12 Ala. 101; D'Ive-mols v. Leavitt, 23 Barb. 63; Barney v. Griffin, 4 Sandf. 552; Goss v. Neale, 5 Moore, 29; Halsey v. Whitney, 4 Mason, 230.

⁵ Story Eq. Jur., § 378, and cases there cited; Spurrirt v. Spiller, 1 Atk. 105; Chesterfield v. Janssen, 1 Atk. 352; Smith v. Bromley, Dougl. 696.

⁶ Grimshaw v. Walker, 12 Ala. 101; Rankin v. Loder, 21 Ala. 380; West v. Snodgrass, 17 Ala. 549; Clayton v. Johnson, 36 Ark. 406; McCall v.

general and absolute assignment for the equal benefit of all creditors, and one which will be implied by the law, if it is not expressly made.¹ But this is only permissible where the assignment is for the benefit of all the creditors,² it being required, wherever such assignment is valid, that the rest of the property must go to the creditors not provided for under the provisions of the assignment.³

But the United States bankrupt laws, whenever they have been in force, subject the whole matter of preferential settlements with creditors to statutory regulations, which are designed to secure an equitable distribution among the creditors; and some of the state insolvent laws⁴ go the length of prohibiting all preferential assignments and transfers of property to creditors, whether they are made indirectly through an assignee, or directly to the creditor in payment of his claim.⁵ In some of the states, the statutes simply nullify the preferential provision, instead of invalidating the whole assignment.⁶ It is, however, the general rule in this country that a debtor in failing circumstances may, by transfers of property, at least in any other mode than by assignments in trust, settle the claims of one or more creditors to the exclusion of others, wherever there is an honest intention to pay a *bona fide* debt.⁷ And such transfer was held to be valid under the late national bankrupt law, as well as under many of the state insolvent laws, as long as it was not made when both seller and buyer contemplated a speedy assignment in bankruptcy.⁸ But in every case where the transfer is ostensibly for the purpose of paying an honest debt, but actually to hinder and defraud creditors, while the goods continue

Hinckley, 4 Gill, 128; Whedbee v. Stewart, 40 Md. 414; Maughlin v. Tyler, 47 Md. 545.

¹ Halsey v. Whitney, 4 Mason, 222; Van Rossum v. Walker, 11 Barb. 237; Curtis v. Leavitt, 15 N. Y. 120; Potter v. Paige, 54 Pa. St. 465; Hall v. Denison, 17 Vt. 310.

² Barney v. Griffin, 2 N. Y. 365; Leitch v. Holister, 4 N. Y. 211.

³ Ely v. Hair, 16 B. Mon. 230; Miller v. Stetson, 32 Ala. 161; Bank v. Gorman, 8 W. & S. 304; N. A. & S. R. v. Huff, 19 Ind. 444; Burgin v. Burgin, 1 Ired. L. 453.

⁴ See Berry v. Cutts, 42 Me. 455; Varnum v. Camp, 1 Greenl. 326; Brown v. Lee, 7 Ga. 267; Bryan v. Burbin, 26 Mo. 423; Garl v. Hill, 1 Stock. Ch. 210; Brown v. Holcomb, 1 Stock. 297.

⁵ There are statutes to that effect in Alabama, California, Colorado, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin.

⁶ Henderson v. Pierce, 9 N. E. Rep. 449; Kerbs v. Ewing, 22 Fed. Rep. 693; Nelson v. Garey, 15 Neb. 531; Smith v. Bowen, 61 Wis. 258.

⁷ York Co. Bank v. Carter, 38 Pa. St. 446, 453; Covanhoven v. Hart, 21 Pa. St. 495; Tompkins v. Wheeler, 16 Pet. 118; Marbury v. Brooks, 7 Wheat. 556; 11 Wheat. 178; Ferguson v. Spear, 65 Me. 277; Clarke v. White, 21 Pet. 176; White-

head v. Woodruff, 11 Bush, 209; Hill v. Bowman, 35 Mich. 191; Fleischer v. Dignon, 53 Iowa, 288; Butler v. White, 25 Minn. 432; Blennerhassett v. Sherman, 105 U. S. 117; Gage v. Cheesbro, 49 Wis. 494; Beurman v. Van Buren, 44 Mich. 496; Eldridge v. Phillipson, 58 Miss. 270; Dudley v. Danforth, 61 N. Y. 626; Smith v. Skeary, 47 Conn. 47, 54; Brigham v. Fawcett, 42 Mich. 542; Gaus v. Renshaw, 2 Pa. St. 36.

⁸ Lincoln v. Wilbur, 125 Mass. 249; Hauselt v. Vilmar, 76 N. Y. 630; Getman v. Oswego Bank, 23 Hun, 498; Bentz v. Rockey, 69 Pa. St. 76; Jones v. Sayer, 52 Md. 211; Sife v. Earman, 26 Gratt. 566; Fraser v. Thatcher, 49 Tex. 26; Gardner v. Commercial Bank, 95 Ill. 298; Grant v. National Bank, 97 U. S. 80; Barbour v. Priest, 103 U. S. 293; Gottwalls v. Mulholland, 15 Up. Can. C. P. 62; Rish v. Sherman, 21 Grant Ch. (Ont.) 250; Blennerhassett v. Sherman, 105 U. S. 100; Rogers v. Palmer, 102 U. S. 263; Auffinordt v. Raisin, 102 U. S. 620; Van Patten v. Burr, 52 Iowa, 518; Scott v. Alford, 53 Tex. 82; Eldridge v. Phillipson, 58 Miss. 276; Dance v. Searman, 11 Gratt. 778; Zahn v. Fry, 10 Phila. 247; Frazier v. Fredericks, 24 N. J. L. 162; Guernsey v. Miller, 80 N. Y. 181; James v. Mechanics' Bank, 12 R. I. 460; Farwell v. Jones, 63 Iowa, 316; Perry v. Vezina, 63 Iowa, 25; Nelson v. Garey, 15 Neb. 531; Gallagher's App., 7 Atl. Rep. 237; Evans v. Winston, 74 Ala. 349.

secretly to be the property of the debtor, the transfer is, of course, fraudulent, and the creditors may avoid it and proceed against the property.¹

§ 238. **Delivery, how far essential to transfer of title as against creditors and subsequent purchasers.**—While, as between the parties to the sale of personal property, the delivery of possession is not essential to the transfer of the title, except when the contract calls for an actual delivery by the vendor; yet, as against creditors and subsequent purchasers, the retention of the possession by the vendor is held by the English and American authorities to be a badge of fraud upon creditors and subsequent purchasers, and as against them the title of the buyer is not absolute. In many of the states, including New York, Maryland, Delaware, Missouri, Indiana, Iowa, Minnesota, Wisconsin, Nebraska and California, as well as in England, there are statutory regulations of the effect of retention of possession by the vendor; but, with or without statutory regulations, the same question is raised everywhere under the common law, and independently of the English statute. Partly affected by the phraseology of the statutory regulations, the authorities are divided as to the effect on the rights of creditors of the vendor's retention of possession. The general prevailing rule is, that the retention of possession by the vendor is only *prima facie* evidence of fraud on creditors and subsequent purchasers, which only becomes conclusive upon the failure to rebut the presumption of fraud. Such is the rule in England,² in United States courts,³ in Alabama,⁴ Arkansas,⁵ Georgia,⁶ Indiana,⁷ Kansas,⁸ Louisiana,⁹ Maine,¹⁰ Massachusetts,¹¹ Michigan,¹² Minnesota,¹³

¹ Roberts v. Radcliffe, 35 Kans. 502

² Martindale v. Booth, 3 Barn. & Ad. 498; Lady Arundel v. Phipps, 10 Ves. Jr. 145; Pennell v. Davidson, 18 C. B. 355; Edwards v. Harben, 2 T. R. 587; Hazelington v. Gill, 3 T. R. 620, note (a); Lindon v. Sharp, 6 M. & G. 895-898.

³ Warner v. Norton, 20 How. 448; but see, *contra*, until recently, Hamilton v. Russell, 1 Cranch, 309; United States v. Howe, 3 Cranch, 73; Meeker v. Wilson, 2 Gall. 419; Prettiplace v. Sayles, 4 Mason, 321, 322; United States v. Conyngham, 4 Dall. 358.

⁴ Hobbs v. Bibb, 2 Stew. 54; Millard v. Hall, 24 Ala. 209; Wyatt v. Steward, 34 Ala. 716; Mayer v. Clark, 40 Ala. 259, 269; Maggs v. Benedicks, 49 Ala. 512; Crawford v. Kirksey, 50 Ala. 590; 55 Ala. 282, 285.

⁵ Field v. Simco, 2 Eng. 269; Hempstead v. Johnson, 18 Ark. 123, 124; George v. Norris, 25 Ark. 121.

⁶ Peck v. Land, 2 Kelly, 1; Fleming v. Townsend, 6 Ga. 103, 104; Carter v. Stanfield, 8 Ga. 49; Goodwyn v. Goodwyn, 20 Ga. 600; Collins v. Taggart, 57 Ga. 355.

⁷ Watson v. Williams, 4 Blackf. 26; Case v. Winship, 4 Blackf. 425; Mitter v. Harris, 9 Ind. 86; Kane v. Drake, 27 Ind. 29; Rose v. Colter, 76 Ind. 590.

⁸ Wolfley v. Rising, 8 Kans. 297; Phillips v.

Reitz, 16 Kans. 396; Denny v. Faulkner, 22 Kans. 89; Frankhouser v. Ellett, 22 Kans. 127.

⁹ Miltenberger v. Parker, 17 La. An. 254; Keller v. Blanchard, 19 La. An. 53; Richardson v. Cramer, 28 La. An. 357; Spiney v. Wilson, 31 La. An. 653; Devonshire v. Gathreaux, 32 La. An. 1132.

¹⁰ Cutter v. Copeland, 18 Me. 127; Vinning v. Gilbreth, 39 Me. 496; Sawyer v. Nichols, 40 Me. 212; McKee v. Garcelon, 60 Me. 165; Fairfield Bridge Co. v. Nye, 60 Me. 372; Farrar v. Smith, 64 Me. 74; Reed v. Reed, 70 Me. 504.

¹¹ Brooks v. Powers, 15 Mass. 244; Bartlett v. Williams, 1 Pick. 288; Shumway v. Rutter, 7 Pick. 56; Carter v. Willard, 19 Pick. 1, 11; Packard v. Wood, 4 Gray, 307; Rourke v. Bullens, 8 Gray, 549; Veazie v. Somerby, 5 Allen, 280; Burger v. Cone, 6 Allen, 412; Lanfear v. Sumner, 17 Mass. 110; Ingalls v. Henick, 108 Mass. 351; Dempsey v. Gardner, 127 Mass. 381; Harlow v. Hall, 132 Mass. 232.

¹² Jackson v. Dean, 1 Dougl. (Mich.) 519; Bagge v. Jerome, 7 Mich. 145; Natch v. Fowler, 28 Mich. 205; Molitor v. Robinson, 40 Mich. 200; Webster v. Bailey, 40 Mich. 641; McLaughlin v. Lange, 42 Mich. 81; Carpenter v. Graham, 42 Mich. 191.

¹³ Blackman v. Wheaton, 13 Minn. 326; Vose v. Stickney, 19 Minn. 367.

Mississippi,¹ Nebraska,² New Hampshire,³ New Jersey,⁴ New York,⁵ North Carolina,⁶ Ohio,⁷ Oregon,⁸ Rhode Island,⁹ South Carolina,¹⁰ Tennessee,¹¹ Texas,¹² Virginia,¹³ Wisconsin.¹⁴ On the other hand, the old English doctrine, as laid down in *Edwards v. Harber*,¹⁵ in very guarded terms, is adopted in many of the states, without any material qualification, and the rule established, that the retention of possession is conclusive evidence of fraud on creditors and subsequent purchasers. This rule has been adopted and followed in California,¹⁶ Colorado,¹⁷ Connecticut,¹⁸ Delaware,¹⁹ Florida,²⁰ Illinois,²¹ Iowa,²² Kentucky,²³

¹ *Carter v. Graves*, 6 How. (Miss.) 9; *Rankin v. Holloway*, 3 Smed. & M. 614; *Colstock v. Rayford*, 12 Smed & M. 369; *Sumner v. Roas*, 42 Miss. 749; *Hilliard v. Cagle*, 46 Miss. 300; *Ketchum v. Brennan*, 53 Miss. 596.

² *Robinson v. Uhl*, 6 Neb. 328; *Morgan v. Bogue*, 7 Neb. 429; *Densmore v. Tomer*, 11 Neb. 118; *Miller v. Morgan*, 11 Neb. 121.

³ *Coburn v. Pickering*, 3 N. H. 415; *Trask v. Bowers*, 4 N. H. 309; *Paul v. Crooker*, 8 N. H. 288; *French v. Hall*, 9 N. H. 145; *Clarke v. Morse*, 10 N. H. 236; *Kendall v. Pitts*, 22 N. H. 1, 7; *Putnam v. Osgood*, 32 N. H. 148; *Clapp v. Rogers*, 38 N. H. 435; *Sumner v. Dalton*, 38 N. H. 295; *Stow v. Taft*, 38 N. H. 445; *Coolidge v. Melvin*, 42 N. H. 510; *Cutting v. Jackson*, 56 N. H. 252; *Crawford v. Forristall*, 57 N. H. 102; 58 N. H. 114; *Plaisted v. Holmes*, 58 N. H. 293.

⁴ *Hall v. Snowhill*, 14 N. J. L. 8; *Miller v. Pancoast*, 29 N. J. L. 250; *Runyon v. Groshen*, 12 N. J. Eq. 86; *Parr v. Brady*, 37 N. J. L. 201. *Contra*, *Chumar v. Wood*, 1 Halst. 155.

⁵ *Hanford v. Artcher*, 4 Hill, 271; *Thompson v. Blanchard*, 4 N. Y. 303; *Ball v. Loomis*, 29 N. Y. 412, 415; *Mitchell v. West*, 55 N. Y. 107; *May v. Walter*, 56 N. Y. 8; *Tilson v. Terwilliger*, 56 N. Y. 273; *Blant v. Gabler*, 77 N. Y. 461; *Steele v. Benham*, 84 N. Y. 634.

⁶ *Rea v. Alexander*, 5 Ired. 644; *Boone v. Hardie*, 83 N. C. 470.

⁷ *Rogers v. Dare*, Wright, 136; *Burbridge v. Seeley*, Wright, 359; *Barr v. Hatch*, 3 Ohio, 327; *Hornbeck v. Van Metre*, 9 Ohio, 153; *Collins v. Meyers*, 16 Ohio, 547, 552.

⁸ *Moore v. Floyd*, 4 Oreg. 101; *McCully v. Swackhamer*, 6 Oreg. 438.

⁹ *Anthony v. Wheatons*, 7 R. I. 490, 498; *Sarle v. Arnold*, 7 R. I. 582; *Meade v. Gardiner*, 13 R. I. 257.

¹⁰ *Pregnall v. Miller*, 21 S. C. 385 (53 Am. Rep. 684); see *Terry v. Belcher*, 1 Bail. (S. C.) 568; *Smith v. Henry*, 2 Bail. 118; *Fulmore v. Burrows*, 2 Rich. Eq. 96; *Garrett v. Rhame*, 9 Rich. 407; *Quinzard v. Aldrich*, 10 Rich. Eq. 253; *Jones v. Blake*, 2 Hill. Ch. 636; *Pringle v. Rhame*, 10 Rich. 74.

¹¹ *Grubbs v. Greer*, 5 Coldw. 160; *Darwin v. Handley*, 3 Yerg. 502; *Callen v. Thompson*, 3 Yerg. 475; *Young v. Pate*, 4 Yerg. 164; *Maney v. Killough*, 7 Yerg. 443; *Galt v. Dibrell*, 10 Yerg. 146; *Maney v. Ebbert*, 9 Heisk. 153; *Camey v. Camey*, 7 Baxt. 204; *Wiley v. Lashlee*, 8 Humph. 717.

¹² *Bryant v. Kelton*, 1 Tex. 415, 431; *Gibson v. Hill*, 21 Tex. 225; *Green v. Banks*, 24 Tex. 508; *Thornton v. Tandy*, 39 Tex. 544; *Kerr v. Hutchins*, 46 Tex. 384; *Scott v. Alford*, 53 Tex. 82, 92; *Edwards v. Dickson*, 66 Tex. (1886) 2613; 2 S. W. Rep. 718.

¹³ *Davis v. Turner*, 4 Gratt. 422; *Forkner v. Stewart*, 6 Gratt. 197; *Dance v. Seaman*, 11 Gratt. 778; *Lipe v. Earman*, 26 Gratt. 563; *Balt. &c. R. R. Co. v. Glenn*, 28 Md. 287, discussing Virginia law.

¹⁴ *Sterling v. Ripley*, 3 Chand. (Wis.) 166; *Whitney v. Brunette*, 3 Wis. 621; *Smith v. Welch*, 10 Wis. 91; *Grant v. Lewis*, 14 Wis. 487; *Bullis v. Borden*, 21 Wis. 135; *Williams v. Porter*, 41 Wis. 422.

¹⁵ 2 T. R. 587.

¹⁶ *Wood v. Bugby*, 29 Cal. 466; *O'Brien v. Chamberlain*, 50 Cal. 285; *Watson v. Rodgers*, 53 Cal. 401; *Grum v. Bainey*, 55 Cal. 254.

¹⁷ *McCraw v. Welch*, 2 Col. 284; *Bassinger v. Spangler*, 9 Col. 175.

¹⁸ *Patten v. Smith*, 5 Conn. 196; *Swift v. Thompson*, 9 Conn. 63, 69; *Osborne v. Tuller*, 14 Conn. 529; *Kirtland v. Snow*, 20 Conn. 23; *Lake v. Morris*, 30 Conn. 550; *Halstat v. Blakeslee*, 41 Conn. 301; *Mead v. Noyes*, 44 Conn. 487.

¹⁹ *Perry v. Foster*, 3 Harr. 293; *Burman v. Herring*, 4 Herring, 458; *Taylor v. Richardson*, 4 Houst. 300.

²⁰ *Gibson v. Love*, 4 Fla. 217, 238; *Wilson v. Lott*, 5 Fla. 305, 325; *Smith v. Hines*, 10 Fla. 285, 295.

²¹ *Thornton v. Davenport*, 1 Scam. 296; *McCann v. Meyer*, 4 Bradw. 376; *Davis v. Ransom*, 18 Ill. 386; *Thompson v. Yeck*, 21 Ill. 73; *Ketchum v. Watson*, 24 Ill. 591; *Walker v. Collier*, 37 Ill. 362; *Young v. Bradley*, 68 Ill. 553; *Broadwell v. Howard*, 77 Ill. 305; *Strauss v. Minzesheimer*, 78 Ill. 492; *Thompson v. White*, 81 Ill. 456; *Lefever v. Mises*, 81 Ill. 456; *Ticknor v. McClelland*, 84 Ill. 471; *Allen v. Carr*, 85 Ill. 388; *Rogier v. Williams*, 92 Ill. 187; *Dunning v. Mead*, 90 Ill. 376.

²² *Prattier v. Parker*, 24 Iowa, 26; *Hesser v. Wilson*, 36 Iowa, 152; *Boothby v. Brown*, 49 Iowa, 104; *Sutton v. Barlow*, 46 Iowa, 577; *McKay v. Clapp*, 47 Iowa, 318; *Smith v. Champney*, 50 Iowa, 174; *Hickok v. Buell*, 51 Iowa, 655.

²³ *Robbins v. Oldham*, 1 Duv. 28; *Hundley v. Webb*, 3 J. J. Marsh. 643; *Allen v. Johnson*, 4 J. J. Marsh. 235; *Brummel v. Stockton*, 3 Dana,

Maryland,¹ Missouri,² Nevada,³ Pennsylvania,⁴ Vermont.⁵ The rule that the vendor's retention of possession operates as a fraud on the creditors and subsequent purchasers, has been held not to apply to judicial and other forced sales; if for no other reason, because the publicity of the sale gives sufficient notoriety to prevent any presumption of fraud.⁶ It is also unnecessary, as against creditors, to deliver the possession of goods, in order to transfer the title, where the goods are exempt from attachment and execution. It is held that there is no fraud on creditors to retain the possession of such goods, because the creditors cannot levy on them, and, therefore, have no interest in them.⁷

In the states, in which the retention of possession is held to be *prima facie* evidence of fraud, the authorities are divided on the question, whether the good or bad faith of the buyer, as against the vendor's creditors or subsequent purchasers, is a question of law for the court, or of fact for the jury. Some of the courts hold it to be a question of law for the court,⁸ whereas others maintain that it is a question of fact for the jury.⁹ Probably the best rule is, that it is a mixed question

135; *Anthony v. Wade*, 4 Bush, 110; *Morton v. Ragan*, 5 Bush, 334; *Woodrow v. Davis*, 2 B. Mon. 298; *Kendall v. Hughes*, 7 B. Mon. 368; but see *Daniel v. Morrison*, 6 Dana, 185; *Enders v. Williams*, 1 Met. (Ky.) 252; *Cummings v. Griggs*, 2 Duv. 87; *Vanmeter v. Estill*, 78 Ky. 456.

¹ *Gough v. Edelen*, 5 Gill, 101; *Green v. Treiber*, 3 Md. 28; *Bruce v. Smith*, 3 H. & J. 499.

² *Claffin v. Rosenberg*, 42 Mo. 439; 43 Mo. 593; *Lesem v. Nerriford*, 44 Mo. 23; *Bishop v. O'Connell*, 56 Mo. 158; *Burgert v. Borchart*, 59 Mo. 80; *Wright v. Cormick*, 67 Mo. 426; *Stern v. Henley*, 68 Mo. 262; *Cator v. Collins*, 2 Mo. App. 225; *Basse v. Thomas*, 3 Mo. App. 472; *Franklin v. Gummarsell*, 11 Mo. App. 306, 311; *Allen v. Massey*, 17 Wall. 351.

³ *Carpenter v. Clark*, 2 Nev. 243; *Lawrence v. Burnham*, 4 Nev. 361; *Gray v. Sullivan*, 10 Nev. 416.

⁴ *Dames v. Cope*, 4 Binn. 258; *Clow v. Woods*, 5 S. & R. 275; *Babb v. Clemons*, 10 S. & R. 428; *Shaw v. Levy*, 17 S. & R. 99; *McKibben v. Martin*, 64 Pa. St. 352; *Bentz v. Rockey*, 69 Pa. St. 71; *Miller v. Garman*, 69 Pa. St. 134; *Garman v. Cooper*, 72 Pa. St. 32; *Worman v. Kramer*, 73 Pa. St. 378; *Bond v. Bronson*, 80 Pa. St. 360; *Maynes v. Atwater*, 88 Pa. St. 496; *Bismarck Bldg. Assn. v. Bolster*, 92 Pa. St. 123; *Parks v. Smith*, 94 Pa. St. 46; *Pearson v. Carter*, 94 Pa. St. 275; *Barr v. Boyle*, 96 Pa. St. 31; *Dougherty v. Haggerty*, 96 Pa. St. 515; *Crawford v. Davis*, 99 Pa. St. 579.

⁵ *Weeks v. Wood*, 2 Aik. 64; *Boardman v. Keeler*, 1 Aik. 158; *Mott v. McNeill*, 1 Aik. 162; *Wilson v. Hooper*, 12 Vt. 653; *Rockwood v. Colamer*, 14 Vt. 141; *Mills v. Warner*, 19 Vt. 609; *Stephenson v. Clark*, 20 Vt. 624; *Parker v. Hendrick*, 29 Vt. 388; *Houston v. Howard*, 39 Vt. 54; *Daniels v. Nelson*, 41 Vt. 161; *Pettingill v.*

Elkins, 50 Vt. 431; *Weeks v. Prescott*, 53 Vt. 57; *Hildreth v. Pitts*, 53 Vt. 684; *Rothschild v. Rowe*, 44 Vt. 389.

⁶ *Latimer v. Batson*, 4 Barn. & C. 652; *Leonard v. Baker*, 1 Maule & S. 251; *Watkins v. Birch*, 4 Taunt. 328; *Jezepe v. Ingram*, 8 Taunt. 838; *Hanford v. Obrecht*, 49 Ill. 146; *Lothrop v. Wightman*, 5 Wright, 297; *Myers v. Harvey*, 2 Pa. St. 478; *Walter v. Gement*, 13 Pa. St. 515; *Craig's Appeal*, 77 Pa. St. 448; *Maynes v. Atwater*, 88 Pa. St. 496; *Smite v. Crisman*, 91 Pa. St. 428; *Bisbing v. Third Nat. Bank*, 93 Pa. St. 79; but see, *contra*, *Fonde v. Cross*, 15 Wend. 628; *Gardener v. Tubbs*, 21 Wend. 169; *Stinson v. Whigley*, 86 N. Y. 332; see, also, *Wordall v. Smith*, 1 Camp. 332; *Ranney v. Moody*, 6 Up. Can. Com. pl. 471.

⁷ *Potter v. Smith*, 4 Conn. 455; *Foster v. McGregor*, 11 Vt. 595. But see, *contra*, *Barton v. Brown*, 68 Cal. 11, on the ground that the right of exemption is a personal privilege, which is waived if it is not claimed by the debtor.

⁸ See *Griswold v. Sheldon*, 4 N. Y. 501; *Edgell v. Hart*, 9 N. Y. 2, 6; *Russell v. Winne*, 57 N. Y. 591; *Tennessee Bank v. Ebbert*, 9 Helsk. 153; *Collins v. Meyers*, 16 Ohio St. 547; *Coburn v. Pickering*, 3 N. H. 415; *Trash v. Bowers*, 4 N. H. 309; *Summer v. Dalton*, 38 N. H. 395; *Stow v. Taft*, 38 N. H. 445; *Coolidge v. Melvin*, 42 N. H. 510; *Lang v. Stockwell*, 56 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253; *Crawford v. Fonistall*, 57 N. H. 102; *Plaisted v. Holmes*, 58 N. H. 293.

⁹ *Scott v. Alford*, 63 Tex. 82; *Gray v. Bidwell*, 7 Mich. 519; *Brett v. Carter*, 2 Low. C. C. 458; *Peck v. Land*, 2 Kelly, 1; *Fleming v. Townsend*, 6 Ga. 103, 104; *Rose v. Colter*, 76 Ind. 590; *Mohrter v. Robinson*, 40 Mich. 200; *Blackman v. Wheaton*, 13 Minn. 326; *Robinson v. Uhl*, 6 Neb. 333; *Densmore v. Tomer*, 11 Neb. 118; *Hanford v. Archer*, 4 Hill, 271; *Mitchell v. West*, 55 N.

of law and fact; a question of law as to the existence or absence of a presumption of fraud, and a question of fact, as to whether the evidence in favor of good faith establishes a rebuttal of the presumption of fraud.¹ In the states, in which the presumption of fraud is conclusive, it is generally held to be a question of fact for the jury whether there has been a sufficient delivery.²

Mere delay in the delivery of the possession is ordinarily not considered fraudulent as to creditors, as long as delivery is actually made before attachment. Until the attachment, the debtor has done nothing to the injury of the creditor, on which to claim an avoidance of the sale.³ In New York the statute calls for an immediate delivery, and so likewise in Minnesota, Nebraska and Wisconsin. In Missouri, the delivery must be made within a reasonable time after the sale.⁴

§ 239. **What delivery is sufficient as against creditors and subsequent purchasers.**—It has been already explained⁵ that delivery is essential to a transfer of the title of goods sold, as against creditors and subsequent purchasers, and that the retention of possession is at least *prima facie*, if not conclusive, evidence of fraud, sufficient to avoid the sale in favor of the attaching creditor or subsequent purchaser. But this rule of law is never enforced in so narrow a spirit as to require the parties to the contract to do an impossible thing; and hence the question, whether there has been a sufficient delivery as against creditors and subsequent purchasers, must be considered and answered in the light of the particular facts of each case. Where, of course, the retention of possession by the vendor is held to be the only *prima facie* evidence of fraud, proof of good faith readily removes the difficulty; but in any case the title is generally held to vest absolutely in the vendee, wherever constructive or symbolical delivery is held to be a sufficient substitute for an actual manual transfer of possession.* Thus, actual delivery is not required as against creditors, where the goods are, for any reason, not susceptible of a manual transfer of possession. The constructive possession which the law implies in such

Y. 107; May v. Walter, 56 N. Y. 8; Blant v. Gabler, 77 N. Y. 461; Rea v. Alexander, 5 Ind. 644; Boone v. Hardie, 83 N. C. 470.

¹ See the New York cases. See, also, Brooks v. Powers, 15 Mass. 244; Bartlett v. Williams, 1 Pick. 288; Shumway v. Ritter 8 Pick. 443; Shurtleff v. Willard, 19 Pick. 202; Hardy v. Potter, 10 Gray, 89; Ingalls v. Herrick, 108 Mass. 351.

² Weber v. Armstrong, 70 Mo. 217; Hewson v. Tootle, 72 Mo. 632; Hughes v. Cory, 20 Iowa, 399; Lake v. Morris, 30 Conn. 201; Weber v. Peck, 31 Conn. 495; Clow v. Woods, 5 S. & R. 275; Evans v. Scott, 89 Pa. St. 136; Rothschild v. Rowe, 44 Vt. 389 Hesthal v. Myles, 53 Cal. 623. But the court may refuse to give the question to the jury, where there is no evidence of a change of possession. Rothschild v. Rowe, 44 Vt. 389. For a discussion of the question,

what constitutes a sufficient delivery to be good against creditors and subsequent purchasers, see *post*, § 239.

³ Gilbert v. Decker, 53 Conn. 401; Calkins v. Lockwood, 16 Conn. 276; Hall v. Gaylor, 37 Conn. 550; Bartlett v. Williams, 1 Pick. 288; Shumway v. Rutter, 8 Pick. 447; Blake v. Graves, 18 Iowa, 312; Clute v. Steele, 6 Nev. 335; Kendall v. Simpson, 12 Vt. 515; Cruikshanks v. Cogswell, 26 Ill. 366; Frank v. Miner, 50 Ill. 455; Berry v. Esnell, 2 Gratt. 333; Snyder v. Gee, 4 Leigh, 535; Wilson v. Leslie, 20 Ohio, 389; Brown v. Webb, 20 Ohio, 389.

⁴ Clafin v. Rosenberg, 42 Mo. 439; 43 Mo. 539; Bishop v. O'Connell, 56 Mo. 158; Burgert v. Borchert, 59 Mo. 80; Wright v. McCormick, 67 Mo. 626.

⁵ See *ante*, § 238.

⁶ See Tiedeman on Sales, §§ 104, 107

cases, is held to be sufficient.¹ So, also, where goods are in the possession of a bailee.² But in that case notice to third persons in possession of property is essential to perfect the sale.³

The most important, as well as the most doubtful, question in this connection, is whether there is a sufficient constructive delivery to avoid the presumption of fraud on creditors, where the vendor retains possession of the goods as bailee of the vendee. Where the statutes expressly require an actual and continued change of possession, it would be very doubtful, except in the plainest and most notorious cases, whether there was a sufficient delivery. The authorities are not uniform, some holding that there would be a sufficient delivery under those facts; and this would seem to be the correct, as well as the most reasonable, rule.⁴ On the other hand, there are some authorities which hold that there is not a sufficient delivery where the vendor retains possession as bailee of the buyer.⁵ But where the retention of possession by the vendor is accompanied by distinct and notorious acts of ownership on the part of the buyer, as where the goods are kept in the same place, but the sign is changed, the delivery is held to be sufficient.⁶ So, also, the branding of cattle,⁷ and the nailing up holes in a corncrib.⁸ On the other hand, there is not a sufficient possession where the old sign is retained over the door of the shop.⁹

In very many cases, the facts have been held sufficiently doubtful, whether there has been a sufficient change of possession, to make the sale valid against the creditors and subsequent purchasers, in order to submit the question to the jury.¹⁰

¹ "Growing crops," *Robbins v. Oldham*, 1 Duv. 29; *Cummings v. Gibbs*, 2 Duv. 87; *Morton v. Ragan*, 5 Bush, 335. "Ponderous articles," *Broadwell v. Howard*, 77 Ill. 305; *Jewett v. Warren*, 12 Mass. 300; *Davis v. Ransom*, 18 Ill. 396; *Wright v. Grover*, 27 Ill. 426; *Hart v. Wing*, 44 Ill. 141; *Simmons v. Jenkins*, 76 Ill. 479; *Webster v. Granger*, 78 Ill. 230; *Lefever v. Mires*, 81 Ill. 456; *Johnson v. Holloway*, 82 Ill. 334; *Ticknor v. McClelland*, 84 Ill. 471; *Allen v. Carr*, 85 Ill. 388; *Goodheart v. Johnson*, 88 Ill. 58; *Richardson v. Rardin*, 88 Ill. 124; *Dunlap v. Eppler*, 88 Ill. 82; *Greenebaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, 90 Ill. 376; *Rozier v. Williams*, 93 Ill. 187; *Clow v. Woods*, 5 S. & R. 275; *Kingsley v. White*, 57 Vt. 565.

² *Linton v. Butz*, 7 Pa. St. 89; *Worman v. Cramer*, 78 Pa. St. 378; *Woods v. Hull*, 81 Pa. St. 451.

³ *Tuxworth v. Willard*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1; *Hardy v. Potter*, 10 Gray, 89; *Whitney v. Lynch*, 16 Vt. 579.

⁴ *Hobbs v. Carr*, 27 Mass. 532; *Phelps v. Cutler*, 4 Gray, 137; *Green v. Rowland*, 16 Gray, 58; *Stinson v. Clark*, 6 Allen, 340; *Cushing v. Breed*, 14 Allen, 376; *Ingalls v. Herrick*, 108 Mass. 351; *Russell v. O'Brien*, 127 Mass. 349; *Goodheart v. Johnson*, 88 Ill. 58; *Smith v. Crisman*, 91 Pa. St. 428; *Steele v. Miller*, 1 Atl. Rep. (Pa.) 434;

Campbell v. Hamilton, 63 Iowa, 393; *Williams v. Lerch*, 56 Cal. 330; *Montgomery v. Hunt*, 5 Cal. 366 (cattle left in charge of vendor's agent as bailee of the buyer); *Walden v. Murdock*, 23 Cal. 533 (where cattle were branded by the buyer); *Evans v. Scott*, 89 Pa. St. 136 (carpet bought but left in the same place to be used by buyer jointly with vendor).

⁵ *Ruddle v. Givens*, (Cal.) 18 Pac. Rep. 421; *Betz v. Franz*, Pa. St. (n 3 Atl. Rep. 940) noted in 27 Cent. L. J. 19; *Oro, &c. Co. v. Starr*, (Cal.) 8 Pac. Rep. 242; *Stevens v. Irain*, 15 Cal. 503; *Bassinger v. Spoulger*, 9 Col. 175.

⁶ *Cook v. Mann*, 6 Col. 21.

⁷ *Walden v. Murdock*, 23 Cal. 533.

⁸ *Pope v. Cheney*, 68 Iowa, 562.

⁹ *Brown v. Kimmel*, 67 Mo. 430; *Woods v. Bugbey*, 29 Cal. 466; *Lawrence v. Burnham*, 4 Nev. 361; *Hull v. Sigsworth*, 48 Conn. 258; *Clafin v. Rosenberg*, 42 Mo. 449; *Perrin v. Reed*, 85 Vt. 2; *Pierce v. Chipman*, 8 Vt. 337.

¹⁰ *Rafferty v. McKenna*, (Pa. St.) 1 Atl. Rep. 546 (stenciling vendee's name on side of cars); *Wolf v. Kahn*, 62 Miss. 814 (business carried on in same name); *Parker v. Muweli*, 60 N. H. 30 (wagon left in seller's possession); *Ziegler v. Hendrick*, 106 Pa. St. 57 (horse, &c. kept in barn of seller's house); *Brown v. Kimmel*, 67 Mo. 430; *Evans v. Scott*, 89 Pa. St. 136 (leaving carpets in brother's house); *Ross v. Sedgwick*,

§ 240. **Conflicting claims of vendor and vendee's creditors.**—

As soon as the title of the goods has been passed to the vendee, his creditors have a right to the goods as a part of the debtor's assets; and if the vendee redelivers the goods to the vendor, it constitutes a preferential satisfaction of a debt, and is fraudulent or not, in accordance with the general principles set forth in the preceding two sections. Thus, it would be a preference to the vendor as a creditor, if the goods were returned to him after the vendee had acquired absolute possession of the goods;¹ whereas, it is not a preference of a creditor for the vendee to return the goods, or allow the vendor time enough to exercise his right of stoppage *in transitu*, before the goods have come into the actual possession of the vendee.²

69 Cal. 247 (brother's control of furniture in lodging-house); O'Gara v. Lowry, 5 Mont. 427 (brother driving team which he has sold); Leavitt v. Jones, 54 Vt. 423 (41 Am. Rep. 849) (sale by husband to wife); McClure v. Tomey, 107 Pa. St. 414 (sale by father to daughter).

¹ Barnes v. Freeland, 6 T. R. 80; Neate v. Ball, 2 East, 123; Richardson v. Goss, 3 Bos. & P. 119;

Heinekey v. Earle, 8 El. & B. 410; Atkins v. Barwick, 1 Stra. 165; 10 Mod. 432; Salts v. Field, 5 T. R. 211.

² Atkins v. Barwick, 10 Stra. 165; Smith v. Field, 5 T. R. 402; Whitehead v. Anderson, 9 M. & W. 529; Bartram v. Farebrothers, 3 Bing. 579; Bolton v. Lancashire, &c. R. Co., L. R. 1 C. C. 431; 35 L. J. C., p. 137.

CHAPTER XIV.

JURISDICTION OVER PERSONS NON SUI JURIS.

	SECTION		SECTION
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Origin of the equitable jurisdiction over infants	245	Jurisdiction over the custody of infants	248
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§ 244. **Who are persons non sui juris.**—Under this term are included all persons who, through tender age or mental weakness, are incapable of taking care of themselves. The fact, that they are incapable of taking care of themselves, is the justification for the exercise of control by some court over their person and their property. In modern times, particularly in this country, this control of the person and property of persons *non sui juris* is chiefly regulated by statute; and the jurisdiction over them is generally conferred on the surrogate or probate courts. In consequence of this modern legislation, the modern equity jurisdiction is not so important as it once was; but in very few cases, if at all, has this jurisdiction of courts having equity powers been abrogated. It is, therefore, proper that a general account should be given of this equitable jurisdiction; but no attempt will be made to include in this chapter any full or general description of the rights and powers of guardians and wards, inasmuch as the general practice of the control of guardians and wards has been transferred by statute to other courts.

§ 245. **Origin of the equitable jurisdiction over infants.**—It has been in times past a matter for dispute, as to the origin of the equitable jurisdiction over infants; but whether it was due to the original executive power of the kings, as *parens patriæ*, to take care of his incapable subjects, or whether it had its beginning in the court of chancery itself, is a matter of very little concern. It has been so long settled as a branch of the equitable jurisdiction of the courts, instead of being the personal prerogative of the chancellor, as the personal representative of the crown, that no dispute can be raised over the authority of equity judges in general to assume jurisdiction over the person and property of the infant. This is not only the judgment of the English courts;¹ but the same jurisdiction is exercised

¹ See *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; 2 Eq. Lead. Cas. 1416, 1446, 1487 (4th Am. ed.); *Morgan v. Dillon*, 9 Mod. 135, 139; De

Manneville v. De Manneville, 10 Ves. 52, 63; *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 20, 21.

freely by the American courts having equity powers, wherever such jurisdiction has not been taken away by statute.¹

§ 246. **Conditions of acquiring jurisdiction.**—In order, however, that a court of equity may acquire jurisdiction over an infant, he must have some property. A court of equity will not undertake the control of the person of an infant where the petition to the court does not contain an allegation that the plaintiff is possessed of property. The possession of property is not essential to the existence of the jurisdiction; but the court will refuse to take jurisdiction where the infant is not possessed of property; because, without such property, the court could not enforce its decree in respect to the maintenance and care of the infant.² But the amount of the property is not material; and some of the American cases have gone so far as to recognize the jurisdiction of a court of equity over the infant, even where it appeared affirmatively that he has no property.³ In order that an infant might be brought within the jurisdiction of a court of equity in any case, he must be brought into the court by means of a suit of some sort, to which he is a party, either plaintiff or defendant.⁴

§ 247. **Extent and mode of exercising jurisdiction.**—As soon as the jurisdiction of a court of equity has attached to an infant, by the bringing of a suit in equity to which he is made a party, the court proceeds to do whatever is necessary to protect the interest of the infant. But, in order that any court of equity may acquire jurisdiction over an infant, the court must be in the state in which the infant is either domiciled or is at the time a resident,⁵ or in which he has property.⁶ But if he is neither domiciled nor actually resident within the state, and has no property there, the court cannot take jurisdiction over him.⁷ And a court will refuse to exercise jurisdiction over an infant who is by force, or surreptitiously, brought

¹ *Hutson v. Townsend*, 6 Rich. Eq. 249; *Striplin v. Ware*, 36 Ala. 87; *Goodman v. Winter*, 64 *Id.* 410; *Johns v. Smith*, 56 Miss. 727; *Cowls v. Cowls*, 3 Gilm. 435; *Minor v. Minor*, 11 Ill. 43; *Lynch v. Rotan*, 39 *Id.* 14; *McCord v. Ochiltree*, 8 Blackf. 15; *Garner v. Gordon*, 41 Ind. 93; *Maguire v. Maguire*, 7 Dana, 181; *Gardenhire v. Hinds*, 1 Head, 402; *Wood v. Wood*, 5 Paige, 596, 605; *People v. Wilcox*, 22 Barb. 178; *Matter of Clifton*, 47 How. Pr. 172; *State v. Stigall*, 2 Zab. 286, 289; *State v. Baird*, 18 N. J. Eq. 184; 21 *Id.* 384, 387; *In re Harrall*, 31 *Id.* 101; *Downin v. Specher*, 35 Md. 474; *Armstrong v. Stone*, 9 Gratt. 102, 106; *Williams v. Berry*, 8 How. (U. S.) 495; *In the matter of Hubbard*, 82 N. Y. 90, 92; *Wilcox v. Wilcox*, 14 *Id.* 575; *Aymar v. Roff*, 3 Johns. Ch. 49; *Matter of Andrews*, 1 *Id.* 99; *Ex parte Crumb*, 2 *Id.* 439; *Matter of Wollstonecraft*, 4 *Id.* 80.

² Lord Eldon says, in *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 21: "It is not, however, from any want of jurisdiction that it (the

court) does not act where it has no property of an infant, but from want of the means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise its jurisdiction use fully and practically only where it has the means of doing so—that is to say, by its having the means of applying property for the use and maintenance of the infants."

³ *Johnstone v. Beattie*, 10 Cl. & Fin. 42; *Cowls v. Cowls*, 3 Gilman, 435; *Maguire v. Maguire*, 7 Dana, 181.

⁴ *Butler v. Freeman*, Ambl. 301; *Williamson v. Berry*, 8 How. (U. S.) 495, 531; *In re Graham*, L. R. 10 Eq. 530; *In re Hodge's Settlement*, 3 K. & J. 213; *In re Potter*, L. R. 7 Eq. 484.

⁵ *Johnstone v. Beattie*, 10 Cl. & Fin. 42; and see *Nugent v. Vetzera*, L. R. 2 Eq. 704.

⁶ *Logan v. Fairlee*, Jacob, 193; *Stephens v. James*, 1 My. & K. 627; *Salles v. Savignon*, 6 Ves. 572; *Hope v. Hope*, 4 De G. M. G. 328.

⁷ *In the matter of Hubbard*, 82 N. Y. 90, 93.

into a state, where he is not domiciled, and where he has no property.¹

If the court can assume jurisdiction, the first step which it takes in the assumption of control over the infant and his property, is to appoint a guardian.² After the guardian has been appointed to take charge of the person or property of the infant, or of both, the further control of the court over the infant's personal property is exerted through the guardian, and consists, generally, in directing and supervising the actions of the guardian, and providing and compelling the obedience of the infant ward to the guardian. In England, the control and supervision by a court relates to three distinct matters: *First*, the intellectual, moral, and religious training; *second*, the management of the property and the provision for support; *third*, the marriage. In regard to the marriage of the ward, in England, a court of equity exercises a very rigid control; particularly with the view to secure a proper settlement of the property of a female ward to her separate use. And it is a contempt of court for one to marry a female ward, without permission of the court which has jurisdiction over her estate. In this country, that jurisdiction is not asserted or exercised, and a court of equity undertakes only to care for the proper training of the child, and the management of its property. The mental and moral training of the child is left to the discretion of the guardian, where the guardian is proven to be one capable of providing for such training. Where, however, the guardian has shown by his moral delinquencies to be incapable of duly providing for the moral and intellectual training of the child, he will be removed and another guardian appointed in his place. But in regard to the management of the property by the guardian, a court of equity applies to it the general jurisdiction, which it has over the performance of trusts in general, and will employ whatever remedy may be needed to compel an enforcement of the trust and the due administration of the property of the infant.

§ 248. **Jurisdiction over the custody of infants.**—Not only will a court of equity appoint a guardian for the person of an orphan, but it will exercise a controlling influence over the natural guardianship of the parents; and whenever the character of the parents be such, that the best interests of the child will be subserved by its removal from the custody of the parents, a court of equity can, upon the application of some friend of such infant, appoint a guardian to take charge of the child, and remove it from the evil influences of its parents. But this is a very delicate jurisdiction, and will only be exercised by a court of equity in extreme cases, and where the facts are plain, and point to

¹ See *Dawson v. Jay*, 3 De G. M. & G. 764; In the matter of *Hubbard*, 82 N. Y. 90, 95; and see *Smith v. Meyers*, 1 T. & C. 665; *Carpenter v. Spooner*, 2 Sandf. 717; In the matter of *Lagrave*, 45 How. Pr. 301, 305.

² In the matter of *Hubbard*, 82 N. Y. 90, 92;

Wood v. Wood, 5 Paige, 596; In the matter of *Wollstonecraft*, 4 Johns. Ch. 80; *Miner v. Miner*, 11 Ill. 43; *Maguire v. Maguire*, 7 Dana, 181; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *In re Kaye*, L. R. 1 Ch. 387; *Wilcox v. Wilcox*, 14 N. Y. 575.

the absolute necessity of the removal of the child from the custody of its parents, in order to prevent its moral ruin.¹ For the same reason, a court of equity has the power to remove a legally appointed guardian, whenever the best interests of the child require such removal.²

§ 249. **Jurisdiction over persons of unsound mind.**—It seems to be definitely settled, that the equitable jurisdiction over persons of unsound mind is not inherent in a court of equity, but is a personal prerogative of the chancellor, as the representative of the crown. This being the case, it is settled under the English chancery practice, that the appointment of a guardian or committee for the care of an unsound person or person of weak mind, either as to the person or to his property, cannot be exercised by any judge of the court of equity, but by the chancellor alone.³ But after the chancellor has assumed jurisdiction and appointed a committee or guardian, it becomes a part of the general jurisdiction of a court of equity to compel such committee or guardian to perform the trust reposed in him.⁴ This is the view which prevails generally in this country; so that, independently of statute, a court of equity does not claim the right to take jurisdiction over the person or property of one who is *non compos mentis*.⁵ But the affairs of persons of weak mind are now regulated by statute, and those courts take jurisdiction over the affairs of such person, which are authorized by this statute to do so. This is not only the rule in England,⁶ but is likewise the case in the American states. The statutory jurisdiction, thus acquired, extends not only to lunatics, but to all persons who are *non compos mentis*, whatever may be the cause of their mental infirmity.⁷ But as soon as the court, which has this statutory jurisdiction over persons of weak mind, has exercised its jurisdiction by the appointment of a guardian or committee, then the court of equity,

¹ *Matter of Waldron*, 13 Johns. 418; *People v. Mercein*, 8 Paige, 47; 25 Wend. 64; *In re Besant*, L. R. 11 Ch. D. 508; *Swift v. Swift*, 4 De G. J. & S. 710; *De Manneville v. De Manneville*, 10 Ves. 52, 62; *Whitfield v. Hales*, 12 Id. 492; *Warde v. Warde*, 2 Phil. 786; *Anon.*, 2 Sim., n. s., 54; *Thomas v. Roberts*, 3 De G. & Sm. 758; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; s. c., *sub nom* *Wellesley v. Wellesley*, 2 Bligh, n. s., 124; and see *State v. Baird*, 21 N. J. Eq. 384; *Commonwealth v. Addicks*, 5 Binn. 520; 2 Serg. & R. 174.

² *Ex parte Mountfort*, 15 Ves. 445.

³ *Ex parte Chumley*, 1 Ves. 296; *Ex parte Phillips*, 19 Id. 118, 122; *Ex parte Pickard*, 3 V. & B. 127; In the matter of *Webb*, 2 Phil. 10; In the matter of *Baker*, 2 Johns. Ch. 232, 234; *Ex parte Grimstone*, Amb. 706; s. c., 4 Bro. Ch. 235 n; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103, 118, 119; *Cary v. Bertie*, 2 Vern. 333, 342, 343; *Wigg v. Tiler*, 2 Dick. 552.

⁴ *In re Baker's Trusts*, L. R. 13 Eq. 168; *In re Evans*, Id. 21 Ch. D. 297; *In re Blair*, 1 My. & Cr. 300, 302; *In re Frost*, L. R. 5 Ch. 699; *In re*

Leeming, 3 De G. F. & J. 43; *In re Fitzgerald* 2 Sch. & Lef. 151, 438; *In re Blewitt*, 6 De G. M. & G. 187.

⁵ See *Dowell v. Jacks*, 5 Jones Eq. 417.

⁶ *In re Webb*, 2 Phil. 10; *Lysaght v. Roysse*, 2 Sch. & Lef. 151, 153; *In re Monaghan*, 3 Jo. & Lat. 258.

⁷ *Walker v. Russell*, 10 S. C. 82; *Morton v. Sims*, 64 Ga. 298; *Gray v. Obeare*, 59 Id. 675; *Watson's Interdiction*, 31 La. An. 757; *Francke v. His Wife*, 29 Id. 302; *Ex parte Dozier*, 4 Baxt. 81; *Cuneo v. Bessoni*, 63 Ind. 524; *Meharry v. Meharry*, 59 Id. 257; *In re Collins*, 18 N. J. Eq. 253; *In re Hill*, 31 Id. 203; *In re Fitzgerald*, 30 Id. 59; *In re Conover*, 28 Id. 330; *In re Lawrence*, 28 Id. 331; *Dean's Appeal*, 90 Pa. St. 106; *Rogers v. Walker*, 6 Barr. 371; *Dowell v. Jacks*, 5 Jones Eq. 417; see *Matter of Baker*, 2 Johns. Ch. 232, 234; *In re Lasher*, 2 Barb. Ch. 97; *In re Dickie*, 7 Abb. N. C. 417; *Hirsch v. Trainer*, 3 Id. 274; *In re McAdams*, 19 Hun. 292; *In re Zimmer*, 15 Id. 214; *In re Page*, 7 Daly, 155; *Matter of Colah*, 6 Id. 308.

as such, can apply to that case its general jurisdiction over the enforcement of trusts, and may compel such guardian or committee to perform the trust thus reposed in them.¹

¹ *In re Harrall*, 31 N. J. Eq. 101; see, also, *Stephens v. Marshall*, 23 Hun, 641; *Polis v. Tice*, 82 N. J. Eq. 432; *Moody v. Bibb*, 50 Ala. 245; *Cole's Com. v. Cole's Adm'r*, 28 Gratt. 365; *Stumph v. Guard. of Pfeiffer*, 58 Ind. 472.

CHAPTER XV.

ANCIENT USES AND STATUTE OF USES.

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§ 252. **Origin and history.**—It is not proposed to give in detail the history of the origin and introduction into the English jurisprudence of Uses and Trusts, but a few words are necessary as explanatory of their character. At common law the only mode of conveying lands was by transmutation of possession. This element was a necessary ingredient of every conveyance, for a common law title was inseparable from the right of possession. The power of alienation was also very much restricted. It could only be done with the consent of the lord, and even after these restrictions upon conveyancing were removed, the inability to dispose of lands by will, the cumbersome character of the common law conveyances, and the burdens attached as incidents to a legal estate, such as the rights of dower and curtesy, the possibility of escheat and forfeiture for attainder of treason or corruption of blood, and the innumerable fines and reliefs required by the feudal law of tenure to be paid to the lord, led to the introduction of Uses and Trusts, which relieved the beneficial owner of all these burdens, and gave him an almost absolute property in the lands. A further impetus was given to their general adoption by the prohibitions imposed by the *magna charta* and the statute of *mortmain* upon the ecclesiastical corporations to hold and acquire lands. These statutes, recognizing and relating solely to legal estates, only prevented such corporations from holding legal estates. The ecclesiastics, with their customary astuteness, had the lands conveyed to persons who could take and hold them in trust, to permit the corporations to enjoy the benefit thereof. It may be doubtful whether the ecclesiastics were the first to adopt this

mode of holding lands, but to them certainly may be ascribed the honor of devising the means for the enforcement of the confidence reposed in the person to whom the land was conveyed. Finally the civil wars between the houses of Lancaster and York, and the increased danger of attainder and confiscation of estates, resulting from participation in these wars upon one side or the other, caused a large portion of the lands of England to be settled in this manner.¹ It is supposed, with good reason therefor, that the doctrine of uses and trusts was derived from the civil or Roman law, and corresponds, in some respects, to what is known in that system of jurisprudence as the *fidei commissum*.²

§ 253. **What is a use?**—A use or trust is a confidence, which acquired, under the operation of the rules of equity, the character of an estate, reposed in the person holding the legal estate, who is known as the feoffee to use or trustee, that he shall permit the person designated in the conveyance to the feoffee to use or by the legal owner, and who is called the *cestui que use or trust*, to enjoy the rents and profits of the land. The use or trust is the beneficial interest in and issuing out of the land, while the legal title remained in the person who was seised in the use.³ In a court of law he was deemed the owner, brought all the actions for the protection of the property against trespass, waste and disseisin, and exercised generally the legal rights of an owner.⁴ He could even maintain an action of ejectment against the *cestui que use*.⁵ The rights of the *cestui que use* were not recognized in a court of law. He had no standing in that court, and only obtained an ample remedy for the protection of his estate when the court of chancery assumed jurisdiction.⁶

§ 254. **Enforcement of the use.**—Before the English court of chancery acquired jurisdiction, the *cestui que use* was compelled to rely upon the good faith of the feoffee to use, although there is supposed to have been an inefficient remedy in the spiritual or ecclesiastical courts. But since these courts had no means of enforcing their decrees, and exerted only a spiritual influence over the conscience, the *cestui que use* was practically dependent upon the honesty of his feoffee to use.⁷

¹ 2 Washb. on Real Prop. 384-386; 1 Spence Eq. Jur. 439-442; Chudleigh's Case, 3 Rep. 123; 2 Pomeroy Eq. Jur., § 978.

² 2 Washb. on Real Prop. 386; Bac. Law Tracts, 315; Cornish, Uses, 10. The *fidei commissum* of the Roman law, however, could only be created by will, and was designed to give the beneficial interest in property to those who were otherwise prohibited from taking as devisee. The testator would direct the heir to transfer the estate to the person designated. This trust was then enforced by the courts. It is, therefore, more proper to say that the *fidei commissum* suggested the use, and the mode of enforcing it, than that the use is derived from the Roman law. Saunder's Justinian, 337, 338; 2 Pomeroy Eq. Jur., §§ 976, 977.

³ 2 Washb. on Real Prop. 388; 2 Bla. Com. 330; Bac. Law Tracts, 307; Co. Lit. 271 b, Butler's note, 231, § 2; 2 Pomeroy Eq. Jur., §§ 978, 979; 1 Spence Eq. Jur. 439-444; Burgess v. Wheate, 1 W. Bl. 158; Tud. Ld. Cas. 252, 253.

⁴ Tud. Ld. Cas. 252; 2 Bla. Com. 330; 1 Spence Eq. Jur. 442; Chudleigh's Case, 1 Rep. 121; 2 Pomeroy Eq. Jur. § 979; 2 Washb. on Real Prop. 388.

⁵ 1 Spence Eq. Jur. 442; Tud. Ld. Cas. 253; Chudleigh's Case, 1 Rep. 121.

⁶ 1 Spence Eq. Jur. 456; Co. Lit. 271 b, Butler's note, 231, § 2; Pom. Eq. Jur., §§ 979, 980; Tud. Ld. Cas. 252; Lewin on Tr. 3, 4.

⁷ 1 Spence Eq. Jur. 444; Tud. Ld. Cas. 252; Bac. Law Tracts, 307.

The ecclesiastics were, of course, greatly concerned in providing a sufficient remedy for their protection and the enforcement of their uses. The court of chancery was at that time entirely under their control, for the chancellor and other judges of the court were almost always appointed from the clergy. And being learned in the civil law, they readily found a precedent in the enforcement of the *fidei commissa*¹ of that system of jurisprudence. With this precedent before him, John De Waltham, Bishop of Salisbury, Master of the Rolls, devised the "writ of subpœna," returnable in chancery, and directed against the feoffee to use, by which he was made to account under oath to the *cestui que use* for the rents and profits he had received from the land.² This writ could at first be issued against the *feoffee to use*, but not against his heirs and assigns. Subsequently it was made issuable against the heirs and all alienees of the feoffee, who took with notice of the use.³ The court of chancery then for the first time acquired complete jurisdiction over uses and trusts. From that time forward, in the exercise of that jurisdiction, a set of rules has been established for their interpretation and construction, which gave to them, as nearly as it was possible or advisable, the character and incidents of legal estates.⁴

§ 255. **Distinction of uses and trusts.**—Although the words *uses* and *trusts* were employed before the passage of the Statute of Uses, as if they were synonymous; and although they may be used interchangeably when speaking generally of these equitable estates, as they then prevailed, yet a distinction was made between them according to the permanent or temporary character of the estate. If the right to the rents and profits was permanent—that is, of a long duration—it was called a *use*. If the right was only of a temporary character, or given only for special [purposes, it was designated a *trust*.⁵ A more radical difference now exists in the present use of these terms, arising out of the change made in equitable estates by the Statute of Uses.

§ 256. **How uses may be created.—By feoffment.**—Since at common law the ordinary conveyance was feoffment with livery of seisin, operating by transmutation of possession and requiring no evidence in writing of such conveyance, a use might have been created before the Statute of Frauds, when employing this mode of conveyance, by a simple declaration of the feoffor at the time that the feoffee was to hold to the use of some other person.⁶ The Statute of Frauds, however, requires uses and trusts as well as legal estates to be evidenced by some writing signed by the party to be charged. At the present

¹ 1 Spence Eq. Jur. 436; Bac. Law Tracts, 315.

² 1 Spence Eq. Jur. 438; 2 Washb. on Real Prop. 389; 1 Pom. Eq. Jur., §§ 428-431.

³ 1 Spence Eq. Jur. 445; 2 Washb. on Real Prop. 380; 2 Bla. Com. 329; Burgess v. Wheate, 1 W. Bl. 156; 2 Pom. Eq. Jur., § 980.

⁴ 2 Washb. on Real Prop. 392; 1 Cruise

Dig. 341; 1 Spence Eq. Jur. 435; 2 Bla. Com. 331.

⁵ 2 Washb. on Real Prop. 398; 1 Cruise Dig. 246; Tud. Ld. Cas. 255; Saund. Uses, 3, 7; 1 Spence Eq. Jur. 448.

⁶ 1 Spence Eq. Jur. 449; 2 Washb. on Real Prop. 392; 2 Bla. Com. 331.

day, therefore, an oral declaration will not be sufficient to raise a use.¹

§ 257. **Same—Resulting use.**—As a consequence of the introduction of uses, if one makes a conveyance in fee without receiving any good or valuable consideration, equity, presuming that one will not part with a valuable estate without receiving in return a consideration, held that the beneficial or equitable interest remained in or resulted to the grantor. He was supposed to have intended that the use should be reserved to himself. This was called a resulting use. It became, therefore, a general rule that a conveyance of the legal estate in fee without a consideration will not carry with it the beneficial interest unless the facts of the case were such as to rebut the presumption that the feoffor did not intend to part with the beneficial interest.² But where the estate conveyed was less than a fee, there was no resulting use, as the duties and liabilities attached to an estate for life, for years and in tail, were considered a sufficient consideration to prevent the use resulting to the grantor and, also, because the retention of a part of the estate negatives the presumption that he did not intend to part with the beneficial interest in the part which he did convey.³ The use can result only to the grantor and his heirs.⁴ And for the purpose of carrying the use to the feoffee, the smallest nominal consideration was sufficient. It need not be stated in the deed if an actual consideration had passed between the parties; on the other hand, if there is an acknowledgment of the receipt of the consideration in the deed of conveyance, there need be no actual consideration, since the parties to the deed will be estopped from denying it.⁵ Nor is a consideration necessary where the deed expressly declares to whose use the land shall be held. But if only a part of the use is declared by the deed, the remainder would result to the grantor, in the same manner as if no use had been limited, unless the use declared is limited to the grantor, when the remainder will be in the feoffee.⁶ Where, however, the use in remainder is limited by will, and there is

¹ Stat. 29 Car. II, Ch. III, §§ 7, 8; 2 Washb. on Real Prop. 500, 501; Saund. Uses, 229; Tud. Ld. Cas. 266.

² 5 Washb. on Real Prop. 393; 1 Spence Eq. Jur. 451; 2 Bla. Com. 331; Lloyd v. Spillett, 2 Atk. 150; 2 Pom. Eq. Jur., § 981; Osborn v. Osborn 26 N. J. Eq. 385.

³ 1 Prest. Est. 192; 1 Cruise Dig. 376; 1 Spence Eq. Jur. 452; 2 Washb. Real Prop. 396; Tud. Ld. Cas. 258.

⁴ 2 Washb. on Real Prop. 393, 394; 1 Prest. Est. 195; 1 Cruise Dig. 373.

⁵ 1 Spence Eq. Jur. 450, 451; 2 Bla. Com. 329; Tud. Ld. Cas. 255; Lewin on Tr. 27; Squire v. Harder, 1 Paige, 494; Bk. of U. S. v. Houseman, 6 Paige, 526; Titcomb v. Morrill, 10 Allen, 15; 1 Greenl. on Ev., § 26; Wilkinson v. Scott, 17 Mass. 257; Griswold v. Messenger, 6 Pick. 517; Bragg v. Geddes, 93 Ill. 39; Bartlett v. Bartlett, 14 Gray, 277; Gerry v. Simpson, 60 Me. 186; Wilt v. Franklin, 1 Binn. 518; Boyd v. Mc-

Lean, 1 Johns. Ch. 582; Farrington v. Barr, 36 N. H. 86; Miller v. Wilson, 15 Ohio, 108; Philbrook v. Delano, 29 Me. 410; Maigly v. Hauer, 7 Johns. 341; Shepherd v. Little, 14 Johns. 210; Morse v. Shattuck, 4 N. H. 229; 2 Washb. on Real Prop. 394; Gould v. Linde, 114 Mass. 366; Graves v. Graves, 29 N. H. 129; Cairns v. Colburn, 104 Mass. 274.

⁶ 1 Spence Eq. Jur. 449, 511; 2 Bla. Com. 329; Lloyd v. Spillett, 2 Atk. 150; Bac. Law Tracts, 317; Saund. Uses, 103, 104, 142; Co. Lit. 23 a; Tud. Ld. Cas. 258; 1 Prest. Est. 191, 195; Pibus v. Mitford, 1 Ventr. 372; Tipping v. Cozzens, 1 Ld. Raym. 33; Volgen v. Yates, 5 Seld. 223; Farrington v. Barr, 36 N. H. 88; Sir Edw. Clere's Case, 6 Rep. 17; Kenniston v. Leighton, 53 N. H. 311; Graves v. Graves, 9 Fost. 129; Sprague v. Woods, 4 Watts & S. 192; Walker v. Walker, 2 Atk. 68; Lamplough v. Lamplough, 1 P. Wms. 112; St. John v. Benedict, 6 Johns. Ch. 116; Capen v. Richardson, 7 Gray, 370; Altham v. Angelesea,

no disposition of the use during the life of the trustee, particularly where the trustee is the wife or other near relative of the testator, a use is held to be limited by implication in the trustee for his or her life.¹ The doctrine of resulting uses has been abolished by statute in some of the states.

§ 258. **Same—By simple declarations.**—Not only could uses be raised by a declaration to that effect, made in connection with a feoffment or other common law conveyance, as above explained, but also by a simple declaration made by the legal owner that he held the land to the use of another.² But since a court of equity lends its aid only to the prevention of an injury or wrong (*injuria*), and will not enforce mere voluntary obligations, these declarations, when made independently of a common law conveyance, had to rest upon a consideration, in order that they might be enforced. If the declaration was made to a stranger a valuable consideration was required, but it need not be a substantial one; while in the case of a declaration to a near blood-relation, a good consideration, natural love and affection, would answer.³ And under this rule equity always construed a contract of sale or agreement to convey as a declaration to uses, and would enforce it if the requisite consideration was present.⁴ The Statute of Frauds now requires all such declarations to be proved by some instrument in writing.⁵

§ 259. **Who might be feoffees to use and cestuis que use.**—As a general proposition, all persons who could be grantees in a common law conveyance can be either *feoffees to use* or *cestuis que use*, infants and married women not excepted. The married woman, as *feoffee to use*, would hold the legal estate free from any attaching rights of her husband, and, as *cestuis que use*, enjoy the beneficial interest as freely as if she were single. Her husband acquires no rights in the equitable estate, since they attach and relate to only legal estates.⁶ Corporations can be *cestuis que use*.⁷ It was formerly held that corporations could not be *feoffees to use*, it being supposed impossible to enforce the performance of the use on account of the intangible, soulless character of the corporation. That doctrine has now been exploded, and courts of equity can enforce their decrees just as effectively against corporations as against natural persons. It is, therefore, the prevailing rule in this country that corporations may hold lands as *feoffee to use*, provided the

11 Mod. 210; *Boyd v. McLean*, 1 Johns. Ch. 582; *Peabody v. Tarbell*, 2 Cush. 232; *Adams v. Savage*, 2 Salk. 679; *Rawley v. Holland*, 2 Eq. Cas. Abr. 753; 1 Cruise Dig. 376; *Roe v. Popham*, Dougl. (Mich.) 25; *McCown v. King*, 23 S. C. 232; *Gove v. Learoyd*, 140 Mass. 524.

1 *Fisher v. Fisher*, 41 N. J. Eq. 16.

2 See *post*, § 294.

3 2 Bla. Com. 329; Co. Lit. 271 b, Butler's note, 231; Tud. Ld. Cas. 268; 1 Spence Eq. Jur. 450; 2 Washb. on Real Prop. 394, 395.

4 2 Washb. on Real Prop. 397; 1 Spence Eq. Jur. 452, 453.

5 See *post*, § 296.

6 Tud. Ld. Cas. 254; 4 Kent's Com. 293; *Egerton v. Brownlow*, 4 H. L. Cas. 206; Saund. Uses, 349; Hill, Trust, 52; *Pinson v. Ivey*, 1 Yerg. 325; *Springer v. Berry*, 48 Me. 338; *Claussen v. La Franz*, 1 Iowa, 237; 2 Washb. on Real Prop. 391, 392; 1 Cruise Dig. 340. It is here meant that the husband's rights during coverture do not attach to the wife's equitable estate. But he has curtesy in such estates, unless expressly excluded. See *Tiedeman Real Prop.*, § 105.

7 Cruise Dig. 354; 2 Washb. on Real Prop. 391; Tud. Ld. Cas. 254.

limitations of their charters do not make such a conveyance foreign to the purposes of their creation.¹

§ 260. **What might be conveyed to uses.**—Every species of real property, which is comprehended under the terms *lands, tenements* and *hereditaments*, both corporeal and incorporeal, may be the subject of conveyance to uses.² At an early period it was held necessary for the grantor to be possessed of an estate of which seisin could be predicted, in order that a use might be created out of it.³ But this doctrine has long since been abandoned, and chattels, both real and personal, can now be settled to uses. But since a mortgage is treated in equity as a lien instead of an estate in lands, there can be no conveyance of it to uses, *i. e.*, independently of the debt. The debt may be conveyed to uses, and the mortgage would follow as an incident of the debt.⁴

§ 261. **Incidents of uses.**—As uses, considered as estates in lands, were the mere creatures of equity, and acquired in the early days of their existence no actual recognition in a court of law, the court of chancery, in establishing rules for the government and construction of them, while following to some extent the analogies of the law in relation to legal estates, adopted only such rules of the common law as were consistent with the intended character of this equitable estate. It, therefore, discarded the doctrines of feudal tenure and seisin altogether. Nor did the court at first recognize in uses the rights of dower and curtesy. Uses were also held to be not liable to levy and sale under execution; nor were they forfeited to the crown upon attainder until the statute of 33 Hen. VIII., ch. 20, § 2.⁵ But they were descendible to the heirs, in conformity with the common law of descents.⁶

§ 262. **Alienation of uses.**—For the same reasons, the restrictions imposed upon the common law power of alienation were not applied to uses. There is no limitation upon the alienation of uses, except that imposed by the Statute of Frauds. Before the passage of that statute no formal assignment in writing was required, a simple direction to the trustee to pay over the rents and profits to the assignee was sufficient. These directions the trustee was bound to follow, and obedience could be enforced in like manner as in the case of the original *cestui que use*. But the assignment of the use necessarily had no effect upon the legal estate in the trustee, unless he joined in the conveyance.⁷ And then the formalities required in all common law con-

¹ Ang. & Ames on Corp., Ch. II, §§ 6-8; 2 Washb. on Real Prop. 391; Vidal v. Girard, 2 How. 127; Sutton v. Cole, 3 Pick. 232; Phillip's Academy v. King, 12 Mass. 546.

² 2 Washb. v. Real Prop. 391; 2 Bla. Com. 331.

³ Bla. Com. 331; 1 Cruise Dig. 340; Tud. Ld. Cas. 259.

⁴ 2 Washb. on Real Prop. 408; Merrill v. Brown, 12 Pick. 220.

⁵ 2 Washb. on Real Prop. 395, 399; 1 Spence Eq. Jur. 455, 456, 460; 1 Washb. on Real Prop.

297; 2 Bla. Com. 331; Jackson v. Catlin, 2 Johns. 261. Uses are now very generally held to be subject to the husband's right of curtesy. See Tiedeman Real Prop., § 105.

⁶ 2 Bla. Com. 339; 1 Spence Eq. Jur. 454.

⁷ 2 Cruise Dig. 342; 1 Spence Eq. Jur. 454. The Statute of Frauds required all trusts and confidences to be proved by some writing. 29 Car. II, Ch. III. See *post*, § 296.

⁸ 2 Washb. on Real Prop. 396; 2 Bla. Com. 331.

veyances must have been complied with in order to pass the legal estate.

§ 263. **Estates capable of being created in uses.**—When one has an unlimited use, *i. e.*, a use in fee, whether alone or merged in the legal estate, there is no limitation upon the number and kinds of estates which might be carved out of it. Not only may all the estates known to the common law be created, such as in tail, for years, for life, in remainder vested or contingent, upon condition and upon limitation,¹ but other estates and interests may be limited which are unknown to the common law, and violate its most inflexible rules. Thus, an estate in freehold in the use may be created to commence in the future without a particular estate to support it, whether it be vested or contingent. Or the grantor may limit the use in such a manner as to pass from one to another upon the happening of a contingency; or he may reserve to himself or grant to another the power to divest the present *cestui que use* and vest the use in another to be appointed, or simply by such destruction of the prior use to cause the use to revert to the grantor. These limitations were impossible at common law.² And in construing the limitations of uses, the strict technical rules are not observed, the intention governing in each case. A fee might, therefore, be created in the use without an express limitation to heirs, if the intention to create such an estate is manifested in any other way.³

§ 264. **Disposition of uses by will.**—Under the feudal system, lands could not be disposed of by will. But uses were held to be capable of devise without limitation; and until the passage of the Statute of Wills, 32 Hen. VIII., which made lands divisible by law, as they were under the Saxon law before the Norman conquest, it was a common custom to convey lands to the use of the grantor, which he could then dispose of by will as well as by deed. The Statute of Wills obviated the necessity of such a conveyance in respect to all persons who were empowered by that statute to devise lands. As married women were expressly excluded from the benefit of the statute, this practice of conveying to uses to enable a disposition by will still obtained as to them. The will in such cases only operates as an assignment or devise of the use, or, if it be executed under a power of appointment, as a declaration or appointment of a use, and the legal estate remains unaffected in the hands of the trustee. But in chancery the equitable interests thus acquired by the devisee would receive as complete a protection as those of an assignee or grantee *inter vivos*.⁴

§ 265. **How lost or defeated.**—The enforcement, and hence the

¹ 1 Spence Eq. Jur. 455; 1 Cruise Dig. 343; 2 Washb. on Real Prop. 397.

² 2 Washb. on Real Prop. 397, 398; 1 Cruise Dig. 343; 1 Spence Eq. Jur. 455. Chudleigh's Case, 1 Rep. 135; Shelley's Case, 1 Rep. 101; Fearne Cont. Rem. 284.

³ 1 Spence Eq. Jur. 452; Tud. Ld. Cas. 253; 2 Washb. on Real Prop. 395.

⁴ Co. Lit. 271 b, Butler's note, 231; Tud. Ld. Cas. 268; 2 Bla. Com. 329; 2 Washb. on Real Prop. 395, 396; 6 Cruise Dig. 3, 4.

validity of a use, depends upon a privity of estate and person, existing between the feoffee and *cestui que use* in relation to the land. Before the Statute of Uses, any act of the feoffee by which this privity was destroyed, would defeat the use also. If the feoffee lost his seisin by being disseised, or he disposed of the land by deed to a purchaser for consideration and without notice of the use, the use would be defeated, whether it was vested or contingent, in possession or in remainder. But a conveyance to one with notice, or without consideration, or a descent of the lands to the heirs of the feoffee would not affect the use. The use could still be enforced against the assignee or heir.¹ Where the feoffee was disseised, he alone could recover the seisin according to the common law, and the *cestui que use* could not enforce the use against the disseisor. And, although even now the disseisin of the trustee is likewise a disseisin of the *cestui que use*, and, if continued for a sufficient length of time, would bar both the equitable and legal estates, yet at present, the *cestui que use* may, upon his own motion, and without the co-operation of his trustee, have the disseisor declared a trustee, holding the legal estate subject to the use.²

§ 266. **History of the Statute of Uses.**—As has been stated in the preceding sections, uses became a very common mode of limiting estates. In consequence of the equitable and uncertain character of the use, and its freedom from the burdens of common law estates, its popularity gave rise to the constant perpetration of frauds upon the legal rights of others. “Heirs were unjustly inherited; the king lost his profits of attained persons, aliens born, and felons; lords lost their wards, marriages, reliefs, heriots, escheats, aids; married men lost their tenancies by the curtesy, and women their dower; purchasers were defrauded; no one knew against whom to bring his action, and manifest perjuries were committed.”³ Several attempts were made by the enactment of statutes to check these abuses, notably a statute in the reign of Richard III. (1 R. III., ch. 1), but to no avail. Means of avoiding the operation of these statutes were soon discovered, and the abuses were as grievous after as they were before their enactment. Finally the statute of 27 Hen. VIII., ch. 10, the celebrated Statute of Uses, was passed by Parliament.⁴ The evident intention

¹ Co. Lit. 371 b, Butler's note, 231, § 2; Tud. Ld. Cas. 254; Lewin on Tr. 2; 2 Washb. on Real Prop. 389, 400; 1 Spence Eq. Jur. 456; Chudleigh's Case, 1 Rep. 120; Dennis v. McCagg, 32 Ill. 445; Hallett v. Collins, 10 How. 174; Den v. Troutman, 7 Ired. 155; Burgess v. Wheate, 1 W. Bl. 156; Cholmondely v. Clinton, 2 Meriv. 358.

² See preceding note; 1 Spence Eq. Jur. 501; 1 Cruise Dig. 403.

³ 1 Sugd. Pow. (ed. 1856) 78.

⁴ The statute enacted that “where any person or persons stood or were seized, or at any time thereafter should happen to be seized, of and in any honours, castles, manors, lands,

tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever it be; that in every such case, all and every such person and persons and bodies politic, that have or hereafter shall have, any such use, confidence or trust, in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession,

of the legislator was to abolish the doctrine of uses altogether by the statutory transfer of the legal estate from the *feoffee to use* to the *cestui que use* in every case, whatever may be the limitations upon the use. But the statute met with the most determined opposition from the bench and bar. Notwithstanding the many alleged frauds which could be committed by an abuse of the doctrine, public sentiment was opposed to its absolute destruction, and was in favor of preserving the power of creating an equitable estate in the nature of a use. And notwithstanding the remedial character of the statute, it received at the hands of the profession a strict and technical construction, and was permitted to operate only as far as it was impossible to render nugatory its express provisions. Instead of destroying uses, the statute only established them upon a firmer basis. By a remarkable course of judicial construction—it was practically legislation—the modern doctrine of trusts arose, which obtains to this day, and which includes every species of equitable estate which, under the statute, is capable of creation without being merged into the legal estate.

§ 267. **When a statute will operate.**—The Statute of Uses will only operate upon a conveyance to uses, and transfer the legal to the holder of the equitable title, when the following three elements are present: *First*, a person seised to a use, and *in esse*; *second*, a *cestui que use in esse*; and *third*, a use *in esse*.¹

§ 268. **A person seised to a use and in esse.**—Any person who was capable of being seised before the statute would satisfy the requirements. And although at first it was supposed and held, that aliens and corporations could not be seised to uses, at the present day there is no such restriction. In regard to alien feoffees to use, the general rules of equity relating to trusts will apply, and prevent the failure of the use because of their incapacity to hold the seisin.² And in this country corporations are included under the term of “persons,” and may be seised to uses if the limitations of their charters permit of such holding.³ But the person seised must be *in esse*. If by reason

of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in the use, confidence or trust of or in the same; and that the estate, title, right and possession, that was in such person or persons, that were or hereafter shall be seized of any lands, tenements or hereditaments to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust, *afersuch quality, manner, form and condition* as they had before, in or to the use, confidence or trust that was in them.” This statute has either been adopted in

the different states of this country as part of the common law, or substantially re-enacted, so that it prevails generally throughout the United States. 2 Pom. Eq. Jur., § 530, note 1; Perry on Tr. 299; Guest v. Farley, 19 Mo. 147; Booker v. Carlisle, 14 Bush, 154; Sherman v. Dodge, 28 Vt. 26, 31; Bryan v. Bradley, 16 Conn. 474; Bowman v. Long, 26 Ga. 142; McNab v. Young, 81 Ill. 11; Gorham v. Daniels, 23 Vt. 600.

¹ 1 Cruise Dig. 349; 2 Washb. on Real Prop. 407.
² 2 Washb. on Real Prop. 408; 1 Cruise Dig. 349; Bac. Law Tracts, 347, 348.

³ Sutton v. Cole, 3 Pick. 240; U. S. v. Amedy, 11 Wheat. 392; Vidal v. Girard, 2 How. 127; Phillip's Academy v. King, 12 Mass. 546; Ang. & Ames on Corp., Ch. V, §§ 6-8; Greene v. Dennis, 6 Conn. 393; First Cong. Soc. v. Atwater, 23 Id. 34; Mayor, &c. v. Elliott, 3 Rawle, 170; Bethlehem Borough v. Perseverance Fire

of the limitations of the conveyance the *feoffee to use* is uncertain, as he would be if the legal estate upon which the use depends is a contingent remainder, the statute cannot operate until the contingency happens, upon which the remainder becomes vested.¹

§ 269. **Freehold necessary.**—Seisin cannot be predicated of leasehold estates. In order, therefore, that the statute may take effect, the estate in the *feoffee to use* must be a freehold, for the reason that the statute only provides for the transfer of the legal estate where one is *seised* to the use of another. All leaseholds held to uses remain unexecuted, as before the statute; and the uses are enforceable only in a court of equity. It was once supposed that the freehold must be greater than a life estate; but it is now held that any freehold estate is sufficient, including life estates and all estates of inheritance.² If the freehold, upon which the use depends, is not commensurate with the use, the use will be valid and will be executed, only as far as the legal estate extends. If the legal estate in the *feoffee* is only a life estate, the use is good only for that time, even though the limitation of the use be in terms a fee simple.³ But it is probable at the present day that the rule would be so far relaxed as to make the legal estate by construction co-extensive with the use, unless a smaller estate is expressly limited, in conformity with the rule governing the same question in its connection with the doctrine of trusts.⁴ And an estate tail has been held sufficient to support a use in fee simple.⁵

§ 270. **Use upon a use.**—Since seisin requires a legal estate, and the person out of whom the legal estate is to be drawn by the statute, and transferred to the *cestui que use*, was required to be seised, the courts have held that the statute can only execute the first use, and can have no effect upon the second or other use depending upon the first. For example, an estate is limited to the use of A. to the use of B. The statute can execute the use in A., but cannot go further and transfer the legal estate to B., the final and actual *cestui que use*, because by the strict construction of the statute the legal estate can only pass from

Co., 81 Pa. St. 445; Trustees, &c. v. King, 12 Mass. 546-553; First Parish, &c. v. Cole, 3 Pick. 232-237; Wade v. Am. Col. Soc., 7 Smed. & M. 697; Ayers v. M. E. Church, 3 Sandf. 351; Matter of Howe, 1 Paige, 214. But if the use or trust is foreign to the purpose of its institution, the corporation cannot hold the seisin or legal estate. A new trustee must be appointed to take its place. Matter of Howe, 1 Paige, 214; Sloan v. McConahy, 4 Ohio, 157; Jackson v. Hartwell, 8 Johns. 422; Trustees, &c. v. Peaslee, 15 N. H. 317; Chapin v. School Dist., 38 N. H. 445; Farmer's Loan, &c. Co. v. Carroll, 5 Barb. 613; Bliss v. Am. Bible Soc., 2 Allen, 334; Montpelier v. East Montpelier, 20 Vt. 12; Mason v. M. E. Church, 27 N. J. Eq. 47.

¹ 2 Washb. on Real Prop. 408; Bac. Law Tracts, 349.

² 1 Cruise Dig. 350, 351, 353; Tud. Ld. Cas. 257-259; Galliers v. Moss, 9 B. & C. 267; 1 Prest. Est.

190; 1 Spence Eq. Jur. 466-490; Ashhurst v. Givens, 5 Watts & S. 327; Merrill v. Brown, 12 Pick. 220; Gilbertson v. Richards, 5 H. & N. 454; Franciscus v. Reigart, 4 Watts, 118; 2 Pom. Eq. Jur. 984; Hopkins v. Hopkins, 1 Atk. 591; 2 Washb. on Real Prop. 408, 409.

³ Tud. Ld. Cas. 259; Sandf. on Uses, 109; Jenkins v. Young, Cro. Car. 230; 2 Washb. on Real Prop. 409.

⁴ Doe v. Nichols, 1 B. & C. 336; Doe v. Ewart, 7 A. & E. 636; Norton v. Norton, 2 Sandf. 296; Barker v. Greenwood, 4 M. & W. 421; Adams v. Adams, 6 Q. B. 860; Atty.-Gen. v. Props., &c., 3 Gray, 48; Cleveland v. Hallett, 6 Cush. 407; Farquharson v. Eichelberger, 15 Md. 73; Coulter v. Robertson, 278; Ward v. Armory, 1 Curt. C. Ct. 419; Morton v. Barrett, 22 Me. 257; Smith v. Metcalf, 1 Head, 64; Renzichaussen v. Keyser, 48 Pa. St. 351. See *post*, § 298.

⁵ 1 Cruise Dig. 352; 2 Washb. on Real Prop. 409.

persons who were seised of the legal estate under the deed. A. had only a use, and therefore was not seised. But inasmuch as after the execution of the use the *cestui que use* was to hold the legal estate in "such quality, manner, form and condition" as he had in the use, A. in the case supposed would hold the legal estate to the use of B., and accountable to B. in equity for the rents and profits.¹

§ 271. **Feoffee and cestui que use.—Same person.**—Where the *feoffee to use* and the *cestui que use* are the same person, there is a merger of the equitable in the legal estate without the aid of the Statute of Uses. He takes an absolute estate at common law, unless such a merger would defeat the purposes of the conveyance.² Nor would there be a merger, if the use to the feoffee was not as extensive as the legal estate which is conveyed to him; as where the estate is a fee, and his use is a life interest, or he takes the use jointly with another. In such cases, the use could only be executed by the statute.³ But, nevertheless, if a use is limited upon the use of the feoffee, it will be construed such a limitation of a use as to preclude the execution of the second use. Thus, in a conveyance to A. to the use of A. to the use of B., although, in the absence of the use to B., A. would have been held to be in possession of the legal estate at common law by the merger of the equitable in the legal estate, yet this express limitation to his use will prevent the operation of the statute upon the use in B. A. would hold the legal estate, and the use in B. would remain unexecuted.⁴ In some of the states this doctrine concerning the effect of a use upon a use has been abolished by statute, and the legal title is made to pass through all the intermediate *cestuis que use* until the final and actual beneficiary is reached, when it becomes vested in him.⁵

¹ 2 Washb. on Real Prop. 406, 409, 457, 460, 461; Tyrrell's Case, Dyer, 155, 1 Co. Rep. 133 b, 187; Croxall v. Shererd, 5 Wall. 283; Wyman v. Brown, 50 Me. 157; Hopkins v. Hopkins, 1 Atk. 591; Willett v. Sanford, 1 Ves. Sr. 186; 2 Pom. Eq. Jur., § 985. The rule above enunciated, that a use cannot be limited upon a use, has been abolished by statute in New York, California, Michigan, Minnesota, and Wisconsin. See *post*, § 277, note. And it has also been disapproved and adversely commented on by the Massachusetts court. Thatcher v. Omans, 3 Pick. 521, 528. But it is, perhaps, generally recognized in this country wherever it has been changed by statute. And, basing their conclusions upon this doctrine, the courts have held that where in a deed of bargain and sale the estate is limited to the bargainee to the use of another, it is such a use upon a use as will not be executed by the statute. See Guest v. Farley, 19 Mo. 147; Jackson v. Myers, 3 Johns. 388, 396; Jackson v. Cary, 16 Johns. 302; Croxall v. Shererd, *supra*; Price v. Sisson, 2 Beas. 168. This is, however, only the case with a pure bargain and sale deed. When such a limitation occurs in a modern deed of conveyance, which might be treated as a common law conveyance, as well as a bargain

and sale, and such is supposed to be the case where the operative words are, "grant, bargain and sell," or "give, grant, bargain and sell," the use would presumably be executed by the statute, the bargainee or grantee having acquired the seisin and the legal estate by force of the deed as a common law conveyance. See Tiedeman Real Prop., § 782.

² 2 Prest. Conv. 481; Co. Lit. 271 b, Butler's note, 231; 1 Cruise Dig. 354; Tud. Ld. Cas. 257; Jackson v. Cary, 16 Johns. 302; Jenkins v. Young. Cro. Car. 231; Sammes' Case, 13 Rep. 56; Doe v. Passingham, 6 B. & C. 305, 317; Orne's Case, L. R. 8 C. P. 281.

³ 1 Cruise Dig. 357; Tud. Ld. Cas. 258; Sammes' Case, 13 Rep. 56; Saund. on Uses, 94, 96.

⁴ Doe v. Passingham, 6 B. & C. 305, 317; Williams on Real Prop. 161; Tud. Ld. Cas. 268; Doe v. Martin, 4 T. R. 89; 2 Smith Ld. Cas. 454; Whetstone v. Bury, 2 P. Wms. 146; 1 Sugden on Pow. 168, 169; Moore v. Schultz, 13 Pa. St. 98; Hayes v. Tabor, 41 N. H. 521, 526; Atty.-Gen. v. Scott, Cas. temp. Talb. 138; Price v. Sisson, 2 Beas. 168, 173, 174; 2 Bla. Com. 336; Francis v. Reigart, 4 Watts, 118. *Contra*, Hurst v. McNiel, 1 Wash. C. Ct. 70.

⁵ See *ante*, 270, note; and *post*, § 277, note.

§ 272. **A use in esse.**—It matters not whether the use is one in possession, reversion, or remainder, if the vesting of the title thereto is not contingent, it is a use *in esse*, and will be executed at once by the statute. If the use is one in possession it will be executed immediately, both in title and in possession. If it is to commence in the future, it is called, according to the terms of the limitation, a contingent, springing, or shifting use, and will be considered in a subsequent section.¹ Nor is it important in what manner the use is created—whether by express limitation or by law, as in the case of a resulting use, however the use arises—if it is *in esse*, *i. e.*, vested, the statute will execute it.² If the use is contingent, the use is not *in esse* until the happening of the contingency upon which its vesting depends, when it will be executed in the same manner as if it had been vested from the time of its creation.³ A contingent use cannot be executed by the Statute of Uses into a legal estate, because the transfer of the seisin would give the *cestui que use* a vested estate, while he had in the use only a contingent estate. And the statute required that the *cestui que use* should take the seisin or legal estate “in such quality, manner, form and condition” as he had the use.

§ 273. **Cestui que use in esse.**—There must, furthermore, be some ascertained person *in esse* who is to take and who can take the use under the conveyance. As a general proposition, subject to an exception to be mentioned elsewhere,⁴ the character of the *cestui que use* will not affect the execution of the use. Any person *in esse* will fulfill the requirements of the statute.⁵ But if the *cestui que use* is not *in esse*, or not ascertained, the use is future and contingent, and the operation of the statute is suspended until the *cestui que use* is known.⁶ If a future use is to vest upon the happening of some contingency independent of human action, it is called a contingent, springing, or shifting use. But if the uncertainty or contingent character is to be settled by the act of some person or persons designated by the grantor or testator, then the limitation, although in fact nothing more than a contingent future use, receives the name of a power.⁷

§ 274. **Words of creation and limitation.**—No special form of expression or set of words is necessary in the creation of uses, provided such words are used, as clearly show the intention of the grantor that a use was to be declared in favor of another. The Statute of Uses employs the words “use, confidence, or trust;” and it would, accord-

¹ See *post*, §§ 278, 288.

² 1 Cruise Dig. 358; *Hopkins v. Hopkins*, 1 Atk. 591; *Chudleigh's Case*, 1 Rep. 126; *Osman v. Sheafe*, 3 Lev. 370; *Doe v. Salkeld*, Willes, 674; 2 Smith's Ld. Cas. 288, 297; *Hays v. Kershaw*, 1 Sandf. Ch. 258; *Tud. Ld. Cas.* 262.

³ *Chudleigh's Case*, 1 Rep. 126; *Tud. Ld. Cas.* 262; *Shep. Touch. Prest. ed.* 529 n; *Saund. on Uses*, 110; 1 Sugden Pow. 41. See *post*, § 279.

⁴ See *post*, § 278.

⁵ 1 Cruise Dig. 354; 2 Washb. on Real Prop. 410.

⁶ 1 Cruise Dig. 354; 2 Bla. Com. 336; *Chudleigh's Case*, 1 Rep. 126; *Jackson v. Myers*, 3 Johns. 388; *Reformed Dutch Church v. Veeder*, 4 Wend. 494; *Ashhurst v. Given*, 5 Watts & L. 323; *Miller v. Chittenden*, 2 Iowa, 371; *Shapleigh v. Pillsbury*, 1 Me. 271; *Sewall v. Cargill*, 15 Me. 414. See *post*, § 240.

⁷ 2 Washb. on Real Prop. 420; *Shep. Touch. Prest. ed.* 529 n.

ingly, be safer to adopt one of these words, although it is not necessary.¹ Although the employment of technical words of limitation was not necessary in the creation of a use before the statute,² and since the statute they are not always necessary in the limitation of equitable estates which are not executed by the statute, and which properly fall under the head of trusts,³ yet if the statute does operate, the use will be valid for the purpose of execution, only so far as the words of limitation are capable of limiting similar estates at common law. The word "heirs" is, therefore, necessary to a use in fee, where the common law, in respect to words of limitation, has not been changed by statute; and its absence cannot be supplied by words of similar import. A conveyance, therefore, to the use of A. and the issue of his body would be neither an estate tail nor a fee simple, and A. would take only a life estate.⁴

§ 275. **Active and passive uses and trusts.**—Both before and after the passage of the statute, uses and trusts have been divided into active and passive. Where the *feoffee to use* was required to perform some duty in respect to the estate, the use was an active one. Where the feoffee had nothing to do but to hold the legal title and seisin for the support of the use, it was called passive. Now, since the feoffee can perform these duties only as long as he retains the legal estate, the statute could not execute an active use or trust without defeating the express purpose and intention of the grantor. Furthermore, his estate in the use was subject to the performance of this duty by the legal owner, and an execution of the use would not vest the seisin and estate after "such quality, manner, form and condition" as he had in the use. The courts, therefore, held that it was not the will of the legislature to execute active uses.⁵ And under the strict construction of the statute, the slightest, most unimportant duty in the trustee would prevent the operation of the statute.⁶

¹ 2 Washb. on Real Prop. 411; Tud. Ld. Cas. 258.

² 1 Spence Eq. Jur. 452; 1 Cruise Dig. 343; Tud. Ld. Cas. 253; 2 Washb. on Real Prop. 395.

³ Villers v. Villers, 2 Atk. 71; Fisher v. Fields, 10 Johns. 505; Newhall v. Wheeler, 7 Mass. 189; Cleveland v. Hallett, 6 Cush. 406; Shaw v. Weigh, 2 Stra. 803; Gibson v. Montford, 1 Ves. Sr. 485; Oates v. Cook, 3 Burr. 1684; Atty.-Gen. v. Props., 3 Gray, 48. See *post*, § 298.

⁴ Tud. Ld. Cas. 261; 1 Cruise Dig. 354; Saund. on Uses, 122; 2 Washb. on Real Prop. 380. In most of the states the common law in respect to the employment of technical words of limitation has been abolished by statute. The above rule, therefore, possesses very little practical importance. See Tiedeman Real Prop., § 37.

⁵ 2 Washb. on Real Prop. 467. See note under § 277.

⁶ Thus, the statute was held not to execute the use, where the trustee was directed to sell or dispose of the property—to collect and pay over the rents and profits—to have the active management of the estate—to permit the *cestui*

que use to receive the *net* profits—to apply the profits to the maintenance of the *cestui que use*—to pay annuities out of the rents, or to receive the rents and allow them to accumulate. In any such case, the legal estate being held necessary to the performance of the trustee's duty, the statute could not operate, and the use retained an equitable estate, to be enforced by the courts of equity. 1 Prest. Est. 185; Co. Lit. 290 b, note 249, § 6; 1 Cruise Dig. 385; Doe v. Briggs, 2 Taunt. 109; Nevil v. Saunders, 1 Vern. 415; Bass v. Scott, 2 Leigh, 356; Exeter v. Odiorne, 1 N. H. 232; Posey v. Cook, 1 Hill, (S. C.) 413; Norton v. Leonard, 12 Pick. 152-158; Newhall v. Wheeler, 7 Mass. 189; Morton v. Barrett, 22 Me. 257; Schley v. Lyon, 6 Ga. 530; Plenty v. West, 6 C. B. 201; Doe v. Homfray, 6 A. & E. 206; Pullen v. Rianhard, 1 Whart. 514, 520; Barnett's App., 46 Pa. St. 398; Fay v. Taft, 12 Cush. 448; Smithwick v. Jordan, 15 Mass. 113; Lancaster v. Dolan, 1 Rawle, 231; Jones v. Say and Seal, 1 Eq. Cas. Abr. 383; Peter v. Beverley, 10 Pet. 532; Elliott v. Fisher, 12 Sim. 505; Craig

§ 276. **Uses to married women.**—So, also, where the purpose of the trust is that the *cestui que use*, a married woman, should hold and enjoy the estate for her own separate use, the statute will not execute the use. For the execution of the use would give to the husband control over the property and its rents and profits during coverture, and the common law right of curtesy would attach because of her disability to hold the legal estate free from his control.¹ In making a conveyance to the separate use of a married woman, her power of alienation may, by a special clause, be entirely taken away during the continuance of the marriage, and this restriction will revive upon any subsequent marriage, if the trust is itself revived by such second marriage.² In the absence of such a restraining clause, in England and some of the states, a married woman is to be treated, in respect to her separate property, as a *femme sole*, and she may dispose of the equitable estate as she pleases.³ In a number of the states, however, the English rule has been discarded, and the contrary doctrine maintained that the married woman has no power over her separate estate, except what is expressly granted or reserved to her in the deed or settlement.⁴ The reason why the Statute of Uses could not execute the separate use of a married woman, was that she could not, according to the common law, take and hold the seisin and estate in “such quality, manner, form and condition” as she had in the use. For this reason, it is to be presumed that in those states where the disability of married women is removed, and they are permitted to hold and dispose of property as if they were single, the reason failing, the rule would also fail, and the statute would execute the use.⁵ So, likewise, since the passive use in the married woman is not executed, only because her disability at common law prevents her taking and holding the

v. Leslie, 3 Wheat. 563; *Gott v. Cooke*, 7 Paige, 521; *Cooper v. Whitney*, 3 Hill, 95.

¹ 1 Cruise Dig. 385; *Harton v. Harton*, 7 T. R. 653; *Stearcy v. Rice*, 27 Pa. St. 75; *Bush's App.*, 33 Pa. St. 85; *Nevill v. Saunders*, 1 Vern. 415; *Ware v. Richardson*, 3 Md. 504; *Williams v. Holmes*, 4 Rich. Eq. 495; *Lines v. Darden*, 5 Fla. 78; *Magniac v. Thompson*, 1 Baldw. 63.

² *Hawkes v. Hubback*, L. R. 11 Eq. 5; *In re Gaffee's Trusts*, 1 Macn. & G. 541; *Tullett v. Armstrong*, 4 My. & Cr. 377; *Waters v. Tazewell*, 9 Md. 291; *Fellows v. Tann*, 9 Ala. 999; *Shirley v. Shirley*, 9 Paige, 363; *Fears v. Brooks*, 12 Ga. 195; *Baggett v. Meux*, 1 Phil. 627; but see *Dubs v. Dubs*, 31 Pa. St. 149; *Miller v. Bingham*, 1 Ired. 423.

³ *Fettilplace v. Gorges*, 1 Ves. 46; *Rich v. Cockrell*, 9 Ves. 69; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp.*, 13 Ves. 190; *Major v. Lusley*, 2 Russ. & My. 357; *Essex v. Atkins*, 14 Ves. 542; *Stead v. Nelson*, 2 Beav. 245; *Dyett v. North American Coal Co.*, 20 Wend. 570; 7 Paige Ch. 1; *Powell v. Murray*, 2 Edw. Ch. 636; *Gardner v. Gardner*, 20 Wend. 526; *Yale v. Dederer*, 18 N. Y. 269; *Imlay v. Huntington*, 20

Conn. 175; *Frary v. Booth*, 4 Am. Law Reg., n. s., 441, and note; *Leaycraft v. Hedden*, 3 Green Ch. 551; *Wyly v. Collins*, 9 Ga. 223; *Cooke v. Husbands*, 11 Md. 492; *Chew's Adm. v. Beall*, 13 Md. 348; *McCroan v. Pope*, 17 Ala. 612; *Collins v. Larenburg*, 19 Ala. 685; *Coleman v. Woolley*, 10 B. Mon. 320; *Hardy v. Van Harlingen*, 7 Ohio, n. s., 208; *Whitesides v. Cannon*, 26 Mo. 457; *Segoud v. Gerland*, 23 Mo. 547; *Frazier v. Brownlow*, 3 Ired. Eq. 227; *Newlin v. Freeman*, 4 Id. 312.

⁴ *Ewing v. Smith*, 3 Desau. 417; *Reed v. Lamar*, 1 Strobb. Eq. 27; *Calhoun v. Calhoun*, 2 Strobb. 231; *Magwood v. Johnson*, 1 Hill Ch. 228; *Lancaster v. Dolan*, 1 Rawle, 231; *Wallace v. Coston*, 9 Watts, 137; *Thomas v. Folwell*, 2 Whart. 11; *Patterson v. Robinson*, 1 Casey, 81; *Metcalf v. Cook*, 2 R. I. 355; *Williamson v. Beekman*, 8 Leigh, 20; *Morgan v. Elam*, 9 Yerg. 375; *Marshall v. Stephens*, 8 Humph. 159; *Doty v. Mitchell*, 9 Smed. & M. 447; *Montgomery v. Agricultural Bk.*, 10 Smed. & M. 567.

⁵ So it was held in *Sutton v. Aiken*, 62 Ga. 753; *Bratton v. Massey*, 15 S. C. 277; *Bayer v. Cockerill*, 3 Kans. 292.

same rights and privileges in the legal estate as she had in the use, if she assigns the use to one, who is not under a similar disability, the statute will at once execute the use, and her grantee would get the absolute legal estate, without the joining of the trustees in the conveyance.¹ And the husband would only have to join in the conveyance in order to bar his curtesy, if he had any, in the equitable estate.

§ 277. **Cases in which the statute will not operate.**—To recapitulate, the following are the principal cases in which the statute will not execute the use: 1. Uses in chattel interests. 2. A use upon a use. 3. Contingent uses, whether the contingency depends upon the uncertainty of the *cestui que use*, or the use itself. 4. Active uses or trusts. 5. Uses to married women. Every other use will be executed immediately upon their creation, the *feoffee to use* acting merely as a conduit for the transfer of the seisin to the *cestui que use*. Contingent uses are executed when they become vested, while the other classes of uses above enumerated remain throughout their entire duration unexecuted, and enforced as trusts by chancery.²

§ 278. **Future uses.**—It has been explained that a use could be limited to commence *in futuro*, with or without a preceding estate in the use to support it, and even in derogation of the preceding estate, and that it may be either vested or contingent.³ If it is a vested use, the statute will operate immediately and convert it into a legal estate, having the characteristics of a vested estate in reversion. But if the use is contingent, the operation of the statute is suspended until the use vests or comes *in esse*. These future uses are divided into contingent, springing, and shifting uses, and will here be explained in the order named.

§ 279. **Contingent future uses.—How supported.**—In a conveyance, where there is a contingent use of limited duration, and consequently there are other vested uses, the latter are executed *eo instanti*

¹ See Tiedeman Real Prop., § 93.

² As has been remarked in a preceding note, the English Statute of Uses has been superseded in some of the states by modern statutes, materially different in their operation from the old statute. New York first set the example in 1848. The statute of New York abolishes all express trusts heretofore known, and enumerates the classes of active trusts which can be created. All other trusts, and particularly passive trusts, are declared to be legal estates, and the seisin vests in the *cestui que use* or *trust* by force of the statute. 1 Rev. Stat. N. Y., p. 727, §§ 45, 46, 47, 48, 49, 50. In New York, therefore, all uses are converted into legal estates, except the express trusts enumerated in the statute and trusts arising by implication of law. 1 R. S. N. Y. 728, §§ 51, 52, 53, 55; Leggett v. Perkins, 2 N. Y. 297; Downing v. Marshall, 23 N. Y. 377; Ring v. McCown, 10 N. Y. 268; Garfield v. Hatmaker, 16 N. Y. 475; Lounsbury v. Parry, 18 N. Y. 515;

Levy v. Brush, 45 N. Y. 595; Marvin v. Smith, 46 N. Y. 571; Rose v. Hatch, 125 N. Y. 427; Greene v. Greene, 125, 506. The future contingent uses become, by operation of the statute, future contingent estates of a legal character, and the common law was so changed as to admit of the limitation of legal estates, which were before only possible as the limitation of a use. 1 R. S. N. Y. 724, §§ 16, 17, 18, 19. This legislation has, in substance, been followed in California, Michigan, Minnesota, and Wisconsin. Cal. Civ. Code, §§ 847, 857, 863, 867, 869, 879; 2 Comp. Laws, Mich. (1871) 1331; Gen. Stat. Minn. (1878), p. 553, § 11; 2 Rev. Stat. Wis., p. 1129, § 11. In these states, therefore, the foregoing presentation of uses under the Statute of Uses, as well as the subsequent section on future or contingent uses, must be taken with the qualifications arising under the local statutes prevailing there.

³ See *ante*, § 263.

whether they are created by express limitation or arise by operation of law under the doctrine of resulting uses; while the contingent use remains unexecuted until the contingency happens. But in order that the statute may operate, there must be a seisin somewhere to feed the contingent uses as they arise. Great difficulty is experienced in discovering where that seisin is to be found, and in determining its character. For example, if an estate is limited to the use of A. for life, to the use of B.'s unborn son, to the use of C. in fee. The uses in A. and C. being vested, are immediately executed by the statute, while the use to the unborn son of B., being contingent, remains unaffected. A., under the statute, acquires a legal estate for life, and C. a vested remainder in fee. The statute, therefore, transfers to A. the seisin for life, and to C. the seisin in fee in remainder. What is the nature of the seisin left to support the contingent use in B.'s unborn son, and where is it to be found when the use vests?

The apparent necessity of locating this seisin and of determining its character arose from the consideration of two questions, viz.: 1. After the legal estate had been vested in A. for life and in C. in remainder, was not the entire seisin exhausted and drawn out of the feoffees or releasees to uses? 2. If any seisin did remain in the feoffees, could it not be destroyed and the contingent use defeated by a feoffment of the feoffees?

A great deal of speculative discussion was indulged in by the earlier judges and writers, and a variety of opinions was the result. Some held that the entire seisin vested in the executed uses, subject to the future vesting of the contingent use; others maintained that sufficient seisin remained "*in nubibus, in mare, in terra, in custodia legis*," ready to become united with the contingent use when the contingency happens; while, perhaps, the largest number sustained the view that a portion of the seisin, which they called a *scintilla juris* (a right to recover the seisin), remained in the feoffees to feed the uses as they came into being. But, under this view of the case, it was necessary for the feoffees to enter in order to revive the seisin for the contingent use, and any feoffment by them would result in the destruction of the *scintilla juris*, and along with it the use depending upon it. But the modern writers upon uses have discarded all this abstruse and subtle reasoning, and support the more rational doctrine advocated by Mr. Sugden that "upon a conveyance to uses * * * immediately after the first estate is executed, the releasees to uses are divested of the whole estate, the estates limited previously to the contingent uses take effect, the contingent uses take effect as they arise, by force of and relation to the seisin of the releasees under the deed, and vested remainders over take effect according to the deed, subject to open and let in the contingent uses."¹ The seisin receives, by force of the

¹ 3 Prest. Conv. 400; 1 Sugden on Pow. 20-48;
4 Kent's Com. 238-247; Fearn's Cont. Rem. 205;
2 Washb. on Real Prop. 611; Chudleigh's Case,

1 Rep. 120; Brent's Case, Dyer, 340; Tud. Ld.
Cas. 200; Saund. on Uses, 110.

statute, the power or capacity of feeding all the uses as they arise, and of being transmitted from one to another as they vest in possession.¹ The maintenance of this view does away with the *scintilla juris*, and removes the necessity of a re-entry by the feoffee to regain the seisin for the support of the contingent use, even where there has been a disseisin of all the parties to the deed.²

§ 280. **Contingent uses.**—In the foregoing pages, the term *contingent use* has been used to signify any future or executory use whose vesting in title depends upon a contingency. But the term has been given a more restricted signification, meaning contingent uses which would be good contingent remainders if they had not been limited by way of uses.³ It is a cardinal rule in the construction of all future estates, whether created by deed or will, that if they can take effect as remainders they will be construed to be such, even if they are limited as uses.⁴ A contingent use is, therefore, treated in all essential particulars as a contingent remainder, and requires a particular estate of freehold to support it. If the use is not vested during the existence of the particular estate in the use, it fails in the same manner as if it had been limited as a common law contingent remainder. And if, at the time of the conveyance, the future uses can take effect as remainders, they cannot take effect as future or executory uses when a change of circumstances has made them void as contingent remainders.⁵ And even where the future estate is void in its inception, if it is limited by way of a remainder, as where the vesting of the future use is made to depend upon the duration of a particular estate which cannot support a contingent remainder because it is less than a freehold, the future use will be void as a remainder, and cannot be construed as a springing or shifting use.⁶ But where the future use is not made to depend upon a preceding use, as where it is to vest at a time subsequent to the natural termination of the particular use, a limitation entirely repugnant to the law of remainders, it will be held to be a shifting or springing use, which will vest independently of the preceding estate.⁷

§ 281. **Springing uses.**—A springing use is one to commence in the future, unsupported by the limitation of a preceding use, and which does not, by its vesting, defeat or cut short any prior limitation,

¹ 2 Washb. on Real Prop. 420.

² 1 Sugden on Pow. 17-48; Fearnie Cont. Rem. 293, 295, and Butler's note; 1 Cruise Dig. 282; 4 Kent's Com. 238-246; 2 Washb. on Real Prop. 611, 612.

³ 1 Prest. Abstr. 105; 4 Kent's Com. 258; 2 Washb. on Real Prop. 608.

⁴ Co. Lit. 217; Fearnie Cont. Rem. 284; 1 Prest. Abstr. 108; 2 Washb. on Real Prop. 609.

⁵ Fearnie Cont. Rem. 284, and Butler's note; 2 Cruise Dig. 261; Adams v. Savage, Salk. 679; s. c., 2 Ld. Raym. 854; Goodtitle v. Billington, Dougl. 758; The State v. Trask, 6 Vt. 363; Davies

v. Speed, Salk. 675; but see Dingley v. Dingley, 5 Mass. 535; Carroll v. Hancock, 3 Jones L. 471; Nichols v. Denny, 37 Miss. 59.

⁶ Adams v. Savage, 2 Ld. Raym. 854; Williams on Real Prop. 293; Southsett v. Stowell, 1 Modern, 238; Cole v. Sewell, 4 Dru. & Warr. 27; Tud. Ld. Cas. 263; 4 Kent's Com. 293; 2 Washb. on Real Prop. 612, 613. Mr. Washburn cites Wils. Uses, 9, in opposition to the text. 2 Washb. on Real Prop. 621.

⁷ 2 Washb. on Real Prop. 621; Gore v. Gore, 2 P. Wms. 28.

Thus, a limitation to the use of B. and his heirs after the death of A. Until the death of A. the use results to the grantor, and at his (A.'s) death it is executed in B. and his heirs. A springing use may be either vested or contingent, according to the certainty or uncertainty of the event upon which it depends. The example given above is a vested springing use, as A. is sure to die, and the use takes effect whether B. dies before A. or survives him; but a limitation to the heirs of B. after the death of A. would be contingent, because of the uncertainty of B.'s dying before A.¹

§ 282. **Shifting uses.**—A shifting or secondary use is one which is so limited, that its vesting will defeat the prior estate in the use, and is always contingent. The use upon the happening of the event shifts from the first taker to the second. At common law, no estate could be limited after a fee or in derogation of the preceding estate.² But there is no such restriction upon the limitation of uses. The use in fee may, upon the happening of successive events, be made to shift from one person to another without limit, provided the doctrine of perpetuity is not thereby violated. A shifting use is, therefore, one class of what are called conditional limitations. A conditional limitation can only be created under the Statute of Uses or the Statute of Wills. Under the former, it is known as a shifting use; while under the latter, it is called an executory devise.³ When a future limitation is a conditional limitation, as distinguished from a contingent remainder, has been already discussed,⁴ and will require no further elucidation.

§ 283. **Future use in chattel interests.**—At common law it is impossible to create a remainder in a chattel interest. The lessee of a term of years could grant a part of the term to one, and the rest to another; as, for example, out of a term of thirty years he could assign it to A. for ten years, and to B. for twenty years, beginning at the close of A.'s term. But he could not give A. a life estate and B. a remainder in fee.⁵ This is possible, however, by way of a future use. Where, therefore, such a limitation of a term is made by way of a use, it will not take effect as a remainder, but as a springing or shifting use, according to the terms of the limitation.⁶

¹ 2 Cruise Dig. 263; 2 Washb. on Real Prop. 600-613; 4 Kent's Com. 298; *Egerton v. Brownlow*, 4 H. L. Cas. 206; *Mutton's Case*, Dyer, 274; *Jackson v. Dunsbaugh*, 1 Johns. Cas. 96; *Shapleigh v. Pillsbury*, 1 Me. 271; *Wyman v. Brown*, 50 Me. 156; *McKee v. Marshall*, (Ky.) 5 S. W. Rep. 415; *McCown v. King*, 23 S. C. 232.

² See *Tiedeman Real Prop.*, §§ 281, 306.

³ *Fearne Cont. Rem.* 385; 1 *Spence Eq. Jur.* 452; *Egerton v. Brownlow*, 4 H. L. Cas. 206; 3 *Cruise Dig.* 264; *Co. Lit.* 271 b, note 231, § 3; *Tud. Ld. Cas.* 363; *Winchelsea v. Wentworth*, 1 Vern. 402; 2 Washb. on Real Prop. 622-624. An example of a shifting use, would be, a limitation to A. and his heirs, and if B. should return from Rome, then over to C. and his

heirs. The return of B. from Rome would determine the use in A., and execute the use in C. *Cogan v. Cogan*, Cro. Eliz. 360; *Carwardine v. Carwardine*, 1 Eden, 34; *Winchelsea v. Wentworth*, *supra*; *Doe v. Whittingham*, 4 Taunt. 22; *Buckworth v. Thirkell*, 3 B. & P. 655; *Batley v. Hopkins*, R. I. 445; *Fogarty v. Stack*, (Tenn.) 8 S. W. Rep. 846.

⁴ See *Tiedeman Real Prop.*, §§ 281, 306, 415, 418.

⁵ 1 *Cruise Dig.* 235; *Fearne Cont. Rem.* 401; 4 *Kent's Com.* 270; *Wright v. Cartwright*, 1 Burr. 284.

⁶ 2 *Bla. Com.* 174; *Fearne Cont. Rem.* 401; *Butler's note*; *Lampet's Case*, 10 Rep. 46; *Wright v. Cartwright*, 1 Burr. 284; 2 Washb. on Real Prop. 624, 625.

§ 284. **Shifting and springing uses.—How defeated.**—At common law the destruction of the particular estate by feoffment or other act of the tenant will defeat any contingent remainder depending upon it.¹ And such is also the rule in regard to contingent uses.² But no act of the tenant of a preceding estate will effect the destruction of a springing or a shifting use, which are in their nature independent of any prior estate which may be had in the use.³ It was formerly supposed that, if the tenant of a particular estate was disseised, in order that the contingent use might be executed, there must be an actual entry by the tenant and the actual seisin regained. But this doctrine has been repudiated by the best authorities; and it is now held that the contingent use would vest in title, whether the tenant is seised or has been disseised, and that the contingent *cestui que use* acquires the right of entry by the force of the Statute of Uses.⁴

¹ See Tiedeman Real Prop., § 419.

² *Faber v. Police*, 10 S. C. 376. And see cases and references cited in note 3.

³ 2 Cruise Dig. 281; 4 Kent's Com. 241; Tud. Ld. Cas. 263; Archer's Case, 1 Rep. 67; Chudleigh's Case, 1 Rep. 120; 2 Washb. on Real Prop. 582, 583, 625, 626; see *Owings v. Hill*, (Ky.) 5 S. W. 418.

⁴ *Fearne Cont. Rem.* 286, 290, 295; 1 Kent's Com. 242, 247; 1 Sugden on Pow. 17-48; 2 Cruise Dig. 282, 284; Tud. Ld. Cas. 280; Chudleigh's Case, 1 Rep. 120; *Wegg v. Villers*, 2 Rolle. Abr. 796. This last case is very celebrated, on account of the fact, that the suit was brought on the settlement by Lord Coke of his property upon his wife and daughter. The following is the account given of the case by Mr. Washburn, which is here appended, because a thorough appreciation of the fine points of the case involves an accurate knowledge of the principles enunciated in the preceding pages. "The circumstances under which it (the case of *Wegg v. Villers*) arose were these, as stated by the biographer of Lord Coke: The relations of Lord Coke with his wife, Lady Hatton, it is well known, were not of the most pleasant kind. Coke having fallen into disgrace with King James, while acting as Lord Chief Justice, sought to regain the favor of that weak and capricious monarch, and it was through the agency of Buckingham, who was, at the time, the King's favorite, that he sought to operate upon the King. Buckingham had a brother, Sir John Villers, and Coke a daughter, Frances, by Lady Hatton, and he proposed a match between them. The mother, angry at not having been consulted in the matter, carried her daughter off, and sequestered her. Coke, discovering her place of concealment, went with his sons and seized her by force. Lady Hatton appealed to the Privy Council, and it became an affair of state. It was at length adjusted, upon Lord Coke's paying £10,000 sterling, and entering into articles of settlement upon the marriage of his daughter, pursuant to articles

and directions of the Lords of the Council. The adroitness with which this settlement was drawn, and the cunning manner in which he arranged its provisions, so as to defeat it or let it stand good as he might choose, will be perceived by recurring to its terms, and remembering and applying the idea advanced in Chudleigh's Case, that the uses, so far as contingent, must have an actual seisin in some one, answering to a feoffee's, to sustain them. In the first place, the conveyance was made by covenant to stand seised on his part, and the limitations derived their force and effect from the seisin in himself, for he covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to her first and other sons in tail, reversion to his own right heirs. This gave an estate to him for life in possession, a vested estate for life in remainder to his wife, and the same to his daughter for life in remainder, with contingent uses by way of remainder to unborn sons in tail, reserving to himself, after and above all these limitations, a reversion in fee. Lord Coke then made a deed of *grant* of this reversion to a third person without consideration, and in his deed recited the foregoing settlement. He then made a *feoffment* in fee of the lands thus settled, with livery of seising. As all the estates but the reversion were by way of use, it was the seisin that was in him as covenantor and reversioner which was to support them, and if this was destroyed, so far as these were contingent, they would be defeated. But as his grant of this reversion was to one having notice, it remained subject to the settlement, and the seisin of this grantee was that out of which these uses were to arise in the same way as from the seisin which Lord Coke had had before the grant. But as he was also in possession for life, the effect of his feoffment was not only to destroy his own seisin and estate, but to make a discontinuance of that of his grantee, the reversioner, together with the

§ 285. **Incidents of springing and shifting uses.**—All such uses are capable of being disposed of in equity by assignment or by will, and they descend to the heirs of the *cestui que use*, and this, too, when the use is contingent, provided the contingency does not depend upon the uncertainty of the *cestui que use*. But they cannot be aliened by deed.¹ Where a springing use is vested, since the statute executes it *co instanti*, it becomes a future legal estate, with all the ordinary rights attaching thereto. Such a use can be disposed of in any manner of which a legal vested estate is capable. For the protection of the interests of these *cestuis que use* against any acts of waste of the prior tenant, the rules of the common law in respect thereto apply by analogy, and chancery, upon the application of the *cestui que use*, would restrain the commission of waste, just as if his estate had been a contingent remainder.² Springing and shifting uses are, in their characteristics, essentially the same as executory devises, differing only in the manner of their creation.³

estates of the wife and daughter. But it left a right of entry in the daughter. But as this discontinuance was a forfeiture of the father's life estate, and that of his wife during coverture, it gave a right of entry in the daughter as holder of the next vested estate, and a contingent right of entry to the wife, dependent on her surviving her husband. The former was sufficient to support the contingent use to the daughter's first son, provided there should be a seisin to serve such use, when it should arise. As it turned out, Lord Coke's wife survived him, and having, by the right of entry which she thereby acquired, entered upon the estate, reinstated the divested estates, including that of the grantee of the reversion, out of whose seisin the contingent uses were to arise, and the limitations took effect in their order. If, however, Lord Coke had made his feoffment before making the grant of the reversion, the effect would have been to have worked a dis-seisin and divested all of the then subsisting estates, including the estate or seisin out of which the contingent uses were to arise, and which was to serve them. For as there was no privity between his feoffee, his wife or daughter and his heirs, whose seisin alone could support their contingent uses, no entry by the wife or daughter

could restore the estate and seisin of Lord Coke or his heirs, contrary to his own feoffment, since he himself could not have entered against such a feoffment. Now, the cunning part of the arrangement, which was defeated by his dying while things were in the above state, was this: If he had seen fit to sustain the remainders, he would have suppressed the feoffment, and only have shown the grant of the reversion, to counteract the feoffment, if that should be set up by anyone. Whereas if he had wished at any time to destroy the remainders, he would have suppressed the grant of the reversion, and left the feoffment to have its effect. As he left both these in force, it gave rise to the action above named, and an indefinite amount of refinement and ingenious discrimination upon a rule of law too subtle to be apprehended by ordinary minds." 2 Washb. on Real Prop. 629-631.

¹ Fearne Cont. Rem. 366, and Butler's note; Jones v. Roe, 3 T. R. 88; Hobson v. Trevor, 2 P. Wms 191; 2 Washb. on Real Prop. 626.

² Fearne Cont. Rem. 362, and Butler's note; Stansfield v. Habergam, 10 Ves. 275; 2 Washb. on Real Prop. 626.

³ See Tiedeman Real Prop., Ch. XIV, §§. 540-543, 545-547.

CHAPTER XVI.

MODERN TRUSTS.

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§ 286. **What is a trust?**—The Statute of Uses makes use of the words “use, confidence, and trust,” and recognizes no distinction between them; and before the statute there was, as has been shown,¹ no material difference between them. Such would have been the case in modern times, if the statute had prevented the continued existence of equitable estates, in conformity with the design and intention of the legislators. But the statute was construed to have no effect upon certain equitable interests,² which remain equitable and distinct from the legal estate after as well as before the statute. For the sake of convenience, and the purpose of distinguishing them from those uses and trusts which were executed by the statute, the term *trust* has since been exclusively applied to those equitable interests, which remain such; while the term *use* represents all such interests as are converted into legal estates, either *eo instanti* or subsequently, as in the case of contingent uses.³

§ 287. **Classes of trusts.**—Modern legislation in regard to the same.—Trusts are, in the first place, to be divided into two distinct classes, viz.: express trusts, and those trusts which arise by implication of law. As has already been said in the preceding paragraph, express trusts constitute all of those cases of ancient uses which remain unexe-

¹ See *ante*, § 255.

² See *ante*, § 277.

³ 1 Spence Eq. Jur. 491, 493, 494; 1 Prest. Est. 186-190; Tud. Ld. Cas. 263-276; 2 Bla. Conn. 336; Doe v. Hamfrey, 6 A. & E. 206; Doe v. Biggs, 2

Taunt. 169; Doe v. Collier, 11 East, 377; 4 Kent's Com. 314; Ayer v. Ayer, 16 Pick. 327-330; Fisher v. Fie'ds, 10 Johns. 505; Jones v. Bush, 4 Harr. 1; Horton v. Horton, 7 T. R. 653; 2 Pom. Eq. Jur., §§ 984-986.

cuted by the Statute of Uses, with the exception of the contingent uses which are expected to become vested upon the happening of the contingency. Hence all express trusts will come within the four other cases of exception to the operation of the Statute of Uses, viz.: *First*, uses in chattel interest; *second*, a use upon a use; *third*, uses to married women; *fourth*, active uses or trusts. But under the later legislation, in which New York took the lead and was followed by several of the states, including Michigan, Wisconsin, Minnesota, California, and Dakota, all uses and trusts heretofore known and operative under the old Statute of Uses have been abolished, and all trusts not expressly provided for and permitted by the statute have been pronounced legal estates, vesting in the *cestui que trust* the legal title to the same extent as such *cestui que trust* would have acquired the equitable title. Under this statute, the express trusts which are declared to be possible are four in number: 1. To sell lands for the benefit of creditors. 2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules concerning the suspension of the power of alienation. 4. To receive rents and profits of lands, and to accumulate the same for the benefit of minors, for and during their minority.¹ The statutes in the other states are substantially the same as the New York statute, the provisions of which have just been given, and for all practical purposes in this present connection may be considered as the same.

§ 288. **Active and passive trusts.**—Where a special duty is to be performed by a trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc.,² the trust is called active. It is the duty which prevents the operation of the statute, for the trustee must have a legal estate in order to perform his duties.³ All other trusts are denominated passive trusts, because there is no duty imposed upon the trustee. He simply acts as a reservoir of the legal estate, because from the terms and character of the conveyance and limitation, the statute cannot transfer the legal estate to the *cestui que use or trust*. Such would be a use upon a use, a use in chattel interests, and uses to persons incapable of holding the legal estate, viz.: married women.⁴

¹ Amendments have been made to this statutory provision, authorizing additional trusts, but the underlying principle remains unchanged.

² 1 Cruise Dig. 384; Co. Lit. 290 b, 249, § 6; Tud. Ld. Cas. 270; 1 Prost. Abst. 143; Sherman v. Dodge, 28 Vt. 26; Aiken v. Smith, 1 Sneed, 304; Wells v. Castles, 3 Gray, 323; Ackland v. Lutley, 9 A. & E. 879; Robinson v. Grey, 6 East, 1; Hovell v. Barnes, Cro. Car. 382; Douglass v. Cruger, 80 N. Y. 15; Smith v. Harrington, 4 Allen, 566; Leonard v. Diamond, 31 Md. 563;

Blake v. Anscombe, 1 B. & P., n. R., 25; Doe v. Field, 2 B. & Ad. 564; Culbertson's App., 76 Pa. St. 145; Brooks v. Marbury, 11 Wheat. 78; Gott v. Cooke, 7 Paige, 521; Doe v. Barthrop, 5 Taunt. 382; Doe v. Ewart, 7 A. & E. 636; Upham v. Varney, 15 N. H. 462; William's Appeal, 83 Pa. St. 377; Appeal of Watson, 125 Pa. St. 340; McClellan's Appeal, 130 Pa. St. 451; Grothe's Appeal, 26 W. N. C. 265; Rudy's Appeal, (Pa. '87) 11 Atl. Rep. 398.

³ See authorities cited in preceding note.

⁴ Doe v. Passingham, 6 B. & C. 305; Doe v

§ 289. **Modern statutory changes.**—The modern statutory legislation already referred to¹ in respect to trusts, has had the effect of limiting the trust estates, which may be created to the active trust, declaring all passive trusts to be invalid and inoperative as such. But in abolishing passive trusts the interest of the *cestui que trust* is fully protected by merger into the legal estate, and by transferring to him the legal estate and title which the trustee had acquired under the conveyance.² It has been held that the first class of express trusts, as provided for by the New York statute, is to be confined to sales for the benefit of creditors.³ But in California the statute includes every kind of trusts in which the trustee is empowered to sell for whatever purpose the sale was authorized.⁴ In the second class of cases are included all those trusts which provide for mortgaging or leasing land and with the money raised to pay off incumbrances which may be on the land, except for the payment of general creditors.⁵ In the third class of cases, where provision is made for the collection of rents and profits, and the like, are included the greater number of modern trusts under the statute, and concerning them is the greatest amount of litigation. Some of the more important cases are found in the note below.⁶ In the fourth class are included all trusts providing for the accumulation of income for the benefit of minors in being, and not longer than during the minority of such minors; and likewise such accumulation is permitted in some of these states for the benefit of

Collier, 11 East, 377; Price v. Sisson, 13 N. J. 173; Hayes v. Tabor, 41 N. H. 521; Kuhn v. Newman, 26 Pa. St. 227; Steacy v. Rice, 27 Pa. St. 75; Lines v. Darden, 5 Fla. 78; Horton v. Horton, 7 T. R. 653; William v. Holmes, 4 Rich. Eq. 495; Ware v. Richardson, 3 Md. 505; Moore v. Shultz, 13 Pa. St. 98; Welch v. Allen, 21 Wend. 147; Ramsay v. Marsh, 2 McCord, 252; Webster v. Cooper, 14 How. 488; 1 Prest. Abst. 140; Wagstaff v. Smith, 9 Ves. 520; Boyd v. England 56 Ga. 598; Sutton v. Aiken, 62 Ga. 733; Bolles v. State Trust Co., 27 N. J. 308; Rogers Loc. Works v. Kelly, 19 Hun, 399; Weber v. Weber, 58 How. Pr. 255; Martin v. Funk, 75 N. Y. 134; Boone v. Bank, 84 N. Y. 83; Badgett v. Keating, 31 Ark. 400.

¹ § 287.

² Rawson v. Lampman, 5 N. Y. 456; Wright v. Douglass, 7 N. Y. 564; Astor v. L'Amoreux, 4 Sandf. 524; and see Hill v. Den, 54 Cal. 6; Wormouth v. Johnson, 8 Pac. L. J. 362; Knight v. Weatherwax, 7 Paige 182; Braker v. Deveraux, 8 Paige, 513, 518; Johnson v. Fleet, 14 Wend. 176, 180, *per* Nelson, J.; Rathburn v. Rathburn, 6 Barb. 98; Knickerbocker Ins. Co. v. Hill, 3 Hun, 577; Patton v. Chamberlain, 44 Mich. 5; Toms v. Williams, 41 Id. 552.

³ Selden v. Vermilyea, 1 Barb. 58.

⁴ Thompson v. McKay, 41 Cal. 221, 230; Learned v. Welton, 40 Id. 349; Handley v. Pfister, 39 Id. 283; Estate of Delaney, 49 Cal. 76, 86; Auguisola v. Arnaz, 51 Id. 435, 438; Grant v. Burr, 54 Cal.

298; Bateman v. Burr, 7 Pac. L. J. 274; Gschwend v. Estes, 51 Cal. 134; Sharp v. Goodwin, 51 Id. 219; Tyler v. Granger, 48 Id. 259.

⁵ Lang v. Ropke, 5 Sandf. 363.

⁶ Cutter v. Hardy, 48 Cal. 568; Estate of Delaney, 49 Cal. 76; Smith v. Ford, 48 Wis. 115; White v. Fitzgerald, 19 Wis. 480; Goodrich v. City of Milwaukee, 24 Wis. 422; overruling Martin v. Tittsworth, 10 Id. 320; Moore v. Hege-man, N. Y. 376; Heermans v. Burt, 78 N. Y. 259; Donovan v. Van De Mark, N. Y. 244; Ireland v. Ireland, 84 N. Y. 321; Delaney v. Van Aulen, N. Y. 16; Toms v. Williams, 41 Mich. 552; Meth. Church, &c. v. Clark, 41 Mich. 730; Lyle v. Burke, 40 Id. 499; Schettler v. Smith, 41 N. Y. 323; Manice v. Manice, 43 Id. 303; Vernon v. Vernon, 53 Id. 351; Kiah v. Grenier, 56 N. Y. 220; Heermans v. Robertson, 64 N. Y. 332; Provost v. Provost, 70 N. Y. 141; Stevenson v. Lesley, N. Y. 512; Verdin v. Slocum, 71 Id. 345; Garvey v. McDevitt, 72 N. Y. 556; Low v. Harmony, N. Y. 408; Amory v. Lord, 9 N. Y. 403; Savage v. Burnham, 17 N. Y. 561; Beekman v. Bonsor, 23 N. Y. 298; Downing v. Marshall, N. Y. 366; Gilman v. Reddington, 24 N. Y. 9; Everitt v. Everitt, 29 N. Y. 39; Post v. Hover, 33 N. Y. 593; Harrison v. Harrison, 36 N. Y. 543; Lorillard's Case, 14 Wend. 265; Hawley v. James, 16 Wend. 61; Kane v. Gott, 24 Id. 641; Hone's Ex'rs v. Van Schick, 20 Id. 564; Moore v. Moore, 47 Barb. 257; Burke v. Valentine, 52 Id. 412; Killam v. Allen, Id. 605; Leggett v. Perkins, 2 N. Y. 297.

married women.¹ Under these statutory provisions, the *cestui que trust* has no interest whatever in the property corresponding to an estate in the land—simply the right to enforce such trust and to secure by such enforcement of the trust a full return to him of the rents and profits acquired. The entire estate in the land is vested in the trustee, and he alone can do anything with the estate in the way of alienation. Whether the trustee has the power to sell the estate depends upon the character of such an estate. Where the express power is given to him as a matter of course, he can make the sale;² but where the express power is not given to him, he cannot claim the power to sell, at least, without the order of a court or the express authority of the statute.³ But there is a possibility of a *bona fide* purchaser acquiring title from such a trustee where the trust was not declared in the same instrument which conveys the title to the trustee, and in consequence of his title appearing on the face of the deed to him to be absolute, a *bona fide* purchaser can claim to take the property without notice of the trust. In his character as a *bona fide* purchaser he can claim the absolute title to the property, free from the claims of the *cestui que trust*.⁴

§ 290. **How express trusts were created.**—Like uses before the statute, no particular form of words is necessary in the creation and declaration of trusts. Any words which manifest the intention that the person named shall have the beneficial interest in the estate will be sufficient.⁵ The words used not only must show clearly an intention to create a trust, but they must themselves create the trust, as *verba de presenti*. A promise to create a trust, if voluntary, will not raise a

¹ Harris v. Clark, 7 N. Y. 242; Kilpatrick v. Johnson, 15 N. Y. 322; Dodge v. Pond, 23 Id. 69; Gilman v. Reddington, 24 Id. 9; Toms v. Williams, 41 Mich. 552; see Hawley v. James, 16 Wend. 61; Vail v. Vail, 4 Paige, 317, 323; Morgan v. Masterton, 4 Sandf. 442.

² Sprague v. Edwards, 48 Cal. 239; Saunders v. Schmaelzle, 49 Id. 59; Learned v. Welton, 40 Cal. 349; Thompson v. McKay, 41 Id. 221, 230.

³ Smith v. Bowen, 35 N. Y. 83; Briggs v. Palmer, 20 Barb. 392; Cruger v. Jones, 18 Id. 467; Leitch v. Wells, 48 Id. 637; Powers v. Bergen, 6 N. Y. 358; Belmont v. O'Brien, 12 Id. 394.

⁴ Griffin v. Blanchard, 17 Cal. 70; Thompson v. Toland, 48 Id. 99; Sharp v. Goodwin, 51 Id. 219; Scott v. Umbarger, 41 Id. 410; Price v. Reeves, 38 Id. 457; Lathrop v. Bampton, 31 Id. 17; Holden v. N. Y. & Erie Bk., 72 N. Y. 286; New v. Nicoll, 73 Id. 127.

⁵ Co. Lit. 290 b, note 249, § 14; 1 Spence Eq. Jur. 506, 507; Gomez v. Tradesman's Bk., 4 Sandf. 102; Ames v. Ashley, 4 Pick. 71; Scituate v. Hanover, 16 Pick. 222; Cleveland v. Hallett, 6 Cush. 403; Montague v. Hayes, 10 Gray, 609; Orleans v. Chatham, 2 Pick. 29; Fisher v. Fields, 10 Johns. 495; Wright v. Douglass, 7 N. Y. 564; Raybold v. Raybold, 20 Pa. St. 308; Barron v. Barron, 24 Vt. 375; Ready v. Kearsley, 14 Mich.

226; Pratt v. Ayer, 3 Chand. 265; Norman v. Burnett, 25 Mass. 183; White v. Fitzgerald, 19 Wis. 480; Cockerill v. Armstrong, 31 Ark. 580; Zaver v. Lyons, 40 Iowa, 510; Smith v. Ford, 43 Wis. 115; Hill v. Den, 54 Cal. 6; Richardson v. Inglesby, 13 Rich. Eq. 59; Lyle v. Burke, 40 Mich. 499; Morrison v. Kinstra, 55 Miss. 71; Kitchen v. Bedford, 13 Wall. 413; Gadsden v. Whaley, 14 S. C. 210; Harris' Ex'rs v. Barnett, 3 Gratt. 339; Barkley v. Lane's Ex'r, 6 Bush, 587; Russell v. Switzer, 63 Ga. 711; Wallace v. Wainwright, 87 Pa. St. 263; Porter v. Bk. of Rutland, 19 Vt. 410; Tobias v. Ketchum, 32 N. Y. 319; Selden's Appeal, 31 Conn. 548; McElroy v. McElroy, 113 Mass. 509; Wheeler v. Smith, 9 How. 55; Slocum v. Marshall, 2 Wash. C. Ct. 397; Smith v. Bowen, 35 N. Y. 83; Taft v. Taft, 130 Mass. 461; Toms v. Williams, 41 Mich. 552; Whitcomb v. Cardell, 45 Vt. 24; O'Rourke v. Beard, (Mass. 1890) 23 N. E. Rep. 576; O'Riley v. McKiernan, (Ky. 1890) 13 S. W. Rep. 380; Warburton v. Camp, 55 N. Y. Super Ct. 290; Sanderson v. Broadwell, 82 Cal. 132; Hellman v. McWilliams, 70 Cal. 449; Carter v. Gibson, (Neb. '90) 45 N. W. 634; Phipard v. Phipard, 55 Hun, 433; Gulon v. Williams, 7 N. Y. S. 786; Kintner v. Jones, 122 Ind. 148; Macy v. Williams, 55 Hun, 489.

trust, either express or implied; while such a promise, for a valuable consideration, would raise an implied trust, which would be enforced by a court of equity.¹ The declaration must, and can only, be made by the owner of the legal estate; but for the creation of the trust, it is not necessary to transfer the legal estate to a third person as trustee. A simple declaration by the owner of the land that he holds it in trust for another, will transfer the beneficial interest to the latter, and convert the legal owner into a trustee, provided the requisite consideration is present in the grant.² And it is not even necessary that the declaration should be made to the proposed *cestui que trust*. It may be made without his knowledge and yet be good, if he accepts it within a reasonable time after he has heard of its existence.³ The declaration must, of course—particularly where it is testamentary—contain words of description sufficient to identify the *cestui que trust*.⁴ But a trust cannot be created in a deed by a declaration that a third party shall hold in trust for the grantee the property which is formally conveyed by the deed to the grantee.⁵ It is different in the case of devises where the special intent of the testator to make a trust could be carried out.

§ 291. **Express trusts inferred by construction.**—Not only is it unnecessary for the execution of trusts to make use of formal modes of expression, as has already just been explained in the preceding paragraph, but it is likewise unnecessary, in the creation of express trusts, that such trusts should be directly and explicitly declared in the instrument which purports to create them. This is at least the case where the instrument in question is a will. Such a trust may be presumed or inferred indirectly from the provisions of the will, when such provisions, in regard to the disposition of the property, cannot be carried out, except upon the hypothesis that a trust has been created. In such a case, the trust is said to be inferred from the provisions of the will as a necessary implication of the donor. Although the creation of trusts by inference may take place in gifts *inter vivos*, it is more likely to occur in testamentary dispositions; because the technical con-

¹ *Young v. Young*, 80 N. Y. 422; *Dellinger's Appeal*, 71 Pa. St. 425; *Hays v. Quay*, 68 Pa. St. 263; *Martin v. Funk*, 75 N. Y. 134; *Stone v. Hackett*, 12 Gray, 227; *Huston v. Markley*, 49 Iowa, 162; *Otis v. Beckwith*, 49 Ill. 121; *Olney v. Howe*, 89 Ill. 556; *Andrews v. Hobson*, 23 Ala. 219; *Wyble v. McPheters*, 52 Ind. 393; *Lane v. Ewing*, 31 Mo. 75; *Estate of Webb*, 49 Cal. 541; *Henderson v. Henderson*, 21 Mo. 379; *Neves v. Scott*, 9 How. 196; *Blanchard v. Sheldon*, 43 Vt. 512; *Minor v. Rogers*, 40 Conn. 512; *Adams v. Adams*, 21 Wall. 185; *Taylor v. Henry*, 48 Md. 550; *Owens v. Owens*, 23 N. J. Eq. 60; *McNulty v. Cooper*, 3 Gill & J. 214; *Davis v. Ney*, 125 Mass. 590.

² *Spence Eq. Jur.* 507; *Crop v. Norton*, 2 Atk. 76; *Suarez v. Pumpelly*, 2 Sandf. Ch. 336; *Morrison v. Beirer*, 2 Watts & S. 81; *Uraun v. Coates*, 109 Mass. 581; *Young v. Young*, 80 N. Y. 422; *Tanner v. Skinner*, 11 Bush, 120; *Taylor v.*

Henry, 48 Md. 550; *Ray v. Simmons*, 11 R. I. 266; *Minor v. Rogers*, 40 Conn. 512; *Gadsden v. Whaley*, 14 S. C. 210; *Boykin v. Pace's Ex'r*, 64 Ala. 68; *Hill v. Den*, 54 Cal. 6; *Baldwin v. Humphrey*, 44 N. H. 609; *Bond v. Bunting*, 78 Pa. St. 210; *Titchenell v. Jackson*, 26 W. Va. 460; but see *Scales v. Maude*, 6 De G. M. & G. 43; *Warriner v. Rogers*, L. R. 16 Eq. 340.

³ *Barrell v. Joy*, 16 Mass. 221; *Ward v. Lewis*, 4 Pick. 521; *Beyant v. Russell*, 23 Pick. 508; *Berly v. Taylor*, 5 Hill. 577; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Scull v. Reeves*, 2 Green Ch. 84; *Shipwith's Ex'rs v. Cunningham*, 8 Leigh, 271.

⁴ *Read v. Williams*, 8 N. Y. S. 24; *In re Foley's Will*, 10 N. Y. S. 12.

⁵ *Annis v. Wilson*, 15 Col. 236. But see *post*, § 333, where it is explained that a married woman's separate estate may be created in a direct conveyance to her of the absolute legal estate.

struction of conveyances and agreements, operating *inter vivos*, make it unlikely that any interest may arise by implication from the express provisions of the instrument.¹ The cases, in which a trust would be inferred from the provisions of a will, are three in number: *First*, where the property is given to a parent, or one standing *in loco parentis*, yet with no express declaration of trust in behalf of the children; but the same instrument contains directions for the maintenance of the family or of the children, so constructed as to enable a court to presume, from the gift and from the directions for the maintenance of the family, that the property was given in express trust for that purpose. It is impossible to lay down any general rule in regard to this question; each case must stand upon its own facts and circumstances. In every case, it is a question of fact or of inference whether the testator intended by the provisions of his will to create, in respect to the property, a trust in behalf of the family for whose maintenance the donee receives directions; and the courts have not uniformly rested their decisions on any reliable principle or rule, which could serve as a reliable guide, in determining when a trust will be presumed or inferred, and when it will not. The ordinary form of disposition of property, from which the inference might be drawn that a trust was intended for the benefit of a family, is where the property is given to one, followed by a general statement that he may occupy and enjoy and otherwise dispose of the property for the benefit of himself and his family. The English cases generally pronounce such dispositions of property to be a trust for the benefit of the whole family,² unless other language is contained in the instrument which excludes the testator's intention of bestowing any beneficial interest upon the parent.³ In some of the cases, the gift has been construed to give the parent a life estate, with a power of appointment in trust for the children.⁴ The American cases are not uniform in their conclusions on this subject: some of the cases holding, that with such disposition of property a trust has been created in behalf of the family;⁵ while on the other hand, in very similar, if not identical, cases, other courts have come to the conclusion that no trust was intended in behalf of the children.⁶

¹ See *Liddard v. Liddard*, 28 Beav. 266.

² *Byne v. Blackburn*, 26 Beav. 41; *Carr v. Living*, 28 *Id.* 644; *Bird v. Maybury*, 33 *Id.* 351; *Hora v. Hora*, *Id.* 88; *Wilson v. Maddison*, 2 Y. & C. Ch. 372; *Longmore v. Eleum*, *Id.* 363, 370; *Staniland v. Staniland*, 34 Beav. 536; *Woods v. Woods*, 1 My. & Cr. 401; *Berry v. Briant*, 2 Dr. & Sm. 1; *Castle v. Castle*, 1 De G. & J. 352.

³ *Blakeney v. Blakeney*, 6 Sim. 52; *Wetherell v. Wilson*, 1 Keen, 80; *Brown v. Casamajor*, 4 Ves. 498; *Benson v. Whittam*, 5 Sim. 22; *Biddles v. Biddles*, 16 Sim. 1; *Jones v. Greatwood*, 16 Beav. 527; but see *Wheeler v. Smith*, 1 Giff. 300.

⁴ *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Crockett v. Crockett*, 2 Phill. 553; *Costabadie v. Costabadie*, 6 Hare, 410; *Gully v. Gregoe*, 24

Beav. 185; *Jeffery v. De Vitre*, Ill. 276; *Shovelton v. Shovelton*, 32 *Id.* 143; but see *Lambe v. Eames*, L. R. 6 Ch. 597.

⁵ *Parsons v. Best*, 1 T. & C. 211.

⁶ *Bryan v. Howland*, 98 Ill. 625; *Taft v. Taft*, 130 Mass. 461; *Biddle's Appeal*, 80 Pa. St. 258; see, in general, *Whiting v. Whiting*, 4 Gray, 236, 240; *Andrews v. Bank of Cape Ann*, 3 Allen, 313; *Smith v. Wildman*, 39 Conn. 387; *Paisley's Appeal*, 70 Pa. St. 153, 158; *Whelan v. Reilly*, 3 W. Va. 597; *Woods v. Woods*, 1 My. & Cr. 401; *Raikes v. Ward*, 1 Hare, 415; *Carr v. Living*, 28 Beav. 644; *Bird v. Maybury*, 33 *Id.* 351; *Byne v. Blackburn*, 26 *Id.* 41; *Longmore v. Eleum*, 2 Y. & C. Ch. 363, 369; *Berry v. Briant*, 2 Dr. & Sm. 1.

The second class of cases of express trust, created by inference, are those in which precatory words are employed. Words which, in their ordinary acceptation, are precatory instead of being mandatory, when used by a testator in respect to the estate devised, will sometimes be sufficient to raise a trust, if from the whole will a clear intention to create a trust may be gathered. Thus, the words entreat, desire, hope, recommend, etc., have been held to declare a trust.¹ The disposition of the courts, however, in the later cases, is to pronounce against the presumption, that a testator using precatory words intended thereby to create a trust. And while the general doctrine is still maintained, the American courts are very strongly opposed to its extension.² In Connecticut and Pennsylvania, the courts are particularly restrictive in their application of the doctrine; and it must be stated, that at best it is a very unsafe practice to give to words of an entirely precatory meaning the force and effect of a command.³

The last class of cases are those in which power is given to a trustee, and the trust is inferred from the bestowal of such powers, because

¹ Pennock's Estate, 20 Pa. St. 274-280; Erickson v. Willard, 1 N. H. 217; Harper v. Phelps, 21 Conn. 257; Foose v. Whitmore, 82 N. Y. 405; Dresser v. Dresser, 46 Me. 48; Amee v. Johnson, 35 Vt. 173; Spooner v. Lovejoy, 108 Mass. 529; Paisley's Appeal, 70 Pa. St. 153; Van Duyne v. Van Duyne, 1 McCart. 397; Williams v. Worthington, 49 Md. 572; Harrison v. Harrison's Adm'r, 2 Gratt. 1; Cook v. Ellington, 6 Jones Eq. 371; Tolson v. Tolson, 10 Gill & J. 159; Young v. Young, 69 N. C. 309; Lesesne v. Witte, 5 S. C. 450; Ingraham v. Fraley, 29 Ga. 553; Lines v. Darden, 5 Fla. 51; Cockrill v. Armstrong, 31 Ark. 580; McKee's Adm'r v. Means, 34 Ala. 349; Collins v. Carlisle, 7 B. Mon. 13; Lucas v. Lockhart, 10 Smed. & M. 466; Harding v. Glyn, 1 Atk. 469; 2 Eq. Ld. Cas. 1838-1848, 1857-1866; Enders v. Tasco, (Ky.) 11 S. W. Rep. 818; Baker v. Brown, 146 Mass. 369; Noe v. Kern, 93 Mo. 367; Wood v. Carnden, &c. Trust Co., (N. J. 1888) 14 Atl. Rep. 885; Colton v. Colton, 127 U. S. 300; Taylor v. Martin, (Pa. 1887) 8 Atl. Rep. 928; Salomon v. Lawrence, 52 N. Y. Super. Ct. 154; see, also, 2 Pom. Eq. Jur. §§ 1014-1017; but see Phillips v. Phillips, 112 N. Y. 197; Fullenwider v. Watson, 113 Ind. 18; Sturgis v. Paine, 146 Mass. 354; In re Haven's Estate, 6 Dem. 456; Sale v. Thornsberry, (Ky. 1887) 5 S. W. Rep. 468; Lawrence v. Cooke, 104 N. Y. 632; Bulfer v. Willigrod, 71 Iowa, 620; Rose v. Porter, 114 Mass. 309; Hopkins v. Glunt, 111 Pa. St. 287; Corby v. Corby, 85 Mo. 371.

² McRee's Adm'r v. Means, 34 Ala. 349; Ellis v. Ellis' Adm'r, 15 Ala. 296; Lucas v. Lockhart, 10 Sm. & Mar. 466; Cockrill v. Armstrong, 31 Ark. 580; Collins v. Carlisle, 7 B. Mon. 13; Hunt v. Hunt, 11 Nev. 442; Young v. Young, 68 N. C. 309; Lesesne v. Witte, 5 S. C. 450; Hunter v. Stemberge, 12 Ga. 192; Ingram v. Fraley, 29 Id. 553; Lines v. Darden, 5 Flor. 51; Williams v. Worthington, 49 Md. 572; Tolson v. Tolson,

10 Gill & J. 159; Harrison v. Harrison's Adm'r, 2 Gratt. 1; Crump v. Redd's Adm'r, 6 Gratt. 372; Reid's Adm'r v. Blackstone, 14 Id. 363; Rhett v. Mason's Ex'r, 18 Id. 541; Cook v. Ellington, 6 Jones Eq. 371; Carson v. Carson, 1 Ired. 329; Foose v. Whitmore, 82 N. Y. 405; Smith v. Bowen, 35 Id. 83; Dominick v. Sayre, 3 Sandf. 555; Parsons v. Best, I. T. & C. 211; Arcularius v. Geisenhainer, 3 Bradf. 64, 75; Van Duyne v. Van Duyne, 1 McCart. 397; Ward v. Peloubet, 2 Stockt. Ch. 304; Dresser v. Dresser, 46 Me. 48; Cole v. Littlefield, 35 Id. 439; Erickson v. Willard, 1 N. H. 217; Van Amee v. Jackson, 35 Vt. 173; Warner v. Bates, 98 Mass. 274, 277; Spooner v. Lovejoy, 108 Id. 529, 533; Chase v. Chase, 2 Allen, 101; Homer v. Shelton, 2 Met. 194, 206; Whipple v. Adams, 1 Id. 444; Enders v. Tasco, (Ky.) 11 S. W. Rep. 818; Baker v. Brown, 146 Mass. 369; Noe v. Kern, 93 Mo. 367; Wood v. Carnden, &c. Trust Co., (N. J. 1888) 14 Atl. Rep. 885; Colton v. Colton, 127 U. S. 300; Taylor v. Martin, (Pa. '87) 8 Atl. Rep. 928; Salomon v. Lawrence, 52 N. Y. Super. Ct. 154; but see Phillips v. Phillips, 112 N. Y. 197; Fullenwider v. Watson, 113 Ind. 18; Sturgis v. Paine, 146 Mass. 354; In re Haven's Estate, 6 Den. 456; Sale v. Thornsberry, (Ky. '87) 5 S. W. Rep. 468; Lawrence v. Cooke, 104 N. Y. 632; Bulfer v. Willigrod, 71 Iowa, 620; Rose v. Porter, 141 Mass. 309; Hopkins v. Glunt, 111 Pa. St. 287; Corby v. Corby, 85 Mo. 371.

³ Harper v. Phelps, 21 Conn. 257; Bull v. Bull, 8 Conn. 47; Pennock's Estate, 20 Pa. St. 268; Kinter v. Jenks, 43 Pa. St. 445; Second Church v. Disbrow, 52 Pa. St. 219; Paisley's Appeal, 70 Pa. St. 153; Biddle's Appeal, 80 Pa. St. 258; Burt v. Herron, 66 Pa. St. 400; Jaureche v. Proctor, 48 Pa. St. 466; Walker v. Hall, 34 Pa. St. 483; Coate's Appeal, 2 Barr. 129; Gilbert v. Chapin, 19 Conn. 342.

such an inference is necessary to the exercise of such powers. Whenever the facts of the case are such, that the trustee is obliged to have the legal title and the control of the property, in order that the powers conferred upon him may be properly exercised, then a trust will be inferred.¹ But in this connection it must be borne in mind, that for many purposes a power may be held by such trustee without the estate being given to him, and this brings us to the distinction which constitutes the subject of the next paragraph.

§ 292. **Powers in trust distinguished from trust estates.**—Where a power is given to one, to be exercised by him in trust for the benefit of another, the bare power is thereby acquired, while the estate remains in the party creating the power; or in the case of his death, where such power appears in the will, the estate vests in the devisee, if there be a devise of the property, subject to the power. If the will makes no disposition of the estate, the estate will vest in the testator's heirs, subject to the exercise of the power created by the will. If, on the other hand, the party to whom the power is given is presumed to have had conferred upon him likewise the possession and control of the land, he acquires the estate in trust prior to the execution of his power, and as trustee is entitled to collect the rents and profits of the estate and apply them to the purposes of the trust. It is simply a question, as to what the testator intended in the premises. As a consequence of this liberal rule, concerning words necessary to create a power in a will, it is very often difficult to determine whether the intention of the testator was to give an estate in the land, or only a naked power. Since technical words are used to create an estate by deed, it rarely happens that doubt will arise in the construction of a power by deed. The question, therefore, possesses importance only in relation to wills.² The intention of the testator will always govern, whenever it can be clearly ascertained, even though the literal meaning of the words used would indicate a different conclusion.³ The most numerous cases have arisen under devises, in which executors are directed to sell land for the purpose of distribution. If the executors are intended to have possession until sale under the power, then it is, of course, a power coupled with an interest, and the estate does not descend for the time being to the donor's heirs.⁴ Suc-

¹ *Tobias v. Ketchum*, 32 N. Y. 319, 327-331; *Brewster v. Striker*, 2 N. Y. 19; *Lewin on Trusts*, 248; *Barker v. Greenwood*, 4 M. & W. 421; *White v. Parker*, 1 Bing. N. C. 573; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Leggett v. Perkins*, 2 N. Y. 297; *Garvey v. McDevitt*, 72 N. Y. 556, 562; *Smith v. Scholtz*, 68 *Id.* 41; *Knox v. Jones*, 47 *Id.* 389, 396; *Vernon v. Vernon*, 53 *Id.* 351, 359; *Van Nostrand v. Moore*, 52 *Id.* 12, 18; *Wagstaff v. Lowerre*, 23 *Barb.* 209, 221; *Ferry v. Liable*, 31 N. J. Eq. 566.

²⁴ *Kent's Com.* 319; *Sharpsteen v. Tillon*, 3 *Cow.* 651; *Jameson v. Smith*, 4 *Bibb*, 307; *Gray v. Lynch*, 8 *Gill*, 403; *Peter v. Beverly*, 10 *Pet.*

532; *Jackson v. Jansen*, 6 *Johns.* 73; *Jackson v. Schaubert*, 7 *Cow.* 187; *Clary v. Frayer*, 8 *Gill* & J. 403; *Walker v. Quigg*, 6 *Watts*, 87; *Ladd v. Ladd*, 8 *How.* 10.

³ *Bloomer v. Waldron*, 3 *Hill*, 361; see cases cited in preceding note; *Franklin v. Osgood*, 14 *Johns.* 527; *Brearly v. Brearly*, 1 *Stockt.* 21; *Diggs' Lessee v. Jarman*, 4 *Har. & McH.* 468; *Jackson v. Ferris*, 15 *Johns.* 346; *Nelson v. Carrington*, 4 *Munf.* 332, pl. 9; *Zeback v. Smith*, 3 *Binn.* 69; *De Vaughan v. McLeroy*, 82 *Ga.* 687.

⁴ *Gary v. Lynch*, 8 *Gill*, 403; *Hartley v. Minor's App.*, 53 *Pa.* 212; *Clary v. Frayer*, 8 *Gill* & J. 403; 2 *Kent's Com.* 320.

cinctly stated, if the devise be that "the executor shall sell," or that "the land shall be sold," only a naked power is granted. But a devise to the executor "to sell," or words of similar import, will vest the legal title in him; it will be a power coupled with an interest.¹ All doubt is, of course, removed where the will makes some other disposition of the legal estate.² In New York State, by statute, the executor in all such cases takes only a naked power, unless some duty is imposed upon him in regard to the management of the property, which would require its possession.³

§ 293. **Executed and executory trusts.**—Where the limitations are all definitely settled by the deed of creation, and there is nothing further to be done in order to determine the exact interest of the *cestui que use* and the duration of the trust, the trust is said to be *executed*. But where the terms of the trust deed simply define how the settlement shall be made, and imposes that duty upon the trustee, the trust is called executory. All passive trusts and such active trusts, in which the duty of the trustee is confined to the ordinary administration of the property, are executed trusts; while active trusts, in which it is the duty of the trustee to convey to the person named, or to determine the shares which several persons shall take, and the like, are comprehended under the head of executory trusts. Executory trusts bear a close resemblance to powers when granted to trustees, which has been already explained in the preceding paragraph.⁵

¹Yates v. Crompton, 3 P. Wms. 308; Lancaster v. Thornton, 2 Burr. 1027; Bergen v. Bennett, 1 Caines' Cas. 16; Doe v. Shotton, 8 Adol. & Ell. 905; Patton v. Crow, 26 Ala. 426; Clinefelter v. Ayers, 16 Ill. 329; Gregg v. Currier, 36 N. H. 200; Thornton v. Gaillard, 3 Rich. 418; Bayard v. Rowen, 1 A. K. Marsh. 214; Snowhill v. Snowhill, 3 Zabr. 447; Killam v. Allen, 52 Barb. 605; Inman v. Jackson, 4 Greenl. 237; McKnight v. Wimer, 38 Mo. 132; 1 Williams on Ex. 540; 4 Kent's Com. 326; 1 Sugden on Pow. 189-194; Mosby v. Mosby, and Miller v. Jones, 9 Gratt. 584; Fluke v. Fluke, 1 Greenl. 478; Fay v. Fay, 1 Cush. 93; Howell v. Barnes, Cro. Car. 382; Haskell v. House, 3 Brev. 242; Ferebee v. Proctor, 2 Dev. & B. 439; Jackson v. Shauber, 7 Cow. 18; Peck v. Henderson, 7 Yerg. 18; Bloomer v. Waldron, 3 Hill, 361; Co. Lit. 113 a, Hargrave's note, 2; Greenough v. Wells, 10 Cush. 371; Gordon v. Overton, 8 Yerg. 121; Warfield v. English, (Ky.) 11 S. W. Rep. 662; Herberts v. Herberts' Ex'rs, 85 Ky. 134; Trap-hagen v. Levy, 45 N. J. Eq. 448; Perkins v. Presnell, 100 N. C. 220; Narr v. Narr, 41 N. J. Eq. 88.

²Den v. Awling, 1 Dutch. 449; Hemingway v. Hemingway, 22 Conn. 462; Peter v. Beverly, 10 Pet. 532; Ladd v. Ladd, 8 How. 10.

³N. Y. Rev. Stat., Art. 2, § 68; Aldrich v. Green, (1888) 1 N. Y. S. 549. In Pennsylvania the statute provides that in all such cases, whatever may be the phraseology used, the executor takes the power coupled with the

estate. Cobb v. Biddle, 14 Pa. St. 444; Brown v. Sterritt, 29 Pa. St. 32; Shippen's Heirs v. Clapp, 29 Pa. St. 265.

⁴Doe v. Passingham, 6 B. & C. 305; Doe v. Collier, 11 East, 377; Price v. Ssson, 13 N. J. 173; Hayes v. Tabor, 41 N. H. 521; Kuhn v. Newman, 26 Pa. St. 227; Steacy v. Rice, 27 Pa. St. 75; Lines v. Darden, 5 Fla. 78; Horton v. Horton, 7 T. R. 653; William v. Holmes, 4 Rich. Eq. 495; Ware v. Richardson, 3 Md. 505; Moore v. Shultz, 13 Pa. St. 98; Welch v. Allen, 21 Wend. 147; Ramsay v. Marsh, 2 McCord, 252; Webster v. Cooper, 14 How. 488; 1 Prest. Abst. 140; Wagstaff v. Smith, 9 Ves. 520; Boyd v. England, 56 Ga. 598; Sutton v. Aiken, 62 Ga. 733; Bolles v. State Trust Co., 27 N. J. 308; Rogers Loc. Works v. Kelley, 19 Hun, 399; Weber v. Weber, 58 How. P. 255; Martin v. Funk, 75 N. Y. 134; Boon v. Bank, 84 N. Y. 83; Badgett v. Keating, 31 Ark. 400.

⁵See § 292. It will be observed that the terms *executed* and *executory*, when applied to modern trusts, have a different significance from that which is given to them, in referring to the operation of the Statute of Uses upon uses. Fearn Cont. Rem. 55, 113, 139; 4 Kent's Com. 304, 305. Mr. Lewin defines these classes of trusts thus: "Trusts executed are where the limitations of the equitable interest are complete and final; in the trust executory, the limitations of the equitable interest are not intended to be complete or final, but merely to serve as minutes and instructions for per-

§ 294. **Alienation of trust estate.**—It is also a well-established rule that the trustee of a dry or passive trust may be compelled by decree in chancery to convey the estate as the *cestui que trust* may direct. And this rule, it would seem, applies to every species of trust where such a decree is not inconsistent with the express terms of the trust. Equity will give to the *cestui que trust* the full power to dispose of the estate, whenever it can do so without violating the express or implied purpose of the trust, and without doing injury to anyone interested therein. Where there is no prohibition against alienation, the execution of the deed of conveyance by trustee and *cestui que trust* passes the absolute title, and the trust is destroyed by the consequent merger of interests.¹ To what extent these general powers exist in an active trust, must depend upon the peculiar limitations of such a trust. Whenever the power of the trustee involves the exercise of a proprietary authority over the property, equity will regard him as the owner, so far as it is necessary for the performance of the trust. And to that extent will the rights and powers of the *cestui que trust* be curtailed.² But when the duties which have made the trust active have been performed, the trust again becomes passive, and if it is not executed by the Statute of Uses, the court might direct a conveyance by the trustee in accordance with the desires of the *cestui que trust*.³ In New York, and other states in which the New York statute on the subject of trusts has been substantially followed, the *cestui que trust* is now possessed of no interest, which he may assign, where the trustee is charged with the collection and payment of the rents and profits of the estate to the *cestui que trust*.⁴

§ 295. **Merger of interests.**—If the legal and equitable estates of a trust become lawfully united in one person, the equitable is merged in the legal estate, in accordance with the general law of merger. But the conjunction of the two estates in one person will not produce

fecting the settlement at some future period. Lewin on Tr. 45; 2 Pom. Eq. Jur., §§ 1000, 1001; Saunders v. Edwards, 2 Jones Eq. 134; Evans v. King, 3 Id. 387; Porter v. Doby, 2 Rich. Eq. 49; Cushing v. Blake, 30 N. J. 689; 1 Eq. Ld. Cas. 1-36; Neves v. Scott, 9 How. 211; Tillinghast v. Coggeshall, 7 R. I. 393; Egerton v. Brownlow, 4 H. L. Cas. 210; Leonard v. Countess of Sussex, 2 Vern. 526; Wright v. Pearson, 1 Eden, 119; Austin v. Taylor, 1 Eden, 361; Boswell v. Dillon, Drury, 201; Mullany v. Mullany, 3 Green Ch. 16; Sackville-West v. Holmesdale, L. R. 4 H. L. Cas. 543; Carroll v. Renick, 7 Smed. & M. 798; Bowen v. Chase, 94 U. S. 812; Imlay v. Huntington, 20 Conn. 146; Biddle v. Cutter, 49 Iowa, 547; Tillman v. Wood, 26 Wend. 9; Berry v. Williamson, 11 B. Mon. 245; Horne v. Lyeth, 4 Har. & J. 431; Dennison v. Goehring, 9 Pa. St. 175; Wood v. Burnham, 6 Paige, 513; Shelley v. Shelley, L. R. 6 Eq. 510; Garnsey v. Mundy, 24 N. J. 243; Garner v. Garner, 1 Deems, 437.

¹ Cruise Dig. 448; Lewin on Tr. 470; Vaux

v. Parke, 7 W. & S. 19; Harris v. McElroy, 45 Pa. St. 216; Barnett's Appeal, 46 Pa. St. 399; Battle v. Petway, 5 Ired. 576; Arrington v. Cherry, 10 Ga. 429; Stewart v. Chadwick, 8 Iowa, 469. But see *ante*, § 276, where it is claimed that, in the case of a passive trust of a married woman, the conveyance of the equitable estate by her, without the co-operation of the trustee, will pass the legal title as well.

² Lewin on Tr. 470; Barnett's Appeal, 46 Pa. St. 399; McCosker v. Brady, 1 Barb. Ch. 329; 1 Spence Eq. Jur. 496, 497; Culbertson's Appeal, 76 Pa. St. 145; Williams' Appeal, 83 Pa. St. 377; Smith v. Harrington, 4 Allen, 566; Bowditch v. Andrew, 8 Allen, 339; Douglass v. Cruger, 80 N. Y. 15.

³ Welles v. Castles, 3 Gray, 323; Sherman v. Dodge, 28 Vt. 26; Waring v. Waring, 10 B. Mon. 331; Leonard's Lessee v. Diamond, 31 Md. 536; Perry on Tr., § 351.

⁴ See *ante*, § 289.

a merger, if it would be prejudicial to the rights of anyone lawfully interested in the trust property. As a general rule, it is necessary that the equitable estate should be of equal extent with the legal estate, so that a merger might take place.¹

§ 296. **Statute of Frauds as to trusts in real estate.**—Before the Statute of Frauds, a trust could be created or transferred by an oral declaration. No writing was necessary for its valid creation. But the Statute of Frauds requires that all declarations or creations of trusts in lands should be manifested and proved by some instrument in writing signed by the party creating the trust. But the statute necessarily does not apply to implied, resulting and constructive trusts, and the original English statute expressly excepted them from its operation. These trusts may, therefore, be proved by parol evidence.² The statute, however, covers all express trusts; and these must invariably be proved by some writing.³ But it is not required that the trust shall be created by some instrument in writing. The writing is only necessary for its proof. Therefore, the writing need not have been made for the purpose of creating or declaring a trust; it can act by way of an admission, as evidence of an existing trust.⁴ But the evidence must, in that case, be clear and free from doubt.⁵ The statute only requires the writing to show that there is a trust, and to give its limitations. If the writing is but an imperfect presentation of the trust, and the terms there stated are uncertain, the trust will not be enforced. Parol evidence is not admissible to supply what has been omitted.⁶ Letters, indorsements on envelopes, acknowledgments and

¹ 3 Prest. Conv. 1 Spence Eq. Jur. 508, 572; *Nicholson v. Halsey*, 7 Johns. Ch. 422; *Rogers v. Rogers*, 18 Hun, 409; *Gardner v. Gardner*, 3 Johns. Ch. 53; *Hopkinson v. Dumas*, 42 N. H. 307; *Bolles v. State Trust Co.*, 27 N. J. Eq. 308; *Cooper v. Cooper*, 1 Halst. Ch. 9; *James v. Morey*, 2 Cow. 284; *Donalds v. Plumb*, 8 Conn. 453; *Mason v. Mason*, 2 Sandf. Ch. 432; *Healy v. Alston*, 25 Miss. 190; *Badgett v. Keating*, 31 Ark. 400; *Hunt v. Hunt*, 14 Pick. 374; *Downes v. Grazebrook*, 3 Meriv. 208; *Brydges v. Brydges*, 3 Ves. 126; *Selby v. Alston*, 3 Ves. 339; *Wade v. Paget*, 1 Bev. Ch. 363; *Butler v. Godley*, 1 Dev. 94. See *ante*, Chapt. VII, where the whole subject of equitable merger is fully presented.

² Washb. on Real Prop. 445, 446, 447; 1 Spence Eq. Jur. 497, 512. See *post*, §§ 308-312.

³ *Hall v. Young*, 37 N. H. 134; *Bartlett v. Bartlett*, 14 Gray, 278; *Lloyd v. Lynch*, 28 Pa. St. 419; *Bragg v. Paulk*, 42 Me. 502; *Moore v. Moore*, 38 N. H. 382; *Pinney v. Fellows*, 15 Vt. 525; *Sturtevant v. Sturtevant*, 20 N. Y. 39; *Flagg v. Mann*, 2 Sumn. 486; *Hearst v. Pujol*, 44 Cal. 230; *Ratliff v. Ellis*, 2 Iowa, 59; *Movan v. Hays*, 1 Johns. Ch. 339; *Lynch v. Clements*, 24 N. J. Eq. 431; *Patton v. Beecher*, 62 Ala. 579; *Wood v. Cox*, 2 My. & Cr. 684; *Cornelius v. Smith*, 55 Mo. 528; *Ambrose v. Otty*, 1 P. Wms. 322; *Johnson v. Ronald*, 4 Munf. 77; *Wolford v. Farnham*, 44 Minn. 159; see *Shelton v. Shelton*, 5

Jones Eq. 292; *Dean v. Dean*, 6 Conn. 285; *Osterman v. Baldwin*, 6 Wall. 116; *Bates v. Hurd*, 65 Me. 180; *Homer v. Homer*, 107 Mass. 82; *Faxon v. Folvey*, 110 Mass. 392; *Fordyce v. Willis*, 3 Bro. Ch. 577; *Wallace v. Wainwright*, 87 Pa. St. 263; *Berrien v. Berrien*, 3 Green Ch. 37; *McCubbin v. Cromwell*, 7 Gill & J. 164; *Barnes v. Taylor*, 27 N. J. Eq. 259; *Packard v. Putnam*, 57 N. H. 43; *De Laurencel v. De Boom*, 48 Cal. 581; *Reid v. Reid*, 12 Rich. Eq. 213; *Kingsbury v. Burnside*, 58 Ill. 310; *Gibson v. Foote*, 40 Miss. 788; *Brown v. Brown*, 12 Md. 87.

⁴ 1 Cruise Dig. 390; *Forster v. Vale*, 3 Ves. 707; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Davies v. Otty*, 33 Beav. 540; *Steere v. Steere*, 5 Johns. Ch. 1; *Jackson v. Moore*, 6 Cow. 706; *McClellan v. McClellan*, 65 Me. 500; *Movan v. Hays*, 1 Johns. Ch. 339; *Unitarian Soc. v. Woodbury*, 14 Me. 281; *Orleans v. Chatham*, 2 Pick. 29; *Barrell v. Joy*, 16 Mass. 231; *Pinney v. Fellows*, 15 Vt. 525; *Flagg v. Mann*, 2 Sumn. 486; *Brown v. Brown*, 1 Strobh. Eq. 363; *Brown v. Combs*, 5 Dutch. 36; *Cornelius v. Smith*, 55 Mo. 528; *Trapnall v. Brown*, 19 Ark. 48.

⁵ *Rogers v. Rogers*, 87 Mo. 257.

⁶ *Forster v. Vale*, 3 Ves. 707; *Wright v. Wright*, 1 Ves. Sr. 409; *Brydges v. Brydges*, 3 Ves. 120; *Steere v. Steere*, 5 Johns. Ch. 1; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Abeel v. Radcliffe*, 13 Johns. 297; *Walker v. Locke*, 5

admissions in equitable pleadings have been held sufficient writing for the proof of a trust.¹ But they are not conclusive.²

§ 297. Trusts of personalty when within the Statute of Frauds.

—The provision of the Statute of Frauds, which directs that declarations of trusts should be manifested by some instrument in writing, is applied to all interests in lands, whether they be freeholds or chattels real.³ But in the declaration of trusts of strictly personal property, or chattels personal, the statute does not apply; so that not only may a parol declaration of a trust in personal property be made, but it may also be proven by parol evidence and without the aid of any memorandum or written admission.⁴ And this is likewise the case in respect to trusts declared by parol in notes or bonds which are secured by mortgage upon lands; such declarations do not come within the provisions of the Statute of Frauds.⁵

§ 298. Words of limitation in the creation of trusts in lands.—

Unlike legal estates in lands at common law, in the limitation of trusts the same technical words are not required to be used. A trust in fee may be created without using the word *heirs*, if the intention of the grantor is manifested in any other way. And such intention will be presumed, if the terms of the trust cannot in any other manner be satisfied. This rule not only refers to the quantity or duration of the equitable estate in the *cestui que trust*; but if the equitable estate under this construction is larger than the legal estate in the trustee, according to the ordinary legal construction, the latter estate will be enlarged by construction to meet all the demands of the trust estate, and the trustee will take a fee, even though the estate is not limited to heirs.⁶ As a corollary to the above rule, it has been well established

Cush, 90; Chadwick v. Perkins, 3 Me. 399; Patton v. Beecher, 62 Ala. 579; Russell v. Switzer, 63 Ga. 711; Wheeler v. Smith, 9 How. 55; 2 Pom. Eq. Jur., § 1009.

¹ Forster v. Vale, 3 Ves. 696; Smith v. Matthews, 3 De G. F. & J. 139; Wright v. Douglass, 7 N. Y. 564; Montague v. Hayes, 10 Gray, 609; Pratt v. Ayer, 3 Chand. 265; Fisher v. Fields, 10 Johns. 495; Barrell v. Joy, 16 Mass. 221; Barron v. Barron, 24 Vt. 375; Hutchinson v. Tindall, 2 Green Ch. 357; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267; De Laurencel v. De Boom, 48 Cal. 581; Moore v. Pickett, 62 Ill. 158; McLamie v. Portlow, 53 Ill. 340; Kingsbury v. Burnside, 58 Ill. 310; McClellan v. McClellan, 65 Me. 500; Bates v. Hurd, 65 Me. 180; Packard v. Putnam, 57 N. H. 43; Baldwin v. Humphrey, 44 N. Y. 609; Ivory v. Burns, 56 Pa. St. 300; Johnson v. Delaney, 35 Texas, 42; Cozine v. Graham, 2 Paige, 177; Patton v. Chamberlain, 44 Mich. 5; Broadrup v. Woodman, 27 Ohio St. 553; Loring v. Palmer, 118 U. S. 321; Weaver v. Emigrant, &c. Sav. Bank, 17 Abb. N. C. 82; Titchenell v. Jackson, 26 W. Va. 754; McCandless v. Warner, 26 W. Va. 754; Macy v. Williams, 8 N. Y. S. 658; 55 Hun, 489; Fowler v. Bowery Sav. Bank, 47 Hun, 399.

² Parkman v. Suffolk Sav. Bank, 151 Mass. 218; 24 N. E. 43; Beaver v. Beaver, 117 N. Y. 421.

³ Forster v. Vale, 3 Ves. 696; Riddle v. Emerson, 1 Vern. 108.

⁴ Silvey v. Hodgdon, 52 Cal. 363; Ray v. Simmons, 11 R. 1. 266; Chace v. Chapin, 130 Mass. 128; Gadsden v. Whaley, 14 S. C. 210; Davis v. Coburn, 128 Mass. 377; McFadden v. Jenkyns, 1 Phil. 153, 157; Hawkins v. Gardiner, 2 Sm. & Giff. 441, 451; Clapp v. Emery, 98 Ill. 523; Hon v. Hon, 70 Ind. 135; Reiff v. Horst, 52 Md. 255; Eaton v. Cook, 25 N. J. Eq. 65; Hooper v. Holmes, 3 Stockt. Ch. 122; Kimball v. Morton, 1 Halst. Ch. 26, 31; Barkley v. Lane's Ex'r, 6 Bush, 587; Higgenbottom v. Peyton, 3 Rich. Eq. 398; Maffitt's Adm'r v. Rynd, 69 Pa. St. 380; see Lister v. Hodgson, L. R. 4 Eq. 30.

⁵ Bellasis v. Compton, 2 Vern. 294; Benbow v. Townsend, 1 My. & K. 506.

⁶ Villiers v. Villiers, 2 Atk. 71; Oates v. Cooke, 3 Burr. 1684; Shaw v. Welch, 2 Stra. 803; Trent v. Hanning, 7 East, 97; Gibson v. Montfort, 1 Ves. Sr. 485; Loveacres v. Blight, Cowp. 356; Doe v. Davies, 1 Q. B. 438; Stanley v. Colt, 5 Wall. 168; Neilson v. Lagow, 12 How. 98; Fisher v. Fields, 10 Johns. 505; Gould v. Lamb, 11 Metc. 87; Welch v. Allen, 21 Wend. 147;

that trustees will not take any larger legal estate than is required for the purposes of the trust. If, by the express limitation of the deed, the trustee has a larger estate; as, for example, he has a fee, and the trust is only a life estate; there is a resulting use in the remainder to the grantor and his heirs, which under the statute will be executed, leaving to the trustee only a legal life estate.¹ But these are only rules of construction by which the character and duration of the legal and equitable estates in the trust are determined, where the intention of the grantor is not clearly expressed. If the estate in the trustee is expressly limited for life, the fact that it is not altogether sufficient to support the equitable estate will not enable a court of equity to enlarge it by construction.² And so, also, if the estate in the trustee is larger than the equitable estate, but the latter is uncertain and indefinite in its duration, there will be no execution of the resulting use in the grantor until the trust has terminated, or has been rendered certain. The uncertainty of duration of the trust makes the resulting use contingent, corresponding somewhat to the legal possibility of reverter.³

§ 299. **Doctrine of remainders applied to trusts.**—If the future estate in a trust is contingent, and is preceded by a particular estate, the destruction of the particular estate by the act of the first *cestui que trust*, or its natural termination before the happening of the contingency, does not defeat the contingent trust, as it would have done if the future estate had been a legal contingent remainder, or one by way of use. The future estate in a trust is altogether independent of the prior estate, and need not necessarily take effect immediately upon the termination of the latter.⁴ The rule in *Shelley's Case* applies generally to all *executed* trusts, so that when an estate is limited in trust to A. for life and remainder in fee to his heirs, A. will

Newhall v. Wheeler, 7 Mass. 189; *Cleveland v. Hallett*, 6 Cush. 406; *Angell v. Rosenbury*, 12 Mich. 266; *Cumberland v. Graves*, 9 Barb. 595; *Wells v. Heath*, 10 Gray, 25; *Atty.-Gen. v. Prop's*, &c. 3 Gray, 48; *Farquharson v. Eichelberger*, 15 Md. 73; *Deering v. Adams*, 37 Me. 264; *Pearce v. Savage*, 45 Me. 90; *Greene v. Wilbur*, 15 R. I. 251; *Chase v. Cartwright*, (Ark. 1890) 14 S. W. Rep. 90; *Boston, &c. Trust Co. v. Mixer*, 146 Mass. 100; *Foe v. Ladd*, 77 Ala. 223. Words of limitation are not now required in a number of the states, in order to create an estate in fee. The above statement applies only to those states where the common law rule, in respect to words of limitation, still prevails.

¹ *Doe v. Davies*, 1 Q. B. 438; *Doe v. Barthrop*, 5 Taunt. 382; *Barker v. Greenwood*, 4 M. & W. 421; *Doe v. Timins*, 1 B. & Ald. 547; *Doe v. Nichols*, 1 B. & C. 336; *Doe v. Ewart*, 7 A. & E. 636; *Ward v. Amory*, 1 Curtis C. Ct. 419; *Morton v. Barrett*, 22 Me. 257; *Wells v. Heath*, 10 Gray, 25; *Norton v. Norton*, 2 Sandf. 296; *Bush's Appeal*, 33 Pa. St. 85; *Cleveland v. Hallett*, 6 Cush. 406; *Deering v. Adams*, 37 Me. 264;

Pearce v. Savage, 45 Me. 90; *Renziehausen v. Keyser*, 48 Pa. St. 351; *Farquharson v. Eichelberger*, 15 Md. 73; *Liptrot v. Holmes*, 1 Ga. 381.

² *Walter v. Hutchinson*, 1 B. & C. 721; *Evans v. King*, 3 Jones Eq. 387. It is possible that this strict rule would not be observed generally in this country. At any rate, even an express limitation for life to the trustees may probably be enlarged into a fee by construction, if the deed gave affirmative evidence of the donor's intention that the trustee is to have as large an estate as the nature of the trust requires.

³ *Doe v. Ewart*, 7 A. & E. 636; *Doe v. Davies*, 1 Q. B. 437; *Doe v. Nichols*, 1 B. & C. 341; *Bush's Appeal*, 33 Pa. St. 85; *Morgan v. Moore*, 3 Gray, 323; *Selden v. Vermilya*, 3 Comst. 525; *Stacey v. Rice*, 27 Pa. St. 75; *Liptrot v. Holmes*, 1 Ga. 381; *Comby v. McMichael*, 19 Ala. 747; *Cumberland v. Graves*, 9 Barb. 595.

⁴ 2 Washb. on Real Prop. 463; *Fearne Cont. Rem.* 304, 305; 1 *Spence Eq. Jur.* 505; 1 *Prest. Abstr.* 146; *Scott v. Scarborough*, 1 Beav. 168; *Wainwright v. Sawyer*, 105 Mass. 168; *People's Sav. Bank v. Denig*, 131 Pa. St. 241; *Barnes v. Dow*, 59 Vt. 530.

be considered *cestui que trust* in fee. But the rule does not apply to executory trusts; and whenever it is the clearly expressed intention of the grantor that the trust shall not vest in fee in the first taker, the rule will not be enforced, and the heirs will take as independent purchasers.¹

§ 300. **Voluntary trusts.**—The general rule of equity, is that no relief will be granted, or agreement or contract enforced in equity, unless such agreement or contract is based upon and supported by a valuable consideration. This is likewise the rule of law; and in both law and equity the rule is very strictly enforced as to all executory contracts. The necessity, however, of a consideration in order to secure validity is limited to executory contracts. As soon as a contract is executed, and rights have been acquired or transferred in the execution of the contract, the fact that its execution was voluntary, and was not based upon any consideration, is no ground for invalidating what has become an executed gift. But a court of equity will never interfere, in the case of an agreement to make a gift, to aid any defective execution of such an agreement. Such is the general rule of law, which is more fully explained in works upon contracts, and needs no citations in support of them in the present connection.² The question here mooted is, under what circumstances a trust without consideration will be enforced; and the answer to the question can only be obtained by an inquiry, in each particular case, whether a trust has been actually created, or whether there is simply an executory agreement to create a trust. If the transaction takes the form of an executory agreement to create a trust, or where an attempted execution of such an agreement is imperfect, there is no ground for holding that the contract is enforceable in equity, or that such a transaction gives rise in equity to the implied creation of a trust. But where the contract or transaction has the effect of creating a trust, and the trust is actually created; the fact, that it has not been supported by some sort of consideration, is not any objection to its validity.³ In the cases just cited, the proposition is maintained, that a

¹ Tud. Ld. Cas. 503, 504; 2 Washb. on Real Prop. 455; 1 Spence Eq. Jur. 503; Croxall v. Shererd, 5 Wall. 281; Tillinghast v. Coggeshall, 7 R. I. 383; Berry v. Williamson, 11 B. Mon. 245; Gill v. Logan, 11 B. Mon. 231; Williams on Real Prop. 285. But the rule in Shelley's Cases has been abolished in a large number of States. See Tiedeman Real Prop., § 433.

² See Lawson on Contracts, § 91, *et seq.*

³ Martin v. Funk, 75 N. Y. 134, 137; Day v. Roth, 18 N. Y. 448; Young v. Young, 80 N. Y. 422, 436; Estate of Webb, 40 Cal. 541, 545; Stone v. Hackett, 12 Gray, 227; Henderson v. Henderson, 21 Mo. 379; Otis v. Beckwith, 49 Ill. 121, 128; Olney v. Howe, 89 Id. 556; Clark v. Lott, 11 Id. 105; Huston v. Markley, 49 Iowa, 162; Wyble v. McPheters, 52 Ind. 393; Dawson v. Dawson, Dev. Eq. 98, 400; Andrews v. Hobson, 23 Ala.

219; Pinckard v. Pinckard, *Id.* 649; Crompton v. Vesser, 19 Id. 259; Evans v. Battle, *Id.* 398; Lane v. Ewing, 31 Mo. 75; Dunbar v. Woodcock, 10 Leigh, 628; Reed v. Vannorsdale, 2 Id. 569; Taylor v. Henry, 48 Md. 550; Cox v. Hill, 6 Id. 274; McNulty v. Cooper, 3 Gill & J. 214; Tolar v. Tolar, 1 Dev. Eq. 460; Dellinger's Appeal, 71 Pa. St. 425; Crawford's Appeal, 61 Id. 52; Pringle v. Pringle, 59 Id. 281; Ritter's Appeal, *Id.* 9; Cressman's Appeal, 42 Id. 147; Lonsdale's Estate, 29 Id. 407; Dennison v. Goehring, 7 Barr. 175, 178; Jones v. Obenchain, 10 Gratt. 259; Bunn v. Winthrop, 1 Johns. Ch. 329, 337; Souverby v. Arden, *Id.* 240; Minturn v. Seymour, 4 Id. 497; Owens v. Owens, 23 N. J. Eq. 60, 62; Vreeland v. Van Horn, 17 Id. 137, 139; Carhart's Appeal, 78 Pa. St. 100, 119; Trough's Estate, 75 Id. 115; Zimmerman v. Streep, 75

simple declaration of a trust will have the effect of creating a trust, even though such declaration is not supported by a valuable consideration. There is no question as to the correctness of that proposition, where such declaration or trust refers to personal property; and in such cases, any parol declarations of a trust will have the effect of creating a trust, valid and binding upon the party declaring it, although he has never parted with the possession of the goods; because the title to personal property can pass from one to another by simple agreement of the parties to that effect, without a transfer of the possession, where the intention to transfer such title is made manifest, and is accompanied by an agreement or understanding, that for some purpose or other the possession of the goods or other personal property will be retained by the donor.¹ That being possible in regard to gifts of personal property, a declaration by the donor that he will ever after hold the personal property in trust for the beneficiary, is nothing more than an equivalent of the present gift of the property, with the understanding that the possession will be retained by such donor for certain purposes agreed upon between the parties. It is nothing more than the creation of a bailment, or differs very little from such a transaction. In respect to real estate, a different rule has been adopted. It has been explained in the preceding chapter² that there are three methods of creating uses or trusts in real estate. In one case, the use or trust is an implication of law from the absence of a consideration in a grant of land, viz.: the resulting use.³ The second method is the transfer of the legal title of such property to a third person accompanied by a declaration, that the property is to be held by such grantee in trust for another. In such a case, where the title is taken by the trustee, subject to the condition of recognizing in the beneficiary the equitable interest created in his behalf, no other consideration than this condition is necessary to make the trust valid.⁴ But where the legal title is retained by the donor, and he desires to create a trust in behalf of another, the conveyance must be supported by an actual consideration, either good or valuable; or such consideration acknowledged under seal, whereby the parties are estopped from denying its existence.⁵

§ 301. **Interest of the cestui que trust.**—This subject has in the main been already explained while treating of uses and trusts as they existed before the Statute of Uses;⁶ and nothing more need now be done

Id. 147; *Stone v. Hackett*, 12 Gray, 227; *Ray v. Simmons*, 11 R. I. 266; *Taylor v. Staples*, 8 *Id.* 170, 176; *Stone v. King*, 7 *Id.* 358; *Minor v. Rogers*, 40 Conn. 512; *Trow v. Shannon*, 78 N. Y. 446; *Curry v. Powers*, 70 *Id.* 212, 219; *Wright v. Miller*, 8 *Id.* 9; *Hunter v. Hunter*, 19 Barb. 631; *Gilchrist v. Stevenson*, 9 *Id.* 9; *Acker v. Phoenix*, 4 Paige, 305; *Hayes v. Kershow*, 1 Sandf. Ch. 258, 261; *Hunt v. Hunt*, 119 Mass. 474; *Clark v. Clark*, 108 *Id.* 522; *Brabrook v. Five Cent Sav. Bk.*, 104 *Id.* 238; *Wason v. Colburn*, 99 *Id.*

342; *Sherwood v. Andrews*, 2 Allen, 79, 81; *Neves v. Scott*, 9 How. (U. S.) 196; *Adams v. Adams*, 21 Wall. 185; *Blanchard v. Sheldon*, 43 Vt. 512; *Davis v. Ney*, 125 Mass. 590.

¹ Tiedeman on Sales, § 84.

² §§ 256-258.

³ *Ante*, § 257.

⁴ *Ante*, § 256.

⁵ *Ante*, § 258.

⁶ See *ante*, §§ 252, 253, 260-265.

than to refer to the more important peculiarities of modern trusts, in which they differ from uses. Generally, trusts at the present day have all the characteristics of an ancient use. They are equitable estates, and enforceable solely in equity.¹ In New York, Michigan, Wisconsin and other states, following the New York legislation, the *cestui que trust* is declared to have no interest in such property that can be aliened or otherwise disposed of. Wherever the trust is of a permanent character, and is established for the purpose of providing periodical payment to the beneficiary of the rents and profits, the rights of the beneficiary are limited to the direct enforcement of the right to the receipt of the rents and profits that periodically accumulate.² In the other classes of express trusts, where the purpose is to provide for the sale of the property and a transfer of the proceeds of sale to the beneficiary in the settlement of some particular claim, it is generally held that the interest of such *cestui que trust* can be assigned, but still it is a question of some doubt.

§ 302. **Liability for debts.**—For a long time, and, indeed, until within a late period, an equitable estate was not subject to liability for the debts of the beneficiary; but now in England, and in most of the states in this country, they are by statute made liable to the satisfaction of his debts.³ But the trust may be so limited as that it will be terminated when an attempt is made to subject it to the debts of the *cestui que trust*. The rule seems to be well established that, if the trust is executory and its duration is discretionary in the trustee; or where the trust by the terms of the deed or will is to cease upon an attempted involuntary conveyance (*i. e.*, whenever creditors seize upon the estate for the payment of a debt), or an assignment in bankruptcy, or upon the insolvency of the *cestui que trust*, these are permissible limitations upon the estate of the beneficiary, and will prevent the transfer of any

¹ Co. Lit. 290 b, note 249, § 14; 2 Spence Eq. Jur. 975; 1 Prest. Est. 189; 1 Spence Eq. Jur. 497; Cholmondeley v. Clinton, 2 Jac. & W. 148; Burgess v. Wheate, 1 Eden, 223; Orleans v. Chatham, 2 Pick. 29; Banks v. Sutton, 2 P. Wms. 713; Bush's Appeal, 33 Pa. St. 88; Price v. Sisson, 13 N. J. 174; 2 Pom. Eq. Jur., § 989; 2 Washb. on Real Prop. 454-457.

² Schettler v. Smith, 41 N. Y. 328; Manice v. Manice, 43 Id. 303; Vernon v. Vernon, 53 Id. 351; Kiah v. Grenier, 56 Id. 220; Heermans v. Robertson, 64 Id. 332; Provost v. Provost, 70 Id. 141; Stevenson v. Lesley, Id. 412; Verdin v. Slocum, 71 Id. 245; Garvey v. McDevitt, 72 Id. 556; Low v. Harmony, Id. 408; Amory v. Lord, 9 N. Y. 403; Savage v. Burnham, 17 Id. 561; Beekman v. Bonsor, 23 Id. 298; Downing v. Marshall, Id. 366; Gilman v. Reddington, 24 Id. 9; Everitt v. Everitt, 29 Id. 39; Post v. Hover, 33 Id. 593; Harrison v. Harrison, 36 Id. 543; Lorillard's Case, 14 Wend. 265; Hawley v. James, 16 Id. 61; Kane v. Gott, 24 Id. 641; Hone's Ex'rs v. Van Schaick, 20 Id. 584; Moore v. Moore, 47 Barb. 257; Burke v. Valentine, 52 Id. 412; Kil-

lam v. Allen, Id. 605; Leggett v. Perkins, 2 N. Y. 297; Moore v. Hegeman, N. Y. 376; Heermans v. Burt, 78 Id. 259; Donovan v. Van De Mark, N. Y. 244; Ireland v. Ireland, 84 N. Y. 321; Delaney v. Van Aulen, Id. 16; Toms v. Williams, 41 Mich. 552; Meth. Church, &c. v. Clark, Id. 730; Lyle v. Burke, 40 Id. 499; Estate of Delaney, 49 Cal. 76; Smith v. Ford, 48 Wis. 115; White v. Fitzgerald, 19 Id. 480; Goodrich v. City of Milwaukee, 24 Id. 422; overruling Marvin v. Titsworth, 10 Id. 320; Cutter v. Hardy, 48 Cal. 568.

³ 1 Prest. Est. 144; 2 Washb. on Real Prop. 456; Pratt v. Colt, 2 Freem. 139; Forth v. Duke of Norfolk, 4 Madd. 503; Kip v. Bank of New York, 10 Johns. 63; Jackson v. Walker, 4 Wend. 462; Foote v. Colvin, 3 Johns. 316; Johnson v. Conn. Bk., 21 Conn. 159; Bush's Appeal, 33 Pa. St. 85; Hutchins v. Haywood, 50 N. H. 491; Bramhall v. Ferris, 14 N. Y. 41; Campbell v. Foster, 35 N. Y. 361; Lyford v. Thurston, 16 N. H. 408; Kennedy v. Nunan, 52 Cal. 326; Wis. Rev. Stat. Ch. 134, § 37; Rudd v. Van Der Hagan, (Ky. '87) 5 S. W. Rep. 416.

interest therein to the creditors, even though there be no limitation over.¹ But it will not be permitted to a man to settle his estate in trust for himself, and so limit it that his creditors cannot touch it. The rule only extends to the settlement of such trusts by friends and relatives, whose desire is to secure means of support for the beneficiary, free from liability for his debts.² But a condition against liability for debts, is always good, where the property is conveyed to charitable uses.³

§ 303. **Classes of active trusts.**—It is almost impossible for one to enumerate in any specific way the various classes of active trust which are possible, in the absence of restrictive legislation. In New York, and several other states which have followed the New York legislation, the classes of express trust which may be created are expressly enumerated, to which reference has already been made in a previous paragraph.⁴ Express trusts, however, may be divided in the first place into private, and public or charitable trusts. Under the head of private trusts would be included all those, in which the benefit is intended for some private person or object. They may, of course, assume a great variety of forms; but, after all, they may be subdivided into three general classes: *First*, including all those, in which the trust is established for the purpose of collecting the rents and profits of the estate, and paying them over periodically to the private beneficiary during the time that the trust was intended to continue. *Secondly*, all those classes of trusts, in which the trustee is directed to accumulate the rents and profits and ultimately divide the estate between the certain beneficiaries. *Thirdly*, where the trust is established for the purpose of securing a sale of such property and a distribution of the proceeds of sale; either among certain beneficiaries as a gift, or for the purpose of liquidating the indebtedness of the creator of the trust to the beneficiaries. Nothing further can be said of a general nature in explanation of the character of these various trusts; but a special consideration should be given to two kinds of the three classes of active private trusts just mentioned, viz.: voluntary assignments for the benefit of creditors, and deeds of trust to secure the payment of a debt.

¹ *Nichols v. Levy*, 5 Wall. 433; *Nichols v. Eaton*, 91 U. S. 716; *Keyser v. Mitchell*, 67 Pa. St. 473; *Norris v. Johnston*, 5 Pa. St. 287; *Rife v. Geyer*, 59 Pa. St. 293; *Leavitt v. Beirne*, 21 Conn. 1, 8; *Bramhall v. Ferris*, 14 N. Y. 41; *Markham v. Guerront*, 4 Leigh, 279; *Hallett v. Thompson*, 5 Paige, 583; *Johnson v. Zane's Trustees*, 11 Gratt. 552; *Hill v. McRea*, 27 Ala. 175; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56; *Easterly v. Kenny*, 36 Conn. 18; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *McIlvaine v. Smith*, 42 Mo. 45; *Ashhurst v. Givens*, 5 Watts & S. 323; *Eyris v. Hetrick*, 1 Harris, 491; *Barnett's Appeal*, 10 Wright, 399-402; *Shankland's Appeal*, 11 Wright, 113; *Rowan's Creditors v. Rowan's Heirs*, 2 Duv. 412; *Frazier v. Barnum*, 4 C. E.

Green, 316; *Shryock v. Waggoner*, 4 Casey, 430; *Fisher v. Taylor*, 2 Rawle, 33.

² *Lester v. Garland*, 5 Sim. 205; *Phipps v. Lord Ennismore*, 4 Russ. 131; *Mackason's Appeal*, 6 Wright, 330; *Ashhurst's Appeal*, 77 Pa. St. 464; *Brooks v. Pearson*, 27 Beav. 181; *Partridge v. Cavander*, 96 Mo. 452; *Lampert v. Haydel*, 96 Mo. 439; *Cummings v. Corey*, 58 Mich. 494. But see *Markham v. Guerront*, 4 Leigh, 279; *Johnson v. Zane's Trustees*, 11 Gratt. 552; and *Hill v. McRea*, 27 Ala. 175, where trusts for the benefit of the grantor and his wife or family have been supported against the claim of creditors.

³ *Butterfield v. Wilton Academy*, (Iowa) 38 N. W. 390.

⁴ See *ante*, § 289.

§ 304. **Voluntary assignments for the benefit of creditors.**—This assignment is a trust deed, whereby a debtor in failing circumstances transfers to his assignee or trustee all his property or assets, for the purpose of providing an equitable distribution of the same among his creditors, in whole or partial liquidation of his indebtedness to them. Two different rules prevail in England and in this country, as to the character of such an assignment. According to the English rule, such an assignment does not create a trust or clothe the creditors with the rights of a *cestui que trust*; and the assignee is treated and considered by these decisions as being merely an agent of the debtor for the purpose of disposing of his property under the debtor's directions. Under that view of the character of an assignment for the benefit of creditors, the assignment may at any time be revoked or cancelled at the direction of the assignor.¹ This, however, is only the case, as long as such assignment has not been accepted and assented to by the creditors. As soon as the creditors have become aware of such assignment and have accepted its terms;² and more especially, where they have made themselves actual parties by executing the deed of assignment,³ the assignment becomes irrevocable, and an actual trust has thereby been established. But where the assignment stipulates that the terms and conditions must be agreed to, or the assignment itself executed by the creditors within a stated time, those who refuse or fail to execute the assignment within the stated time will be excluded from the benefit of its provisions.⁴ But, in America, a different rule prevails, where it is held that an assignment for the benefit of creditors—wherever local laws, in respect to the right to make such assignment, do not interfere with its validity—is a trust created in favor of the creditors; and, after having been once executed and delivered to the trustee or assignee, is irrevocable and enforceable by the creditors as a trust.⁵ The assignee is treated as a trustee for both the assignor and the creditors; and he must strictly observe the terms of the trust in the performance of his fiduciary duties.⁶ Assignments for the benefit of creditors are very generally regulated by statutes; and certain kinds of preferential assignments

¹ *Acton v. Woodgate*, 2 My. & K. 492; *Browne v. Cavendish*, 1 Jo. & Lat. 606; and see *Brooks v. Marbury*, 11 Wheat. 78; *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & My. 451; *Walwyn v. Coutts*, 3 Meriv. 707; 3 Sim. 14.

² *Cornthwaite v. Frith*, 4 De G. & Sm. 552; *Synnott v. Simpson*, 5 H. L. Cas. 121, 133; *Biron v. Mount*, 24 Beav. 642; *Kirwan v. Daniel*, 5 Hare, 493, 499; *Smith v. Hurst*, 10 Hare, 30; *Acton v. Woodgate*, 2 My. & K. 492; *Field v. Lord Donoughmore*, 1 Dr. & War. 227.

³ *Montefiore v. Browne*, 7 H. L. Cas. 241, 266; *Le Touche v. Earl of Lucan*, 7 Cl. & Fin. 772; *Mackinnon v. Stewart*, 1 Sim., n. s., 76, 88.

⁴ *Watson v. Knight*, 19 Beav. 369; *Johnson v. Kershaw*, 1 De G. & Sm. 280; *Forbes v. Limond*, 4 De G. M. & G. 298.

⁵ *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; *Stimpson v. Fries*, 2 Jones Eq. 156; *Tennant v. Stoney*, 1 Rich. Eq. 222; *England v. Reynolds*, 38 Ala. 370; *Pearson v. Rockhill* 4 B. Mon. 296; *Furman v. Fisher*, 4 Coldw. 626; but see *Gibson v. Rees*, 50 Ill. 383; *Pratt v. Thornton*, 23 Me. 355; *Ward v. Lewis*, 4 Pick. 518, 523; *New Eng. Bank v. Lewis*, 8 Pick. 113, 118; *Pingree v. Comstock*, 18 Id. 46, 50; *Read v. Robinson*, 6 Watts & S. 329; *McKinney v. Rhoads*, 5 Watts, 343; *Ellison v. Ellison*, 1 Eq. Lead. Cas. 423 (4th Am. ed.); *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 129; *Shepherd v. McEvers*, 4 Id. 136, 138; *Nicoll v. Mumford*, Id. 522, 529.

⁶ *In re Lewis*, 81 N. Y. 421; *Nicholson v. Leavitt*, 6 Id. 510, 519.

are prohibited as being fraudulent toward creditors. But, in the absence of such express regulations, any assignment for the benefit of creditors will be valid and enforceable, even where preferences are made, as long as the debtor is not a participant in the benefit of such a preference. Assignments for the benefit of creditors, which are or can be shown to be made for the purpose of hindering or delaying creditors, are of course void; but where that intention cannot be shown to exist, the assignment is generally held to be free from defect, subject, of course, to the express regulations of statutes, as to what is or is not a valid assignment for the benefit of creditors.¹ An assignment for the benefit of creditors may be made to include property which has been levied upon by execution; but, of course, the assignment attaches to such property subject to the lien of the levy.² And there may be a partial assignment of the debtor's property, wherever such partial assignment is not made with a fraudulent intent, and is in fact made to secure or provide for the payment of a *bona fide* debt.³

§ 305. **Deeds of trust to secure debts.**—Somewhat similar in effect to mortgages with power of sale are deeds of trust, in which the property is conveyed to a trustee, in trust to secure the creditor in his claim, and to sell the property for the satisfaction of the debt, if it is not paid at maturity. This conveyance is in the nature of a mortgage, and is very often used to secure an issue of railroad bonds, so as to avoid the necessity of giving a mortgage for each bond. But it is also very generally used in some of the western states in the place of an ordinary mortgage, in order to obviate the difficulty of securing a valid sale of the premises, which is so often experienced when the mortgagee exercises the power of sale. It is the conveyance of a legal estate, in trust to secure the debt and its satisfaction by sale upon the breach of the condition.⁴ It is to be distinguished from an assignment

¹ Halstead v. Gordon, 34 Barb. 422; Schlusell v. Willett, Barb. 615; Barney v. Griffin, 2 N. Y. 365; Leitch v. Hollister, 4 Id. 211; Litchfield v. White, 7 Id. 438; Kellogg v. Slawson, 11 Id. 302, 304; Nichols v. McEwen, 17 Id. 22; Campbell v. Woodworth, 24 Id. 304; 33 Barb. 425; Coyne v. Weaver, 84 N. Y. 386; McConnell v. Sherwood, 84 Id. 522; Townsend v. Stearns, 32 Id. 209; Benedict v. Huntington, Id. 219; Spaulding v. Strang, 37 Id. 135; 38 Id. 9; Cuyler v. McCartney, 40 Id. 221; Putnam v. Hubbell, 42 Id. 106; and see 1 Am. Lead. Cas., pp. 56-75; Hendricks v. Robinson, 2 Johns. Ch. 283; Nicholson v. Leavitt, 6 N. Y. 510; Hauselt v. Vilmar, 76 Id. 630; Halsey v. Whitney, 4 Mason, 206, 227-230; Ogden v. Larrabee, 57 Ill. 389; Dunham v. Waterman, 17 N. Y. 9; Nicholson v. Leavitt, 6 Id. 510; Brigham v. Tillinghast, 13 Id. 215; Rapalee v. Stewart, 27 Id. 310; Ogden v. Peters, 21 Id. 23; Griffin v. Marquardt, Id. 121; Jessup v. Haulse, Id. 168; Wilson v. Robertson, Id. 587; see Strickney v. Crane, 35 Vt. 89; Therasson v. Hickok, 37 Id. 454; McGregor v. Chase, Id. 225; Frink v.

Buss, 45 N. H. 325; Fairchild v. Hunt, 1 McCarter, 367; Hyslop v. Clarke, 14 Johns. 458; Austin v. Bell, 20 Id. 442; Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Sheldon v. Dodge, 4 Denio, 217; Lentilhon v. Moffat, 1 Edw. Ch. 451; Grover v. Wakeman, 11 Wend. 187, 201, 203; 4 Paige, 23.

² Mumper v. Rushmore, 79 N. Y. 19.

³ See State v. Benoist, 37 Mo. 500; Robbins v. Fitz, 33 N. Y. 420.

⁴ Devin v. Hendershott, 32 Iowa, 194; Newman v. Samuels, 17 Iowa, 536; Sargent v. Howe, 21 Ill. 149; Thornton v. Boyd, 31 Ill. 200; Sherwood v. Saxton, 63 Mo. 78; Soutter v. Miller, 15 Fla. 625; Richard v. Holmes, 18 How. 147; Coe v. McBrown, 22 Ind. 257; Webb v. Hoselton, 4 Neb. 308; 19 Am. Rep. 638; Woodruff v. Robb, 19 Ohio, 122; Chappell v. Allen, 38 Mo. 213; see Heard v. Baird, 40 Miss. 799; Lenox v. Reed, 12 Kans. 233; Union Nat. Bk. v. Bank of Kansas City, 136 U. S. 223; Plum v. Studebaker, 89 Mo. 162; but see 2 Am. Law Reg., N. S., 655.

for the benefit of creditors, and does not come within the operation of laws which prohibit preferential assignments.¹ It has been held that mere payment of the debt will not revest the title in the grantor.² But the weight of authority is in favor of holding that a reconveyance is not necessary, although a satisfaction of the records may be required.³ But the payment or tender of payment will render the the trust inoperative so far as the subsequent exercise of the power is concerned.⁴ The grantor by such a conveyance divests himself of his entire legal estate in possession, and has nothing left, against which execution may issue. But he has a reversionary interest, which in equity may be reached by a creditor's bill, and which is also capable of alienation.⁵ If the trustee dies or refuses to execute a trust, the court will appoint another to take his place; and in some of the states, by statute, it is provided that, upon the death, inability or refusal of the trustee to serve, the sheriff will be authorized to execute the trust. Or the deed may itself provide for a substitution of trustees.⁶ But without express authority, the trustee can in no case delegate his power to sell.⁷ If there are two or more trustees, upon the death of one, the survivors may execute the power.⁸ But the court may, if they deem it wise, compel the trustee to execute the trust instead of appointing another.⁹ Sales under the power are watched and closely scrutinized by the courts, and a court of equity will at any time, at the instance of one interested in the property, direct, restrain, or enforce the exercise of the power.¹⁰ If there are two or more trustees named as joint donees of the power, the sale will be valid, in the absence of direct proof of fraud or unfairness, although it is conducted in the absence of one of them.¹¹ This class of deeds or trusts is governed by the same equitable rules, which are applied to ordinary trusts, unless there are statutory provisions intended to supercede them.

§ 306. **Public or charitable trusts.**—The public or charitable trust differs from the ordinary private trust in that the beneficiary or beneficiaries of the public or charitable trusts are an uncertain and constantly changing class, and, therefore, the variableness as to

¹ *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 225.

² *Heard v. Baird*, 40 Miss. 796.

³ *Crosby v. Huston*, 1 Texas, 239; *Ingle v. Culbertson*, 43 Iowa, 265; *McGregor v. Hall*, 3 St. & P. 397; *Woodruff v. Robb*, 19 Ohio, 212; *Smith v. Doe*, 26 Miss. 291.

⁴ *Thornton v. Boyden*, 31 Ill. 210; *Lowe v. Grinnan*, 19 Iowa, 197; *Heard v. Baird*, 40 Miss. 796.

⁵ *Pettit v. Johnson*, 15 Ark. 55; *Turner v. Watkins*, 31 Ark. 429; *Morris v. Way*, 16 Ohio, 469; *McIntyre v. Agric. Bank*, 1 Freem. Ch. 105; *Heard v. Baird*, 40 Miss. 796; *Tyler v. Herring*, (Miss. '90) 7 So. 840; 2 *Jones on Mort.*, § 1769.

⁶ *Lake v. Brown*, 116 Ill. 83.

⁷ *Holden v. Stickney*, 2 McArthur, 141; *Farm-*

ers' Loan, &c. Co. v. Hughes, 11 Hun, 130; *McKnight v. Winner*, 38 Mo. 132; *Whittlesey v. Hughes*, 39 Mo. 13.

⁸ *Peter v. Beverly*, 10 Pet. 565; *Franklin v. Osgood*, 14 Johns. 527; *Hannah v. Carrington*, 18 Ark. 104.

⁹ *Leffler v. Armstrong*, 4 Iowa, 482; *Sargent v. Howe*, 21 Ill. 148; *Drane v. Gunter*, 19 Ala. 731; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 141.

¹⁰ *Goode v. Comfort*, 39 Mo. 325; *Youngman v. Elmira, &c. R. R.*, 65 Pa. St. 278; *Newman v. Jackson*, 12 Wheat. 572; *Brisbane v. Stoughton*, 17 Ohio, 488; *Brown v. Bartee*, 10 Smed. & M. 275; *Kock v. Briggs*, 14 Cal. 256; *Reece v. Allen*, 5 Gilm. 236.

¹¹ *Smith v. Black*, 115 U. S. 308.

beneficiaries introduces the element not only of uncertainty, but also of perpetuity. The English statute of charitable uses expressly enumerated the purposes, which would be considered as charitable and coming therefore within the permissive provision of the statute. But the statute has also been construed to give a general permission for the creation of all sorts of charitable uses and trusts; and the class enumerated in the statute have been taken simply as illustrative of what is a charitable use or trust. Under that view, as to what is a charitable use, and what is the proper construction to be placed upon the statute of charitable uses, the American courts have generally held that charitable uses and trusts are recognized in this country, wherever they are for religious, benevolent and educational purposes, and other purposes of a public character. Under the heading of religious purposes, the courts have generally included every provision of every sort for the purpose of propagating any particular religion or religious doctrine.¹ But it has been impossible, so it has been held, to sustain as a religious trust provisions for the promotion of infidelity.² In England, also, it has been held that superstitious uses, such as provisions for masses for the soul of the deceased, are not valid as a charitable use. But it is believed in this country no such distinction, as to what is or is not a superstitious use, will be recognized as a proper limitation upon the right to create a charitable use.⁴

Under the heading of benevolent purposes will be found all sorts of charitable trusts, designed for the alleviation of poverty and suffering by the establishment of hospitals, asylums and the like.⁵ Under the head of educational purposes have been recognized all trusts for the maintenance and support of institutions of learning, professorships and schools, as well as for the promotion of scientific investigations.⁶ Finally, any trust which is established for the promotion of some public cause or purpose, will be supported as a valid charitable trust, as long as the purpose is not contrary to public policy. All trusts, therefore, designed to lighten public burdens, to improve towns, or assist in

¹ Goodell v. Union Ass'n, &c., 29 N. J. Eq. 32; Fairbanks v. Lamson, 99 Mass. 533; Maine v. Baptist Miss. Con. v. Portland, 65 Me. 92; Starkweather v. Am. Bible Soc., 72 Ill. 50; De Camp v. Dobbins, 29 N. J. Eq. 36; Trustees of Cory Univ. Soc. v. Beatty, 28 Id. Eq. 570; Jones v. Habersham, 3 Woods, 443; Laird v. Bäss, 50 Tex. 412; Old South Soc. v. Crocker, 119 Mass. 1; Meeting St. Bap. Soc. v. Hail, 8 R. I. 234.

² Zeisweiss v. James, 63 Pa. St. 465.

³ In re Blundell, 30 Beav. 360; Heath v. Chapman, 2 Drew. 417; Cary v. Abbot, 7 Ves. 490, 495; Atty.-Gen. v. Fishmongers' Co., 5 My. & Cr. 11; West v. Shuttleworth, 2 My. & K. 684.

⁴ Gass v. Wilhite, 2 Dana, 170; Methodist Ch. v. Remington, 1 Watts, 218.

⁵ Swift v. Beneficial Soc., 73 Pa. St. 362; De Camp v. Dobbins, 29 N. J. Eq. 36; Mayer v. Soc. of Visitation of the Sick, 2 Brews. 385; Thom-

son's Ex'rs v. Norris, 20 N. J. Eq. 489; Ould v. Washington Hospital, 5 Otto, 303; McDonald v. Mass. Gen. Hospital, 120 Mass. 432; Cruse v. Axtell, 50 Ind. 49; Mason v. Meth. Epis. Ch., 27 N. J. Eq. 47; Fellows v. Miner, 119 Mass. 541; Gooch v. Ass'n of Relief, &c., 109 Mass. 558; Sohler v. Burr, 127 Mass. 221; Goodell v. Union Ass'n, &c., 29 N. J. Eq. 32.

⁶ Mason v. Meth. Epis. Ch., 27 N. J. Eq. 47; Birchard v. Scott, 39 Conn. 63; Craig v. Secrist, 54 Ind. 419; Clement v. Hyde, 50 Vt. 716; De Camp v. Dobbins, 29 N. J. Eq. 36; Atty.-Gen. v. Parker, 126 Mass. 216; Dodge v. Williams, 46 Wis. 70; Carne v. Long, 2 De G. F. & J. 75; Atty.-Gen. v. Soule, 28 Mich. 153; Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; Russell v. Allen, 5 Dillon, 235; Boxford, &c. Soc. v. Harriman, 125 Mass. 321; Stevens v. Shippen, 28 N. J. Eq. 487.

the payment of public debts, will be sustained as a valid charitable use.¹

§ 307. **Certainty or uncertainty in the creation of a charitable trust.** — Now the principal point which distinguishes charitable trusts from private trusts, is in respect to the certainty or uncertainty of the object of the trust and of the beneficiaries, and also the exception in favor of charitable trusts to the rule of perpetuity. In consequence of the necessity of the case, greater laxity is permitted in respect to the certainty of the object of the trust in the case of charitable uses, than in the case of private uses. And while the transaction is one that may be created by deed, or other conveyance, *inter vivos*, charitable uses and trusts are oftener created by will; and the question as to the validity of charitable uses or trusts, on account of uncertainty of the object, arises almost exclusively in the case of wills. For, in the case of charitable trusts created by deed, the donor may remove any such uncertainty by a supplementary deed of confirmation. The general rule is, that gifts to charitable uses will be sustained, although there are no trustees and no definite beneficiaries, provided the general intent of the testator can be ascertained. It is explained elsewhere,² that courts of equity will never suffer a trust to fail for the want of a trustee. But in ordinary trusts, the *cestui que trust* must be definite and ascertained. The statute of 43 Eliz., ch. 4, enacted that where a devise was made to a charitable use, and no trustee was appointed, the court of chancery shall have the power to appoint trustees, who shall administer the trust in conformity with the testator's wishes, if they could be definitely ascertained and carried out; and if not, then as nearly as possible, the latter provision being known as the *cy pres* doctrine. It has always been a matter of considerable doubt, whether the provisions of this statute constituted a part of the American jurisprudence; but the general importance of this question has been dissipated by the almost unanimous conclusion of the courts, that the statute was only remedial and confirmatory of the power which the court of chancery had previously possessed and exercised.³ But whether the court of chancery had original jurisdiction, or it was first conferred upon it by the statute of Elizabeth, the doctrine of charitable uses is generally recognized throughout the United States.⁴

¹ *Atty.-Gen. v. Eastlake*, 11 Hare, 205, 215, 216; *Atty.-Gen. v. Brown*, 1 Sw. 265, 301, 302; *Humane Fire Co.'s Appeal*, 88 Pa. St. 389; *Bethlehem v. Perseverance Fire Co.*, 81 *Id.* 445; *Atty.-Gen. v. Webster*, L. R. 20 Eq. 483.

² See *post*, § 313.

³ *Vidal v. Gerard*, 2 How. 127; *Going v. Emery*, 16 Pick. 107; *Baptist Ass'n v. Hart*, 4 Wheat. 1; *Witman v. Lex*, 17 Serg. & R. 88; *Green v. Dennis*, 6 Conn. 292; *Earle v. Wood*, 8 Cush. 430; *Dexter v. Gardner*, 7 Allen, 246; *Jackson v. Phillips*, 14 Allen, 577; *Burbank v. Whitney*, 24 Pick. 152; *Potter v. Thornton*, 7 R. I. 263; *Bell Co. v. Alexander*, 22 Texas, 362; *Inglis v.*

Trustees of Sailors' Snug Harbor, 3 Pet. 140. *Contra*, *Owens v. Missionary Soc.*, 14 N. Y. 380; *Bascom v. Albertson*, 34 N. Y. 618.

⁴ See *Tappan v. Deblois*, 45 Me. 122; *Drew v. Wakefield*, 54 Me. 295; *Burr's Ex'rs v. Smith*, 7 Vt. 241; *Dashlell v. Atty.-Gen.*, 5 Har. & J. 392; *Gallego v. Atty.-Gen.*, 3 Leigh, 450; *Beall v. Fox*, 4 Ga. 404; *Am. Bible Soc. v. Wetmore*, 17 Conn. 181; *Atty.-Gen. v. Moore*, 19 N. J. Eq. 503; *Trustees, &c. v. Zanesville C. & M. Co.*, 9 Ohio, 203; *Gals v. Wilhite*, 2 Dana, 170; *Griffin v. Graham*, 1 Hawks, 96; *Miller v. Chittenden*, 2 Iowa, 315.

The uncertainty, which in private trusts would invalidate the devise, but which could be cured under the doctrine of charitable uses, may refer either to the trustee, to the beneficiary, or to the object of the devise. In all charitable uses, the beneficiaries are indefinite and uncertain, usually consisting of a class, the individuals of which are constantly changing. Thus, where a devise is made to a university, or to found one, the beneficiaries are the students, who from time to time enter its halls. But it is a general rule that the object of charity, and the class of persons who are to be benefited by it, should be sufficiently described, as to be capable of identification.¹ Where there is a trustee or board of trustees appointed by the will to administer the trust, it seems to be the universal rule, adopted alike in all the states, that such a charitable trust will be sustained, if the class of beneficiaries is definitely described. And I apprehend that a greater uncertainty is permissible in such cases than in those in which no trustee has been appointed.² And where the trustees are authorized by the will to *exercise their discretion* in the selection of the beneficiaries, the devise has in many cases been declared definite and valid, while it would probably be invalid, if the trustees were not appointed by the will. *Id certum est, quod certum reddi potest.*³ It is also the rule, in perhaps all the states except New York, that where the object of the devise is certain and ascertainable, it will be sustained, although there are no ascertained trustees or beneficiaries. The courts of equity have the power in such cases to appoint trustees to carry out the will and administer the trust.*

Whether the English doctrine of *cy pres* is applicable in this country to a devise to a charitable use, where no trustee is appointed, is a matter of some doubt. It is certain, however, that the courts would

¹ *Wheeler v. Smith*, 2 How. 55; *Perin v. Carey*, 24 How. 465; *Loring v. Marsh*, 6 Wall. 337; *Bartlett v. King*, 12 Mass. 537; *Atty.-Gen. v. Trinity Church*, 9 Allen, 422; *Treat's Appeal*, 30 Conn. 113; *State v. Griffith*, 2 Del. Ch. 392; *Newson v. Clark*, 46 Ga. 88; *Fink v. Fink*, 12 La. An. 301; *Wade v. Am. Col. Soc.*, 7 Smed. & M. 695; *Moore v. Moore*, 4 Dana, 354; *Miller v. Teachout*, 24 Ohio St. 525; *De Bruler v. Ferguson*, 54 Ind. 549; *Heuser v. Allen*, 42 Ill. 425; *Lepage v. McNamara*, 5 Iowa, 146; *Elnell v. Universalist Gen. Convention*, 76 Tex. 514.

² *Perry on Tr.*, § 732; *Beekman v. Bonsor*, 23 N. Y. 298; *Downing v. Marshall*, 23 N. Y. 366; *Going v. Emery*, 16 Pick. 107; *Treat's Appeal*, 30 Conn. 113; *Schultz's Appeal*, 80 Pa. St. 396; *State v. Griffith*, 2 Del. Ch. 392; *Needles v. Martin*, 33 Md. 609; *Bridges v. Pleasants*, 4 Ired. Eq. 26; *De Bruler v. Ferguson*, 54 Ind. 549; *Chambers v. St. Louis*, 29 Mo. 543; *Schumacker v. Reel*, 61 Mo. 592; *Lepage v. McNamara*, 5 Iowa, 146; *Miller v. Chittenden*, 2 Iowa, 315.

³ *Treat's Appeal*, 30 Conn. 113; *Witman v. Lex*, 17 Serg. & R. 88; *Beavers v. Filson*, 8 Pa. St. 327; *Pickering v. Shotwell*, 10 Pa. St. 23;

Atty.-Gen. v. Jolly, 1 Rich. Eq. 99. But there must be some definite description of the class of persons from which the trustees are to select. *Wheeler v. Smith*, 9 How. 55; *Fontain v. Ravenel*, 17 How. 369; *Levy v. Levy*, 33 N. Y. 97; *Gallego v. Atty.-Gen.*, 3 Leigh, 450; *Miller v. Atkinson*, 63 N. C. 537.

⁴ *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Bliss v. Am. Bible Soc.*, 2 Allen, 334; *Sanderson v. White*, 18 Pick. 328; *Bull v. Bull*, 8 Conn. 47; *Stone v. Griffin*, 3 Vt. 400; *McAllister v. McAllister*, 46 Vt. 272; *McLain v. School Directors*, 51 Pa. St. 196; *Zeisweiss v. James*, 63 Pa. St. 465; *Dashiell v. Atty.-Gen.*, 5 Har. & J. 392; *Walker v. Walker*, 25 Ga. 420; *Mason v. M. E. Church*, 27 N. J. Eq. 47; *Williams v. Pearson*, 38 Ala. 299; *Urmey v. Wooden*, 1 Ohio St. 160; *Trustees, &c. v. Zanesville C. & M. Co.*, 9 Ohio, 203; *Gass v. Wilhite*, 2 Dana, 170; *Griffin v. Graham*, 1 Hawks, 96; *Miller v. Chittenden*, 2 Iowa, 315. *Contra, Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 Iowa, 584; *Downing v. Marshall*, 23 N. Y. 366; see, also, *Tilden v. Green*, 130 N. Y. 29.

not, in following the tendency of the English courts, go so far as to authorize funds, bequeathed to found a Jews' synagogue, to be transferred to a foundling hospital, as was done in one case in an English court.¹ And if the doctrine is recognized, it is applied in subordination to the general rule, that the courts cannot supply the intention of the testator by conjecture; but must act in strict compliance with the general intent, appearing on the face of the will; and then only, when the special intent cannot be carried out.² Finally, the doctrine of perpetuities does not apply to charitable uses.³

This distinction between charitable uses and trusts on the one hand and private uses and trusts on the other, is accepted without qualification in a few of the states.⁴ And in a great majority of the states, the distinction is adopted with some modification—particularly in respect to the scope of the *cy pres* doctrine of construction.⁵ On the other hand, in some of the states, the distinction

¹ Washb. on Real Prop. 521; Story on Eq. Jur., § 1169.

² *Fountain v. Ravenel*, 17 How. 389; *Loring v. Marsh*, 6 Wall. 337; *Harvard College v. Society, &c.*, 3 Gray, 283; *Saunderson v. White*, 18 Pick. 333; *Brown v. Concord*, 33 N. H. 285; *Beekman v. Bonsor*, 23 N. Y. 308; *Holmes v. Mead*, 52 N. Y. 344; *Philadelphia v. Girard*, 45 Pa. St. 28; *Methodist Church v. Remington*, 1 Watts, 226; *McAuley v. Wilson*, 1 Dev. Ch. 276; *Cromie's Heirs v. Louisville Home Soc.* 3 Bush, 375.

³ *Jackson v. Phillips*, 14 Allen, 550; *Odell v. Odell*, 10 Allen, 8; *Hillyard v. Miller*, 10 Pa. St. 335; *Griffin v. Graham*, 1 Hawks, 131; *Gass v. Wilhite*, 2 Dana, 183; *Miller v. Chittenden*, 2 Iowa, 362. *Contra*, *Levy v. Levy*, 33 N. Y. 130; *Bascom v. Albertson*, 34 N. Y. 598.

⁴ *Kentucky*: *Hadden v. Chorn*, 8 B. Mon. 70; *Atty.-Gen. v. Wallace*, 7 *Id.* 611; *Moore v. Moore*, 4 Dana, 354; *Gass v. Wilhite*, 2 *Id.* 170; *Cromes v. Louisville, &c. Soc.*, 3 Bush, 365; *Bap. Church v. Presb. Church*, 18 B. Mon. 635. *Massachusetts*: *Burbank v. Whitney*, 24 Pick. 146; *Sanderson v. White*, 18 Pick. 328; *Going v. Emery*, 16 *Id.* 107; *Hadley v. Hopkins Acad.*, 14 *Id.* 249; *Bartlett v. King*, 12 Mass. 537; *Barker v. Wood*, 9 *Id.* 419; *Winslow v. Cummings*, 3 Cush. 358; *Brown v. Kelsey*, 2 *Id.* 243; *Baker v. Smith*, 13 Met. 34; *Sohier v. St. Paul's Ch.*, 142 *Id.* 250; *Washburn v. Sewall*, 9 *Id.* 280; *Tucker v. Seaman's Aid Soc.*, 7 *Id.* 188; *Bartlett v. Nye*, 4 *Id.* 378; *Easterbrooks v. Tillinghast*, 5 Gray, 171; *Am. Acad. v. Harvard Coll.*, 12 Gray, 582; *Wells v. Heath*, 10 Gray, 17; *North Adams, &c. Soc. v. Fitch*, 8 *Id.* 421; *Harvard Coll. v. Soc. Prom. Theol. Educ.*, 3 *Id.* 280; *Wells v. Doane*, *Id.* 201; *Earle v. Wood*, 8 Cush. 430; *Nourse v. Merriam*, *Id.* 11; *Parker v. May*, 5 *Id.* 336; *Odell v. Odell*, 10 Allen, 1; *Drury v. Natick*, *Id.* 169; *Atty.-Gen. v. Trinity Ch.*, 9 *Id.* 422; *Dexter v. Gardner*, 7 *Id.* 243; *Tainter v. Clark*, 5 *Id.* 66; *Bliss v. Am. Bible Soc.*, 2 *Id.* 334; *Nicholas v. Allen*, 130 Mass. 211; *Olliffe v.*

Wells, 130 *Id.* 221; *Atty.-Gen. v. Garrison*, 101 *Id.* 223; *Fairbanks v. Lamson*, 99 *Id.* 533; *Hosea v. Jacobs*, 98 *Id.* 65; *Jackson v. Phillips*, 14 Allen, 539; *Atty.-Gen. v. Old South Soc.*, 13 Allen, 474; *Saltonstall v. Sanders*, 11 Allen, 446; *Atty.-Gen. v. Parker*, 126 Mass. 216; *Sohier v. Burr*, 127 Mass. 221; *Boxford, &c. Soc. v. Harriman*, 125 *Id.* 321; *McDonald v. Mass. Gen. Hospital*, 120 *Id.* 432; *Old South Soc. v. Crocker*, 119 *Id.* 1; *Fellows v. Miner*, 119 *Id.* 541; *Gooch v. Ass'n for Relief, &c.*, 109 *Id.* 558.

⁵ *Alabama*: *Carter v. Balfour's Adm'r*, 19 Ala. 814; *Antones v. Eslava*, 9 Port. 527; *Johnson's Adm'r v. Longmire*, 39 *Id.* 143; *Williams v. Pearson*, 38 *Id.* 299. *Arkansas*: *Grissom v. Hill*, 17 Ark. 483. *California*: *Hinchley's Estate*, 8 Pac. Law J. 407. *Connecticut*: *Am. Bible Soc. v. Wetmore*, 17 Conn. 181; *Hampden v. Rice*, 24 *Id.* 350; *White v. Fisk*, 22 *Id.* 31; *Treat's Appeal*, 30 *Id.* 113; *Birchard v. Scott*, 39 *Id.* 63; *Bull v. Bull*, 8 Conn. 47; *Chatham v. Brainard*, 11 *Id.* 60; *Brewster v. McCall*, 15 *Id.* 274. *Vermont*: *Clement v. Hyde*, 50 Vt. 716; *Burr v. Smith*, 7 *Id.* 241; *Penfield v. Skinner*, 11 *Id.* 296; *Stone v. Griffin*, 3 *Id.* 400. *New Jersey*: *Mason's Ex'rs v. Meth. Epis. Ch.*, 27 N. J. Eq. 47; *Thomson's Ex'rs v. Norris*, 20 *Id.* 489; *Norris v. Thomson's Ex'rs*, 19 *Id.* 307; *Atty.-Gen. v. Moore's Ex'rs*, 19 *Id.* 503; *Goadell v. Union Ass'n*, 29 *Id.* 32; *De Camp v. Dobbins*, 29 *Id.* 36; *Trustees, &c. v. Beatty*, 28 *Id.* 570; *Stevens v. Shippen*, 28 *Id.* 487. *Tennessee*: *Gass v. Ross*, 3 Sneed, 211; *Franklin v. Armfield*, 2 *Id.* 305; *Green v. Allen*, 5 Humph. 170; *Dickson v. Montgomery*, 1 Swan, 348; *White v. Hale*, 2 Coldw. 77. *New Hampshire*: *Dublin Case*, 38 N. H. 459; *Chapin v. School Dist.*, 35 *Id.* 445; *Brown v. Concord*, 33 *Id.* 295; *Second Cong. Soc. v. First Cong. Soc.*, 14 *Id.* 315; *Duke v. Fuller*, 9 *Id.* 536. *South Carolina*: *Combe v. Brazier*, 2 Desau. Eq. 431; *Gibson v. McCall*, 1 Rich. Law, 174; *Atty.-Gen. v. Clergy Soc.*, 8 Rich. Eq. 190; *Atty.-Gen. v. Jolly*, 1 Rich. Eq. 99; 2 Strobb. Eq. 379. *Rhode Island*: *Meeting St. Bap. Soc. v. Hall*, 8 R. I.

between charitable uses and trusts, as laid down by the English and American cases in general, has been expressly abrogated, and other statutes have been enacted, expressly prohibiting any kind of charitable use or trust, except those which are enumerated and set out in the provisions of the statute.¹ In a few states, the distinction between the charitable and private trust is not recognized; and in order that the charitable trust may be upheld as valid, it is required that such trust should contain all the elements of a valid private trust, *i. e.*, there must be the same distinctness and certainty as to the trustee and beneficiary, as the law requires in respect to private trusts.²

§ 308. **Trusts arising by operation of law.—Classes.**—Trusts which arise by implication of law are subdivided by the books into implied, resulting and constructive trusts. These names are purely arbitrary, and do not convey to the mind any idea of the distinguishing feature of the trusts which they respectively represent. All trusts created by operation of law may be said to be implied or con-

234; *Potter v. Thornton*, 7 *Id.* 252; *Derby v. Derby*, 4 *Id.* 414. *Missouri*: *Acad. of Visitation v. Clements*, 5 Mo. 167; *Russell v. Allen*, 5 *Dillon*, 235; *Chambers v. St. Louis*, 29 Mo. 543; *State v. Prewett*, 30 Mo. 165. *Mississippi*: *Wade v. Am. Colon. Soc.*, 7 Sm. & Mar. 663. *Maine*: *Howard v. Am. Peace Soc.*, 49 Me. 288; *Preachers' Aid Soc. v. Rich*, 45 *Id.* 552; *Tappan v. Deblois*, 45 *Id.* 122; *Shapleigh v. Pillsbury*, 1 *Id.* 271; *Maine Bap. Miss. Con. v. Portland*, 65 Me. 92; *Swasey v. Am. Bible Soc.*, 57 *Id.* 523. *Louisiana*: *Fink v. Ex'r Fink*, 12 *Id.* 301; *New Orleans v. McDonough*, 12 *Id.* 240; *Soc. of Orphan Boys v. New Orleans*, 12 La. An. 62. *Iowa*: *Miller v. Chittenden*, 2 *Iowa*, 315, 352; *Johnson v. Mayne*, 4 *Id.* 180; *Lepage v. McNamara*, 5 *Id.* 124, 146. *Indiana*: *Ex parte*, *Lindley*, 32 *Ind.* 367; *Sweeney v. Sampson*, 5 *Id.* 465; *Common Council of Richmond v. The State*, 5 *Id.* 334; *McCord v. Ochiltree*, 8 Blackf. 15; *Comm'rs of Lagrange Co. v. Rogers*, 55 *Id.* 297; *Craig v. Secrist*, 54 *Id.* 419; *Cruse v. Axtell*, 50 *Id.* 49; *Grimes' Ex'rs v. Harmon*, 35 *Id.* 198. *Illinois*: *Starkweather v. Am. Bible Soc.*, 72 *Ill.* 50; *Heuser v. Harris*, 42 *Id.* 425; *Gilman v. Hamilton*, 16 *Id.* 225. *Pennsylvania*: *Zimmerman v. Anders*, 6 W. & S. 218; *Philadelphia v. Elliott*, 3 Rawle, 170; *Girard v. Philadelphia*, 7 Wall. 1; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127; *Pickering v. Shotwell*, 10 Barr. 23; *Hillyard v. Miller*, 10 Pa. St. 326; *Method. Ch. v. Remington*, 1 Watts, 218; *Martin v. McCord*, 5 Watts, 493; *Ex parte Cassel*, 3 *Id.* 408, 440; *Morrison v. Belrer*, 2 W. & S. 81; *Cresson's Appeal*, 30 Pa. St. 437; *Barr v. Weld*, 24 *Id.* 84; *Brendle v. German Ref. Cong.*, 33 *Id.* 415; *Witman v. Lex*, 17 S. & R. 88; *Gregg v. Irish*, 6 *Id.* 211; *Wright v. Linn*, 9 Barr. 433; *Henderson v. Hunter*, 59 Pa. St. 335; *Philadelphia v. Fox*, 64 *Id.* 169; *Soohan v. Philadelphia*, 33 *Id.* 9; *Price v. Maxwell*, 28 *Id.* 23; *Griffiths v. Cope*, 17 *Id.* 96; *McLain v. School Directors*, 51 *Id.* 196; *Evangelical Association's Appeal*, 35 *Id.* 316; *Mission. Society's Appeal*,

30 *Id.* 425; *Humane Fire Co.'s Appeal*, 88 Pa. St. 389; *Swift's Ex'rs v. Eaton Beneficial Soc.*, 73 *Id.* 362; *Zeisweiss v. Jamess*, 63 *Id.* 465; *Mayer v. Soc. of Visitation of the Sick*, 2 Brews. 385; *Philadelphia v. Girard*, 45 Pa. St. 9; *McLean v. Wade*, 41 *Id.* 266; *Miller v. Porter*, 53 *Id.* 292. *Georgia*: *Walker v. Walker*, 25 Ga. 420; *Beall v. Fox*, 4 *Id.* 404; *Jones v. Habersham*, 3 Woods, 443. *Ohio*: *Am. Bible Soc. v. Marshall*, 15 Ohio St. 537; *Urmey's Ex'rs v. Wooden*, 1 *Id.* 160; *Hullman v. Honcomp*, 5 *Id.* 237; *McIntire's School v. Zanesville*, 9 Ohio, 203. *Delaware*: *Griffith v. State*, 2 Del. Ch. 421; *State v. Griffith*, 2 *Id.* 392.

¹ *Michigan*: *Methodist Ch. v. Clark*, 41 Mich. 830; *Atty.-Gen. v. Soule*, 28 Mich. 153. *Wisconsin*: *Gould v. Taylor Orphan Asylum*, Wis. 106; see *Dodge v. Williams*, 46 *Id.* 70; *Heiss v. Murphy*, 40 Wis. 276; *Ruth v. Oberbrunner*, 40 Wis. 238. *New York*: *Williams v. Williams*, 8 N. Y. 525; *Bascom v. Albertson*, 34 N. Y. 584; *Levy v. Levy*, 33 *Id.* 97; *Holmes v. Mead*, 52 *Id.* 332; *Beekman v. Bonsor*, 23 *Id.* 298; *Dodge v. Pond*, *Id.* 69; *Burrill v. Boardman*, 43 *Id.* 254, 263; *Adams v. Perry*, *Id.* 437; *Rose v. Rose*, 4 Abb. App. Dec. 108; but see *Powers v. Cassidy*, 79 N. Y. 602.

² *Virginia*: *Virginia v. Levy*, 23 Gratt. 21; *Carter v. Wolfe*, 13 *Id.* 301; *Seaburn's Ex'r v. Seaburn*, 15 *Id.* 423; *Gallego's Ex'rs v. Atty.-Gen.*, 3 Leigh, 450; *Kain v. Gibboney*, 11 Otto, 362; 3 Hughes C. C. 397. *Maryland*: *Methodist Church v. Warren*, 28 Md. 338, 355; *Needles v. Martin*, 33 *Id.* 609; *Murphy v. Dallam*, 1 Bland, 529; *Dashiell v. Atty.-Gen.*, 5 H. & J. 392, 400; 6 *Id.* 1; *Wilderman v. Baltimore*, 8 Md. 551. *North Carolina*: *Trustees v. Chambers' Ex'rs*, 3 Jones' Eq. 253; *Holland v. Peck*, 2 Ired. Eq. 255; *White v. Atty.-Gen.*, 4 *Id.* 19; *Miller v. Atkinson*, 63 N. Car. 537; *McAuley v. Wilson*, 1 Dev. Eq. 276. *West Virginia*: *Venable v. Coffman*, 2 W. Va. 310; *Carpenter v. Miller's Ex'r*, 3 *Id.* 174.

structive; while the use of the word resulting serves, perhaps, to confound these trusts with resulting uses. But it is convenient to make use of this subdivision; and, for the want of better terms, these are employed to denote the three classes. Trusts created by operation of law cannot be executed by the Statute of Uses. They are not recognized by courts of law. They are the creatures of equity, and the principles are applied by the court of equity to all inequitable transactions where the ends of justice cannot be otherwise attained.¹ But such trusts cannot be enforced against the property, after it has passed into the hands of a *bona fide* purchaser for value.²

§ 309. **Implied trusts.**—Whenever the owner of land directs a certain disposition of it, which is to enure to the benefit of a third person without expressly creating a trust in his behalf, under the maxim, that equity treats that as done which ought to be done, a trust will be implied in behalf of such beneficiary. Thus, if the testator directs his lands to be sold for the satisfaction of his debts, an implied trust is raised in favor of the creditors which will enable them to compel a performance of the trust by the executor. This implied trust was specially valuable in the days when real property was not liable for the debts of the owner.³ This species of trust is, however, really an express trust, although it arises by construction, and is not strictly created by express limitation.⁴ Another well-known application of the doctrine is the case of equitable conversion, so-called.⁵ When a contract for the sale of real property is made for a valuable consideration, and it is evidenced by an instrument in writing, equity will, by raising an implied trust in favor of the vendee, treat the vendor as his trustee in respect to the land to be conveyed, and the trust will be enforced by a decree for specific performance.⁶ But there must, of course, be a written agreement of sale to satisfy the Statute of Frauds, or such a part performance as will take the case out of the statute.⁷ An implied trust will also arise in favor of partnership-creditors in respect to the partnership property, when the insolvency of a firm or of its members creates a contention of interests between the partnership creditors and the creditors of the individual partners.⁸ So settled

¹ 2 Washb. on Real Prop. 437; 2 Pom. Eq. Jur., § 1030; 1 Spence Eq. Jur. 496; 1 Prest. Est. 191; Nightingale v. Hidden, 7 R. I. 121; Thompson v. Peake, 7 Rich. 353.

² Kearney v. Fleming, 10 N. Y. S. 169.

³ 1 Spence Eq. Jur. 509; 2 Washb. on Real Prop. 438.

⁴ 2 Pom. Eq. Jur., § 1010. See Walker v. Whiting, 23 Pick. 313; Fay v. Taft, 12 Cush. 448; Baker v. Red, 4 Dana, 158; Lane v. Lane, 8 Allen, 350; Hoxie v. Hoxie, 7 Paige, 187; Blatch v. Wilder, 1 Atk. 420; Withers v. Yeadon, 1 Rich. Eq. 324; Watson v. Mayrant, 1 Rich. Eq. 449; Randolph v. Randolph, 40 N. J. Eq. 73.

⁵ See *ante*, Chapt. IX, where the subject of Conversion and Reconversion is fully presented.

⁶ 1 Spence Eq. Jur. 509; Jackson v. Morse, 16 Johns. 197; Connor v. Lewis, 16 Me. 268; Coman v. Lakey, 80 N. Y. 345; Pelton v. Westchester Fire Ins. Co., 77 N. Y. 605; Musham v. Musham, 87 Ill. 80; Felch v. Hooper, 119 Mass. 52; Bowie v. Barry, 3 Md. Ch. 359; Knox v. Gye, L. R. 5 H. L. Cas. 656; Coffin v. Argo, (Ill. '90) 24 N. E. 1068; Green v. Brooks, 81 Cal. 328.

⁷ Harris v. Barnett, 3 Gratt. 339; Hill v. Meyers, 43 Pa. St. 170; Phillips v. Thompson, 1 Johns. Ch. 131; Ryan v. Dox, 34 N. Y. 312; 3 Washb. on Real Prop. 215.

⁸ Hastings v. Drew, 76 N. Y. 9; Bartlett v. Drew, 57 Id. 587; Murray v. Murray, 5 Johns. Ch. 69; West v. Skip, 1 Ves. Sr. 239; Campbell v. Mullett, 2 Sw. 551; Knox v. Gye, L. R. 5 H. L. Cas. 656.

is the fiduciary character of the relation of vendor and vendee under an executory contract of sale, that the vendee may enjoin the vendor from the commission of waste.¹ This trust may be enforced against the subsequent purchaser from the vendor with notice of the prior contract of sale.²

At this point attention should be given to an apparent contradiction. The implied trust, just explained, which arises from an executory contract for the sale of land, is held to be beyond the operation of the Statute of Uses,³ so that the *cestui que trust*, or executory vendee, would never acquire the legal title to the land, unless the trust is enforced by a decree for specific performance of the executory contract of sale. In a previous paragraph,⁴ where the creation of uses by simple declarations is explained, it is stated that "Equity always construed a contract of sale or agreement to convey as a declaration to uses, and would enforce it if the requisite consideration was present." That is, equity would treat a bargain and sale of lands as the express creation of a use, which could be executed in a legal estate by the Statute of Uses, if the use so created did not come within one of the five Classes of Cases, in which the statute did not operate.⁵ Whenever the English statute of enrolment is in force, no use created by bargain and sale can be executed by the Statute of Uses, unless it be created by deed, sealed and recorded. In England, therefore, a use created by a bargain and sale, which did not conform to the requirements of the Statute of Enrolment, would be denominated an implied trust which could be enforced only by a decree for specific performance. But this distinction between these two classes of equitable estates only obtains, where the mode of creating uses by simple declarations is regulated by statute, beyond the requirement of the Statute of Frauds, that it should be manifested in writing. Where there is no such regulation of the creation of uses, the executory bargain and sale would, according to one set of authorities, create a use which would be executed into a legal estate; and, according to the second set of cases, it would be an implied trust, which would remain an equitable estate until the trust is enforced by a decree for specific performance. There is but one way to reconcile these otherwise conflicting decisions, viz.: that the character of the equitable estate created by a bargain and sale, would depend upon the intention of the parties in making the bargain and sale. If, in executing the written contract of sale, the intention was to pass an absolute title, the equitable estate of the vendee would be a use and not an implied trust; and if the intention of the parties was to make the bargain and sale only preliminary to a specific and more formal performance, then the bargain and sale creates an implied trust and not a use.⁶

¹ *Moses v. Johnson*, 88 Ala. 517.

² *McWhinnie v. Martin*, (Wis. '90) 46 N. W. 118.

³ See *ante*, § 308.

⁴ See *ante*, § 258.

⁵ See *ante*, § 277; *Tiedeman Real Prop.*, § 776.

⁶ See *Hanks v. Folsom*, 11 Lea. 555; *Opinion by Chancellor Cooper, citing Beecher v. Hicks*, 7 Lea. 211; *Carnes v. Apperson*, 2 Sneed, 562; *Topp*

§ 310. **Resulting trusts to donor.**—These trusts arise in two principal cases: *First*, where only a part of the trust is declared, and the rest remains undisposed of. In such a case there is a resulting trust in favor of the grantor. Resulting trusts of this class are such as result to the grantor; but which, on account of the terms of the conveyance, cannot be executed as uses. Where the statute can operate, the equitable interest is a resulting use, and becomes a legal estate under the statute. Resulting interests in chattels, held in trust, are resulting trusts, and not resulting uses. They are called resulting trusts, because they cannot be executed by the statute of uses. In every other respect they are like resulting uses, and will arise only under such circumstances as would cause a resulting use in the freehold estate. A resulting trust in a chattel only arises when there is no consideration to the grantor, and no consideration expressed in the grant.¹ In the devise of an income to one, when he becomes of age, there is a resulting trust in the immediate income to the deviser's heirs; or where property is directed to be sold for certain purposes, and the proceeds are more than sufficient for the purposes of the trust, there is a resulting trust in the surplus to the heirs of the deviser.² There is also a resulting trust in favor of the grantor and his heirs, where the purposes of the express trust have failed, from whatever cause the failure may arise. Thus, if the trust be to appoint the estate in favor of a certain person, and the trustee fails to appoint, or the person dies before the appointment, the trust will result to the grantor.³ The trustee will in none of these cases enjoy the trust, even though a nominal consideration be mentioned in the deed. Nothing will prevent the resulting of the trust to the grantor but the payment of an adequate, or at least substantial, consideration.⁴

v. White, 12 Heisk. 165, 173; Alderson v. Clears, 7 Heisk. 667; Lafferty v. Whitesides, 1 Swan, 123.

¹ For the particular cases in which there will be a resulting use, and, if it be a chattel interest, a resulting trust, see *ante*, § 257.

² Lloyd v. Lloyd, L. R. 7 Eq. 458; Longley v. Longley, L. R. 13 Eq. 133; Cottinger v. Fletcher, 2 Atk. 155; Lloyd v. Spillet, 2 Id. 149; Ellicock v. Mapp, 3 H. L. Cas. 492; Davidson v. Foley, 2 Bro. Ch. 203; Halford v. Stains, 16 Sim. 488; Watson v. Hayes, 5 My. & Cr. 125; Sewell v. Denny, 10 Beav. 315; Read v. Stedman, 26 Id. 495; Esterbrooks v. Tillinghast, 5 Gray, 17; Hogan v. Jaques, 19 N. J. Eq. 123; Loring v. Elliott, 16 Gray, 568; Hogan v. Stayhorn, 65 N. C. 279; McCallister v. Willey, 52 Ind. 382; Trapnall v. Brown, 19 Ark. 39; Pouce v. McElroy, 47 Cal. 154; Kennedy v. Nunan, 52 Cal. 326; Edinger v. Heiser, 62 Mich. 598; Schlesinger v. Mallard, 70 Cal. 326; Ball v. Gaff, (Ky. '90) 1 S. W. 724.

³ 1 Cruise Dig. 375, 394; Ashhurst v. Givens, 5 Watts & S. 327; Sturtevant v. Jaques, 14 Allen, 523; Shaw v. Spencer, 100 Mass. 382; Nichols v. Allen, 130 Mass. 211; Olliffe v. Wells, 130 Mass.

221; Dashiell v. Atty.-Gen., 6 Har. & J. 1; Power v. Cassidy, 79 N. Y. 602; Lemmond v. Peoples, 6 Ired. Eq. 137; Hawley v. James, 5 Paige, 318; Stratt v. Uhrig, 56 Mo. 482; Bennett v. Hudson, 33 Ark. 762; Russ v. Mebius, 16 Cal. 350; Ackroyd v. Smithson, 1 Bro. Ch. 503; Goodere v. Lloyd, 3 Sim. 538; Taylor v. Haygarth, 14 Sim. 8; Williams v. Coade, 10 Ves. 500; Davenport v. Coltman, 12 Sim. 588; James v. Allen, 3 Meriv. 17; Stubbs v. Sargon, 3 My. & Cr. 507; Kendall v. Granger, 5 Beav. 300; Williams v. Kershaw, 5 Cl. & Fin. 111; Richards v. Delbridge, L. R. 18 Eq. 11; Carrick v. Errington, 2 P. Wms. 361; Coard v. Holderness, 20 Beav. 147; Pawson v. Brown, L. R. 13 Ch. 202; Pilkington v. Boughey, 12 Sim. 114; Dawson v. Clark, 18 Ves. 247; Atty.-Gen. v. Windsor, 8 H. L. Cas. 369; Ashton v. Wood, L. R. 6 Eq. 419; Stansfield v. Habergham, 10 Ves. 273; Wood v. Cox, 2 My. & Cr. 507; Pratt v. Miller, 23 Neb. 496; Parker v. McMillan, 55 Mich. 285.

⁴ 1 Spence Eq. Jur. 467; Orton v. Knab, 3 Wis. 576; 2 Washb. on Real Prop. 438; 2 Pom. Eq. Jur., § 1033; see Clark v. Hershey, 52 Ark. 473.

The nominal consideration will prevent the resulting of such a use as will be executed by the statute, but will have no effect upon the resulting trust.

§ 311. **Resulting trusts to parties paying considerations.**—The second class of resulting trusts includes those cases, in which the estate is purchased in the name of one person, and the consideration is paid by another. But two circumstances must concur, in order that a trust may result to the one paying the consideration: *First*, the execution of the deed in the name of the one person must be the result of some fraud, accident, or mistake. Or, if it is done with the knowledge and consent of the person paying the consideration, his intention that he should have the beneficial interest in the estate must be clearly established.¹ The payment of the consideration and the intention of the parties in respect to the beneficial interest may be established by parol evidence, even against the express recitals of the deed. But the evidence must be clear. It would seem that this would be a clear violation of the Statute of Frauds, where the deed was taken in the name of another, with the understanding that the one paying the consideration shall be the beneficial or equitable owner. For it is difficult to see in what way such a trust differs from an express trust, which is required to be manifested by some writing. But the decisions have held that it was not necessary for it to be in writing, and such must be taken to be the law. In like manner the presumption of a trust arising from the payment of the consideration may be rebutted by parol evidence, showing that the one paying the consideration intended that the grantee in the deed should have the

¹ *Dyer v. Dyer*, 2 Cox, 92; 1 Eq. Ld. Cas. 314; *Lloyd v. Read*, 1 P. Wms. 607; *Withers v. Withers*, Amb. 151; *Rider v. Kidder*, 10 Ves. 360; *Medmer v. Medmer*, 26 N. J. Eq. 269; *Smith v. Patton*, 12 W. Va. 541; *Billings v. Clinton*, 6 S. C. 90; *Lee v. Browder*, 51 Ala. 288; *Thomas v. Standiford*, 49 Md. 181; *Tilford v. Torrey*, 53 Ala. 120; *Cunningham v. Bell*, 83 N. C. 328; *Kelley v. Jenness*, 50 Me. 455; *Hopkinson v. Duman*, 42 N. H. 306; *Kendall v. Mann*, 11 Allen, 15; *Nixon's App.*, 63 Pa. St. 279; *Clark v. Clark*, 43 Vt. 685; *Boyd v. McLean*, 1 Johns. Ch. 582; *Brooks v. Shelton*, 54 Miss. 353; *Hampson v. Fall*, 64 Ind. 382; *Duval v. Marshall*, 30 Ark. 230; *Dean v. Dean*, 6 Conn. 285; *McGovern v. Knox*, 21 Ohio St. 547; *Latham v. Henderson*, 47 Ill. 185; *Mahis v. Stufflebeam*, 94 Ill. 481; *Moss v. Moss*, 95 Ill. 449; *Johnson v. Quarles*, 47 Mo. 423; *McLennan v. Sullivan*, 13 Iowa, 521; *Boskowitz v. Davis*, 12 Nev. 446; *Logan v. Walker*, 1 Wis. 527; *Case v. Codding*, 38 Cal. 191; *Roberts v. Ware*, 40 Cal. 634; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Jackson v. Cleveland*, 15 Mich. 102; *Smith v. Strahan*, 16 Texas, 314; *Sayre v. Townsend*, 15 Wend. 647; *Mershon v. Duer*, 40 N. J. Eq. 333; *Osgood v. Eaton*, 62 N. H. 512; *Parker v. Logan*, 82 Va. 376; *Farrington v. Duval*, (S. C. '90) 10 S. C. 944; *Mance v. Mance*, 28 Ill. App.

587; see *Willis v. Willis*, 2 Atk. 71; *Gascoigne v. Thwing*, 1 Vern. 366; *Heard v. Pilley*, L. R. Ch. 548; *Baker v. Vining*, 30 Me. 121; *Boyd v. McLean*, 1 Johns. Ch. 582; *Hennesy v. Walsh*, 55 N. H. 515; *Parker v. Snyder*, 31 N. J. Eq. 164; *Livermore v. Aldrich*, 5 Cush. 431; *Jackson v. Feller*, 2 Wend. 465; *Stumpfer v. Roberts*, 18 Pa. St. 283; *Whitmore v. Learned*, 70 Me. 276; *Thomas v. Standiford*, 49 Md. 181; *Miller v. Blose's Ex'r*, 30 Gratt. 744; *Hyden v. Hyden*, 6 Baxt. 406; *Coates v. Woodworth*, 13 Ill. 654; *Lee v. Browder*, 51 Ala. 288; *Agricultural Ass'n v. Brewster*, 51 Texas, 257; *Byers v. Wackman*, 16 Ohio St. 440; *Bryant v. Hendricks*, 5 Iowa, 256; *Murphy v. Peabody*, 63 Ga. 522; *Billings v. Clinton*, 6 S. C. 90; *Drum v. Simpson*, 6 Binn. 478; *Smith v. Patton*, 12 W. Va. 541; *McCreary v. Casey*, 50 Cal. 349; *Ward v. Armstrong*, 84 Ill. 151; *Lane v. Dighton*, Amb. 409; *Benbow v. Townsend*, 1 My. & K. 506; *Hopkinson v. Duman*, 42 N. H. 303; *Edwards v. Edwards*, 39 Pa. St. 378; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *White v. Carpenter*, 2 Paige, 238; *Perkins v. Nichols*, 11 Allen, 545; *Adams v. Greerard*, 26 Ga. 651; *Shepherd v. White*, 11 Texas, 346; *Warren v. Steer*, 112 Pa. St. 634; *Tryon v. Huntoon*, 67 Cal. 325; *Moore v. Williams*, 55 N. Y. Super. Ct. 116.

benefit of the purchase as a gift, provided such parol evidence does not contradict the terms of the deed.

The second circumstance is that the consideration must be paid by the person claiming the resulting trust at the time of the transaction of sale or conveyance. Any subsequent payment of the consideration by such person, even though he has been compelled to do so as surety of the grantee, will not raise a trust.¹ So, also, will the trust result to one who pays a part of the purchase money with the intention that he shall have an interest in the land. But in order that there may be a resulting trust in his favor, the exact amount which he advances must be clearly established. Any doubt or uncertainty in that respect will prevent the trust from resulting.² The absence of either of these circumstances will prevent the trust resulting from the payment of the consideration.³ And the evidence in support of both propositions must be clear and free from reasonable doubt.⁴

Resulting trusts are now regulated by statute in New York, Michigan, Indiana, Kentucky, Minnesota, Wisconsin and Kansas. They all substantially abolish such resulting trusts as arise in a conveyance to one person in favor of another who has paid the consideration, except in favor of the judgment-creditors of the latter. They may enforce the trust in their behalf if they were creditors at the time of the conveyance. But the statutes expressly except those cases where the deed has been taken in the name of another, through some accident, fraud or mistake.⁵

¹ *Howell v. Howell*, 15 N. J. Eq. 78; *Brooks v. Fowler*, 14 N. H. 248; *Buck v. Swazey*, 35 Me. 41; *Kelley v. Johnson*, 28 Mo. 249; *Oliver v. Dougherty*, 3 Iowa, 371; *Sullivan v. McLennans*, 2 Iowa, 442; *Baumgartner v. Guessfeld*, 38 Mo. 96; *Brawner v. Staup*, 21 Md. 337; *Francestown v. Deering*, 41 N. H. 443; *Barnett v. Dougherty*, 32 Pa. St. 371; *Gee v. Gee*, 32 Miss. 190; *Kendall v. Mann*, 11 Allen, 17; *Perkins v. Nichols*, 11 Allen, 546; *Kellum v. Smith*, 33 *Id.* 164; *Alexander v. Tams*, 13 Ill. 221; *Perry v. McHenry*, 33 *Id.* 227; *Davis v. Wetherell*, 11 Allen, 20; *Whiting v. Gould*, 2 Wis. 552; *Hopkinson v. Dumas*, 42 N. H. 301; *Pegnes v. Pegnes*, 5 Ired. Eq. 418; *Mershon v. Duer*, 40 N. J. Eq. 333; *Brown v. Cave*, 23 S. C. 251; *Walsh v. McBride*, (Md. '90) 19 Atl. 4; *Shaw v. Shaw*, 86 Mo. 594; *Pulford v. Morton*, 62 Mich. 25; *Rice v. Pennypacker*, 5 Del. Ch. 33.

² *Purdy v. Purdy*, 3 Md. Ch. 547; *Shoemaker v. Smith*, *Humph.* 81; *Miller v. Birdsong*, 7 Baxt. 531; *Smith v. Patton*, 12 W. Va. 541; *Pierce v. Pierce*, 7 B. Mon. 438; *Franklin v. McEntire*, 23 Ill. 91; *Smith v. Smith*, 85 Ill. 189; *Cramer v. Hoose*, 93 Ill. 503; *Shea v. Tucker*, 56 Ala. 450; *Hidden v. Jordan*, 21 Cal. 92; *Bayless v. Baxter*, 22 Cal. 578; *Case v. Coddling*, 38 Cal. 191; *McCreary v. Casey*, 50 Cal. 349; *Wray v. Steele*, 2 V. & B. 388; *Barron v. Barron*, 24 Vt. 375; *McGowan v. McGowan*, 14 Gray, 119; *Harper v. Phelps*, 21 Conn. 257; *Williams v. Hollingsworth*, 1 Strobb. Eq. 103; *Botsford v. Burr*, 2

Johns. Ch. 405; *Smith v. Strahan*, 16 Texas, 314; *Sayre v. Townsend*, 15 Wend. 647; *Wallace v. Duffield*, 2 Serg. & R. 521; *Springer v. Springer*, 114 Ill. 550; *Somers v. Overhulser*, 67 Cal. 237.

³ *McCue v. Gallagher*, 23 Cal. 53; *Gee v. Gee*, 32 Miss. 190; *Dow v. Jewell*, 21 N. H. 470; *Gibson v. Foote*, 40 Miss. 792; *Hunt v. Moore*, 6 Cush. 1; *Ramsdell v. Emory*, 46 Me. 311; *Jackman v. Ringland*, 4 W. & S. 149; *Botsford v. Burr*, 2 *Johns. Ch.* 405; *Stephenson v. Thompson*, 13 Ill. 188; *McCullough v. Ford*, 96 Ill. 439; *House v. House*, 57 Ala. 262; *Kennedy v. Price*, 57 Miss. 771; *Hennesy v. Walsh*, 55 N. H. 515, and cases cited in the preceding notes; *Heneke v. Floring*, 114 Ill. 554; *Green v. Dietrich*, 114 Ill. 636; *Burdette v. May*, 100 Mo. 13; *Nance v. Nance*, 28 Ill. App. 587; *Rice v. Pennypacker*, 5 Del. Ch. 33. There is no resulting trust in favor of one whose money is expended in improvements on the land. *Bodwell v. Nutter*, 63 N. H. 446.

⁴ *Heneke v. Floring*, 114 Ill. 554; *Green v. Dietrich*, 114 Ill. 636; *St. Patrick's Catholic Church v. Daly*, 116 Ill. 76; *Woodward v. Sibert*, 82 Va. 441; *Catoe v. Catoe*, (S. C. '90) 10 S. E. 1078; *Hoover v. Hoover*, 129 Pa. St. 201; *Behm v. Molly*, (Pa. '90) 19 Atl. 562; *Guest v. Guest*, 74 Tex. 664.

⁵ For cases in which these statutes have been under consideration see *Reitz v. Reitz*, 80 N. Y. 538; *Siemon v. Schurck*, 29 N. Y. 598; *Moore v. Williams*, 55 N. Y. Super. 116; *Woerz v. Rade-*

These resulting trusts rest upon the presumption that the person beneficially entitled has been deprived of his interest against his will. But where the relation between the parties is so close as to permit of the counter-presumption, that the one paying the consideration intended it as a gift to the one in whose name the deed is taken, as where the parties are husband and wife, parent and child, and the like, there will be no resulting trust. It is presumed to be a gift, because the purchasers in the cases supposed, husband and father, are under a moral *quasi* legal obligation to maintain the persons in whose names the deeds are taken, viz.: wife and child.¹ And the same presumption prevails whenever one purchases property in the name of another, while the former stands *in loco parentis*, as between mother and child,² or between grandfather and grandchild.³ On the other hand, there is no presumption of a gift where the deed is taken in the name of the husband or father, and the purchase money is paid by the wife or child.⁴ But all these are disputable presumptions, and may be rebutted by the proof of a contrary intention. If it is shown that the deed was taken in the name of the wife or child through a mistake of the scrivener, or the fraud of someone, or with the intention that the husband or father should have the beneficial interest, the trust will result as in any other case.⁵

macher, 120 N. Y. 62; Denning v. Kane, 7 N. Y. S. 704; Weare v. Linnell, 29 Mich. 224; Munch v. Shabel, 37 Mich. 166; Derry v. Derry, 74 Ind. 560; Hon v. Hon, 70 Ind. 135; Catherwood, 65 Ind. 576; Baker v. Baker, 22 Minn. 262; Rogers v. McCauley, *Id.* 384; Durfee v. Pavitt, 14 Minn. 422; Graves v. Graves, 3 Metc. 167; Kennedy v. Taylor, 20 Kans. 558; Mitchell v. Skinner, 17 Kans. 563; Underwood v. Sutcliffe, 77 N. Y. 51; Traphagen v. Burt, 67 N. Y. 30; Bedford v. Graves, (Ky. '90) 1 S. W. 534.

¹ Cruise Dig. 394; 1 Spence Eq. Jur. 511; Kingdom v. Bridges, 2 Vern. 67; Dyer v. Dyer, 2 Cox, 92; Rider v. Kidder, 10 Ves. 360; Finch v. Finch, 15 Ves. 43; Williams v. Williams, 32 Beav. 370; Sayre v. Hughes, L. R. 5 Eq. 376; Marshall v. Crutwell, L. R. 20 Eq. 328; Livingston v. Livingston, 2 Johns. Ch. 537; Farnell v. Lloyd, 69 Pa. St. 239; Lorentz v. Lorentz, 14 W. Va. 809; Douglass v. Brice, 4 Rich. Eq. 322; Stevens v. Stevens, 70 Me. 92; Welton v. Divine, 20 Barb. 9; Lochenour v. Lochenour, 61 Ind. 595; Smith v. Strahan, 16 Texas, 314; Sunderland v. Sunderland, 19 Iowa, 338; Baker v. Baker, 22 Minn. 262; Read v. Huff, 40 N. J. Eq. 229; Robinson v. Robinson, 45 Ark. 481; Spaulding v. Cleghorn, 8 N. Y. S. 269; *In re* Camp, 10 N. Y. S. 141.

² *In re* De Visme, 2 De G. J. & S. 17; Batstone v. Salter, L. R. 19 Eq. 250; but see Murphy v. Nathans, 46 Pa. St. 508; Shaw v. Read, 47 Pa. St. 103; Flynt v. Hubbard, 57 Miss. 471.

³ Co. Lit. 290 b, note 249, § 8; Ebrand v. Dancer, 2 Chan. Cas. 26; see generally, Beckford v. Beckford, Lofft. 490; Loyd v. Read, 1 P. Wms. 607; Tucker v. Burrow, 2 Hem. & M. 515;

Sayre v. Hughes, L. R. 5 Eq. 376; Currant v. Jags, 1 Coll. 261; Smith v. Patton, 12 W. Va. 541; Higdon v. Higdon, 57 Miss. 264.

⁴ Howell v. Howell, 15 N. J. Eq. 77; Beck's Ex'rs v. Graybill, 28 Pa. St. 66; Thomas v. Standiford, 49 Md. 181; Lofton v. Witboard, 92 Ill. 461; Moss v. Moss, 95 Ill. 449; Catherwood v. Watson, 65 Ind. 575; Squire v. Harder, 1 Paige, 494; Russ v. Mebius, 16 Cal. 350; Cunningham v. Bell, 83 N. C. 328; Tilford v. Torrey, 53 Ala. 120; Leman v. Whitley, 4 Russ. 423; Sasser v. Sasser, 73 Ga. 275; Chiles v. Gallagher, (Miss. '90) 7 So. 208.

⁵ Wallace v. Bowens, 28 Vt. 638; Sawyer's Appeal, 16 N. H. 414; Dickinson v. Davis, 43 N. H. 647; Jackson v. Matadurf, 11 Johns. 91; Livingston v. Livingston, 2 Johns. Ch. 539; Stevens v. Stevens, 70 Me. 92; Baker v. Vining, 30 Me. 121; Rankin v. Harper, 23 Mo. 579; Eddy v. Baldwin, 23 Mo. 588; Springer v. Berry, 47 Me. 338; Shepherd v. White, 10 Texas, 72; Guthrie v. Gardner, 19 Wend. 414; Smith v. Strahan, 16 Texas, 314; Lampleigh v. Lampleigh, 1 P. Wms. 111; Sidmouth v. Sidmouth, 2 Beav. 447; Williams v. Williams, 32 Beav. 370; Kilpin v. Kilpin, 1 My. & R. 520; Devoy v. Devoy, 3 Sm. & Giff. 403; Read v. Huff, 40 N. J. Eq. 229; Russell v. Russell, (Ky. '90) 12 S. W. Rep. 709. It has been held that there can be no resulting trust in favor of a husband in property in the name of the wife, because the wife cannot be trustee for the husband. 1 Cruise Dig. 402; Kingdom v. Bridges, 2 Vern. 67; Alexander v. Warrance, 17 Mo. 228; Jencks v. Alexander, 11 Paige Ch. 619. This technical rule is not presumed to prevail in this country as an obstacle

§ 312. **Constructive trusts.** — Constructive trusts arise where the trustee or any other person holding a fiduciary position, by fraud, actual or constructive, makes an illegal disposition of the trust property, to the injury of the *cestui que trust* or beneficiary. The latter can, at his election, follow such trust property, into whosoever hands it may come, with notice of the trust.¹ And it matters not whether the original holding of such property was legal or illegal; if it afterwards becomes illegal, the same rule will apply. Thus, if a mortgage is given jointly to two, and one dies, the survivor would hold the mortgage as trustee for himself and the heirs and personal representatives of the deceased.² The most common instances of constructive trusts are purchases by the trustee of trust property at his own sale, or an illegal conveyance by him to one having notice of the trust, without paying any valuable consideration. It is a general rule of law that a trustee cannot purchase at his own sale; and if he does, he cannot acquire an absolute title. It is voidable at the election of the *cestui que trust*. Until an avoidance or ratification by him, there is a constructive trust raised in his favor.³ But this rule does not prevent him from purchasing the trust property with the consent of the *cestui que trust*, provided the latter is of age and *sui juris*. But such transactions are closely watched; and if the consideration paid therefor be not adequate, the courts are greatly disposed to set aside the sale.⁴ The court of equity may also authorize the trustee to buy the property

in the way of raising a resulting trust, and certainly not in those states where the wife is treated, in respect to her property, as a *femme sole*. See cases cited, *supra*.

¹ Washb. on Real Prop. 447; 1 Spence Eq. Jur. 511; 2 Pom. Eq. Jur. 1044; Perry on Tr., § 166; Bailey v. Winn, (Mo. '90) 12 S. W. 1045; Murphy v. Murphy, (Iowa, '90) 45 N. W. 914; Lehmann v. Rothbarth, 111 Ill. 185; Morgan v. Fisher's Adm'r's, 82 Va. 417.

² Buck v. Swazey, 35 Me. 41; Randall v. Phillips, 3 Mason, 378; Caines v. Grant, 5 Binn. 119.

³ Jennison v. Hapgood, 7 Pick. 8; Gardner v. Ogden, 22 N. Y. 327; Collins v. Smith, 1 Head, 251; Swinburne v. Swinburne, 28 N. Y. 568; Bellamy v. Bellamy, 6 Fla. 62; McNish v. Pope, 8 Rich. Eq. 112; Brown v. Lynch, 1 Paige, 167; Hubbell v. Medbury, 53 N. Y. 98; Hoffman, &c. Co. v. Cumberland, &c. Co., 16 Md. 507; Jamison v. Glascock, 29 Mo. 191; Fairman v. Bavin, 29 Ill. 76; Charles v. Dubose, 29 Ala. 367; Huff v. Earl, 3 Ind. 306; Herr's Estate, 1 Grant Cas. 272; Baldwin v. Allison, 4 Minn. 25; Gaerrens v. Bailieno, 48 Cal. 118; Scott v. Umbarger, 41 Cal. 410; Boyd v. Blankman, 29 Cal. 20; Mitchell v. Berry, 1 Metc. (Ky.) 602; McCrary v. Foster, 1 Iowa, 276; Grumley v. Grumley, 44 Mo. 444; Cookson v. Richardson, 69 Ill. 137; Newton v. Taylor, 39 Ohio St. 399; Rea v. Copelin, 47 Mo. 76; Broyless v. Nowlin, 59 Tenn. 191; Reickhoff v. Brecht, 51 Iowa, 633; Pindall v. Trevor, 30 Ark. 249; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Barnett

v. Bamber, 81 Pa. St. 247; Webster v. King, 33 Cal. 348; Tracy v. Colby, 55 Cal. 67; Tracy v. Craig, 55 Cal. 359; Davis v. Rock Creek, 55 Cal. 359; Giddings v. Eastman, 5 Paige, 561; Reitz v. Reitz, 80 N. Y. 538; Smith v. Stephenson, 45 Iowa, 645; Mathews v. Light, 32 Me. 305; Manning v. Hayden, 5 Sawyer, 360; Jones v. Dexter, 130 Mass. 380; Whitwell v. Warner, 26 Vt. 425; Blout v. Robeson, 3 Jones Eq. 73; Hastings v. Drew, 76 N. Y. 9; Bennett v. Austin, 81 N. Y. 308; Smith v. Frost, 70 N. Y. 605; Treadwell v. McKeon, 7 Baxt. 201; Fox v. Mackreth, 2 Bro. Ch. 400; Church v. Sterling, 16 Conn. 388; 1 Eq. Ld. Cas. 188, *et seq.*; Powell v. Glover, 3 P. Wms. 252; Kimber v. Barber, L. R. 8 Ch. 56; Heath v. Crealock, L. R. 18 Eq. 215; *In re Hallet's Estate*, L. R. 13 Ch. 696; Wedderburn v. Wedderburn, 4 My. & Cr. 41; Willett v. Blanford, 1 Harr. 253; Fawcett v. Whitehouse, 1 Russ. & M. 132; Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586; Barnes v. Addy, L. R. 9 Ch. 244; Bassett v. Shoemaker, (N. J. '90) 20 Atl. 52.

⁴ Downes v. Grazebrook, 3 Meriv. 208; *Ex parte Lacey*, 6 Ves. 625; Morse v. Royal, 12 Ves. 355; Denton v. Donner, 23 Beav. 285; Coles v. Treckstlick, 9 Ves. 234; Spencer v. Newbold's Appeal, 80 Pa. St. 317; Bayan v. Duncan, 11 Ga. 67; Sallee v. Chandler, 26 Mo. 124; Richardson v. Spencer, 18 B. Mon. 450; Kennedy v. Kennedy, 2 Ala. 571; Villines v. Norfleet, 2 Dev. Eq. 167; Mitchell v. Berry, 1 Metc. (Ky.) 602; Marshall v. Stephens, 8 Humph. 159.

in, and in that case the title of the trustee will be good against all parties.¹ In the same manner, if the trustee attempts to make an illegal disposition of the land, his grantee will take it bound with a constructive trust in favor of the *cestui que trust*, unless he has had no actual or constructive notice of the trust, and has paid a valuable consideration.² And where such grantee is a *bona fide* purchaser for value, the proceeds of sale will be subject to the constructive trust in favor of the *cestui que trust*, into whatever kind of property such proceeds may be invested, as long as the possibility of identifying them remains.³

These are only the more common instances of constructive trusts. But there are many others; and it may be stated as the invariable rule that, where there has been a fraud committed in the disposition or acquisition of the property, equity will raise a constructive trust in favor of the person defrauded, unless it will interfere with and affect the interest of innocent third persons.⁴ Thus, if one embezzles money intrusted to his care and invests it in real estate, the person to whom the money belongs will have a constructive trust in such land, as against every one except an innocent subsequent purchaser.⁵ But there will

¹ Scholle v. Scholle, 101 N. Y. 167.

² Thompson v. Wheatley, 5 Smed. & M. 499; Fillman v. Divers, 31 Pa. St. 42; Hopkins v. Duman, 42 N. H. 304; Shryock v. Waggoner, 28 Pa. St. 430; Church v. Church, 25 Pa. St. 278; Boone v. Chiles, 10 Pet. 177; Lyford v. Thurston, 16 N. H. 408; Stewart v. Chadwick, 8 Iowa, 463; Paul v. Fulton, 25 Mo. 156; McVey v. Quality, 97 Ill. 93; Dey v. Dey, 26 N. J. Eq. 182; Palmer v. Oakley, 2 Dougl. (Mich.) 433; Veile v. Blodgett, 49 Vt. 270; Murray v. Bailou, 1 Johns, Ch. 566; Phelps v. Jackson, 31 Ark. 272; Planter's Bk. v. Prater, 64 Ga. 609; Dotterer v. Pike, 60 Ga. 29; Musham v. Musham, 87 Ill. 80; Swinburne v. Swinburne, 28 N. Y. 568; Newton v. Porter, 69 N. Y. 133; Siemon v. Schurck, 29 N. Y. 598; Russell v. Clark's Ex'rs, 7 Cranch, 69; Mercier v. Hemme, 50 Cal. 427; Sharpe v. Goodwin, 51 Cal. 219; Boyd v. Brincken, 55 Cal. 427; Griffin v. Blancher, 17 Cal. 70; Winona, &c. R. R. v. St. Paul, &c. R. R., 26 Minn. 179; Blandin v. Silsby, (Vt. '90) 19 Atl. 639; McEachin v. Stewart, 106 N. C. 336.

³ Burks v. Burks, 7 Baxt. 353; Broyles v. Nowlin, 59 Tenn. 191; Tilford v. Torrey, 53 Ala. 120; Pindall v. Trevor, 30 Ark. 249; Friedlander v. Johnson, 2 Woods C. C. 675; McDonough v. O'Neil, 113 Mass. 92; Tracy v. Kelley, 52 Ind. 535; Cookson v. Richardson, 69 Ill. 137; Coles v. Allen, 64 Ala. 98 (when no trust arises); Dodge v. Cole, 97 Ill. 338; Derry v. Derry, 74 Ind. 560; Wells v. Robinson, 13 Cal. 133, 140, 141; Lathrop v. Bampton, 31 Id. 17; Schlaeffer v. Corson, 52 Barb. 510; Swinburne v. Swinburne, 28 N. Y. 568; Hastings v. Drew, 76 N. Y. 9, 16; Bartlett v. Drew, 57 Id. 587; Holden v. N. Y. & Erie Bk., 72 Id. 286; Newton v. Porter, 69 Id. 133, 136-140; Taylor v. Mosely, 57 Miss. 544; Mich., &c. R. R.

v. Mellen, 44 Mich. 321; Murray v. Lylburn, 2 Johns. Ch. 441, 443; Boyd v. McLean, 1 Id. 582; Shaw v. Spencer, 100 Mass. 382; Shelton v. Lewis, 27 Ark. 190; Mathews v. Heyward, 2 S. C. 239; Thompson v. Perkins, 3 Mason, 232; Duncan v. Jaudon, 15 Wall. 165; Newton v. Taylor, 32 Ohio St. 399; Barrett v. Bamber, 81 Pa. St. 247; Veile v. Blodgett, 49 Vt. 270; Hubbard v. Burrell, 41 Wis. 365 (proceeds charged with a trust on sale to a *bona fide* purchaser).

⁴ Lakin v. Sierra Buttes Gold Mining Co., 25 Fed. Rep. 337; Boyce v. Stanton, 15 Lea. 346; Palmetto Lumber Co. v. Risley, 25 S. C. 309; Wingerter v. Wingerter, 71 Cal. 105; Denning v. Kane, 7 N. Y. S. 704; McElroy v. Hiner, (Ill. '90) 24 N. E. 435; Huxley v. Rice, 40 Mich. 73; Troll v. Carter, 15 W. Va. 567; Phelps v. Jackson, 31 Ark. 272; Hendrix v. Nunn, 46 Tex. 141; Veile v. Blodgett, 49 Vt. 270; Newell v. Newell, 14 Kans. 202; Jenkins v. Doolittle, 69 Ill. 415; Greenwood's Appeal, 92 Pa. St. 181; Barnes v. Taylor, 30 N. J. Eq. 7; Hollinshead v. Simms, 51 Cal. 158; Mercier v. Hemme, 50 Id. 606; Dewey v. Moyer, 72 N. Y. 70, 76; Hammond v. Pennock, 61 Id. 145; Fulton v. Whitney, 5 Hun, 16; Baier v. Berberich, 6 Mo. App. 537; Beach v. Dyer, 93 Ill. 295; Naylor v. Winch, 1 S. & S. 555, 564; Bingham v. Bingham, 1 Ves. Sen. 126; Tucker v. Phipps, 3 Atk. 359, 360; Downes v. Jennings, 32 Beav. 290; Bailey v. Stiles, 1 Green Ch. 220.

⁵ Foote v. Colvin, 3 Johns. 216; Murdock v. Hughes, 7 Smed. & M. 219; Prevost v. Gatz, 1 Pet. C. Ct. 364; Phillips v. Crammond, 2 Wash. C. Ct. 441; Johnson v. Dougherty, 18 N. J. Eq. 406; Robb's Appeal, 41 Pa. St. 45; Smith v. Burnham, 3 Sumn. 435; Thomas v. Walker, 6 Humph. 92; Turner v. Petigrew, 6 Humph. 438; Wallace v. Duffield, 2 Serg. & R. 521; Williams

not be any constructive trust unless it can be shown that specific pieces of property had been purchased with trust funds.¹ A constructive trust also arises, where one procures a devise or bequest upon the fraudulent misrepresentation, that he will apply such testamentary provisions to the use and benefit of another;² or succeeds in effecting a purchase of property, without the competition of one who desired to make the same purchase, by fraudulently promising the latter the benefit of any such purchase, if he refrains from competition.³ But, in all such cases of dissuasion from competition, the element of fraud, and not the bare verbal promise, gives rise to the constructive trust; and if there be no fraud, there will be no constructive trust.⁴ And the invalidity of the voluntary conveyance, against the creditors of the grantor, may be ascribed to the application of the same principle. The creditors have a constructive trust in the property of the debtor, which follows the lands into the hands of the voluntary grantees.⁵ A

v. Turner, 7 Ga. 348; *Pratt v. Oliver*, 2 McLean, 313; 3 How. (U. S.) 333; *Duncan v. Jaudon*, 15 Wall. 165; *Hubbard v. Burrell*, 41 Wis. 365; *Pugh v. Pugh*, 9 Ind. 132; *Barker v. Barker*, 14 Wis. 146; *Barrett v. Bamber*, 81 Pa. St. 247; *McLarren v. Brewer*, 51 Me. 402; *Church v. Sterling*, 16 Conn. 388; *Homer v. Homer*, 107 Mass. 82; *Jones v. Dexter*, 130 Mass. 380; *Shaw v. Spencer*, 100 Mass. 382; *Mathews v. Heyward*, 2 S. C. 239; *Watson v. Thompson*, 12 R. I. 466; *Schlaeffer v. Carson*, 52 Barb. 510; *Ferris v. Van Vechten*, 73 N. Y. 113; *Bancroft v. Consen*, 15 Allen, 50; *Shelton v. Lewis*, 27 Ark. 190; *Mich., &c. R. R. v. Mellen*, 44 Mich. 321; *Derry v. Derry*, 74 Ind. 560; *Reickhoff v. Brecht*, 51 Iowa, 633; *White v. Drew*, 42 Mo. 561; *Tilford v. Torrey*, 53 Ala. 120; *Coles v. Allen*, 64 Ala. 98; *Moss v. Moss*, 95 Ill. 449; *Winkfield v. Brinkman*, 21 Kans. 682; *Roy v. McPherson*, 11 Neb. 197; *Thomas v. Standiford*, 49 Md. 181; *Tracy v. Kelley*, 52 Ind. 535; *Dodge v. Cole*, 97 Ill. 338; *Settembre v. Putnam*, 30 Cal. 490; *Jenkins v. Frink*, 30 Cal. 586; *Flanders v. Thompson*, 3 Woods C. Ct. 9; *Keech v. Sandford*, Sel. Cas. Ch. 61; 1 Eq. Ld. Cas. 48; *Riehl v. Evansville Founding Ass'n*, 104 Ind. 70; *Paxton v. Stuart*, 80 Va. 873; *Phillips v. Overfield*, 100 Mo. 466; *McEachin v. Stewart*, 106 N. C. 336.

¹ *Phillips v. Overfield*, 100 Mo. 466.

² *Bulkeley v. Wilford*, 8 Bligh, n.s., 111; *Chester v. Urwick*, 23 Beav. 407; *Middleton v. Middleton*, 1 J. & W. 94, 96; *Church v. Ruland*, 64 Pa. St. 432; *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, *per* Lord Westbury (see *ante*, Vol. I, § 481); *Podmore v. Gunning*, 7 Sim. 644; 5 *Id.* 485; *Hoge v. Hoge*, 1 Watts, 163, 213; *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 29 N. J. Eq. 417.

³ *Combs v. Little*, 3 Green Ch. 310; *Marlatt v. Warwick*, 18 N. J. Eq. 108; 19 *Id.* 439; *Merritt v. Brown*, 21 *Id.* 401, 404; *Martin v. Martin*, 16 B. Mon. 8; *Arnold v. Cord*, 16 Ind. 177; *Laing v. McKee*, 13 Mich. 124; *Nelson v. Worrall*, 20

Iowa, 469; *Coyle v. Davis*, 20 Wis. 564; *Hidden v. Jordan*, 21 Cal. 92, 99, 102; *Sandfoss v. Jones*, 35 *Id.* 481, 489; *Coyote, &c. Co. v. Ruble*, 8 Ore. 284; *Troll v. Carter*, 15 W. Va. 567; *Schmidt v. Gatewood*, 2 Rich. Eq. 162; *Green v. Ball*, 4 Bush, 586; *Moore v. Tisdale*, 5 B. Mon. 352; *Rose v. Bates*, 12 Mo. 30; *Wolford v. Herrington*, 86 Pa. St. 39; 1 Eq. Lead. Cas. 350, 364 (4th Am. ed.); *Hunt v. Roberts*, 40 Me. 187; *Hodges v. Howard*, 5 R. I. 149; *Fraser v. Child*, 4 E. D. Smith, 153; *Hoge v. Hoge*, 1 Watts, 163, 214; *Cousins v. Wall*, 3 Jones Eq. 43; *Cameron v. Ward*, 8 Ga. 245; *Jones v. McDougal*, 32 Miss. 179; *Ryan v. Dox*, 34 N. Y. 307; and *Wheeler v. Reynolds*, 66 *Id.* 227; see, also, *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Walker v. Hill's Ex'rs*, 22 *Id.* 519; *Merritt v. Brown*, 21 *Id.* 401, 404; *Farnham v. Clements*, 51 Me. 426; *McCulloch v. Cowher*, 5 Watts & S. 427, 430; *Kisler v. Kisler*, 2 Watts, 323.

⁴ *Pattison v. Horn*, 1 Grant's Cas. (Pa.) 301; *Hogg v. Wilkins*, 1 *Id.* 67; *Barnet v. Dougherty*, 32 Pa. St. 371; *Campbell v. Campbell*, 2 Jones Eq. 364; *Chambliss v. Smith*, 30 Ala. 366; *Whiting v. Gould*, 2 Wis. 552; 1 Eq. Lead. Cas. 355, 364 (4th Am. ed.); *Leman v. Whitley*, 4 Russ. 423; *Lery v. Brush*, 45 N. Y. 589; *Wheeler v. Reynolds*, 66 *Id.* 227; *Payne v. Patterson*, 77 Pa. St. 134; *Bennett v. Dollar Sav. Bk.*, 87 *Id.* 382; *Hon v. Hon*, 70 Ind. 135; *Gibson v. Decius*, 82 Ill. 304; *Farnham v. Clements*, 51 Me. 426.

⁵ *Hills v. Elliot*, 12 Miss. 31; *Partridge v. Messer*, 14 Gray, 180; *Case v. Gerrish*, 15 Pick. 49; *Bliss v. Matteson*, 45 N. Y. 22; *Dewey v. Moyer*, 72 N. Y. 70; *Mann v. Darlington*, 15 Pa. St. 310; *Haston v. Castner*, 31 N. J. Eq. 697; *Kahn v. Gumbert*, 19 Ind. 430; *Jones v. Reeder*, 22 Ind. 111; *Brackett v. Waite*, 4 Vt. 389; *Salmon v. Bennett*, 1 Conn. 525; *Clark v. Douglass*, 62 Pa. St. 408; *Gridley v. Watson*, 53 Ill. 186; *Crambaugh v. Kugler*, 3 Ohio St. 544; *Filley v. Register*, 4 Minn. 391; *Fellows v. Smith*, 40 Mich. 689; *Cowen v. Alsop*, 51 Miss. 158; *Crawford v.*

constructive trust will also arise in favor of a principal, where an agent buys property and takes a deed in his own name, when he had been instructed to buy the property for his principal.¹ So, also, is there a constructive trust in favor of the wife, where a husband conveys an estate to a third person, with an oral agreement that the grantee is to convey the same to the wife.² And it may be stated generally, that whenever one, in a fiduciary relation with another, and in violation of his duties to such beneficiary, acquires property or profit which ought to have gone to such beneficiary, the property or profit so acquired is charged with a constructive trust.³

Kirksey, 55 Ala. 282; Church v. Chapin, 35 Vt. 223; Freeman v. Burnham, 36 Conn. 469; Pomeroy v. Bailey, 48 N. H. 118; Ellinger v. Crowl, 17 Md. 361; Stewart v. Rogers, 25 Iowa, 395.

¹ Rose v. Hayden, 35 Kans. 106; Reese v. Wallace, 113 Ill. 589; Stewart v. Duffy, 116 Ill. 47; Storm Lake Bank v. Mo. Val. Ins. Co., 66 Iowa, 617; Hodge v. Twitchell, 33 Minn. 389; McLemore v. Carter, (Miss. '90) 7 So. 357; but see *contra*, Baker v. Springfield & W. R.R. Co., 86 Mo. 75.

² Fischbeck v. Gross, 112 Ill. 208; Hall v. Linn, 8 Col. 264.

³ Baker v. Whiting, 3 Sumn. 475, 495; Kelley v. Greenleaf, 3 Story, 93, 101; Huson v. Wallace, 1 Rich. Eq. 1, 2, 3, 7; Lacy v. Hale, 37 Pa. St. 360; Barrett v. Bamber, 81 Id. 247; Winkfield v. Brinkman, 21 Kans. 682; Jones v. Dexter, 130 Mass. 380; Laffan v. Naglee, 9 Cal. 662; Gower v. Andrew, 8 Pac. L. J. 617; Gibbes v. Jenkins, 3 Sand. Ch. 130; Dickinson v. Codwise, 1 Id. 214, 226; Dougherty v. Van Nostrand, 1 Hoff. Ch. 68, 70; Bennett v. Van Syckle, 4 Duer, 162; Dunlop v. Richards, 2 E. D. Smith, 181; Struthers v. Pearce, 51 N. Y. 357; Leach v. Leach, 18 Pick. 68, 75; Burdon v. Barkus, 3 Giff. 412; 4

De G. F. & J. 42; Holridge v. Gillespie, 2 Johns. Ch. 30; Van Horne v. Fonda, 5 Id. 388, 407; Davoue v. Fanning, 2 Id. 252, 258; Phyfe v. Wardell, 5 Paige, 268; Armour v. Alexander, 10 Id. 571; Wood v. Perry, 1 Barb. 114, 134; Webster v. King, 33 Cal. 348; Scott v. Umberger, 41 Id. 410; Guerrero v. Ballerino, 48 Id. 118; Tracy v. Colby, 55 Id. 67; Tracy v. Craig, Id. 91; Davis v. Rock Creek, &c. Co., Id. 359; Cookson v. Richardson, 69 Ill. 137; Reickhoff v. Brecht, 51 Iowa, 633; Treadwell v. McKeon, 7 Baxt. 201; Newton v. Taylor, 32 Ohio St. 399; Barrett v. Bamber, 81 Pa. St. 247; Jones v. Dexter, 130 Mass. 380; Rea v. Copelin, 47 Mo. 76; Whitwell v. Warner, 20 Vt. 425; Giddings v. Eastman, 5 Paige, 561; Brown v. Lynch, 1 Id. 147; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Grumley v. Webb, 44 Mo. 444; Swinburne v. Swinburne, 28 N.Y. 568; Bennett v. Austin, 81 Id. 308; Hastings v. Drew, 76 Id. 9; Holden v. N. Y. & Erie Bk., 72 Id. 286; Smith v. Frost, 70 Id. 65; Hubbell v. Medbury, 53 Id. 98; Gardner v. Ogden, 22 Id. 327; Manning v. Hayden, 5 Sawy. 380; Broyles v. Nowlin, 59 Tenn. 191; Pindall v. Trevor, 30 Ark. 249.

CHAPTER XVII.

POWERS, DUTIES AND LIABILITIES OF TRUSTEES.

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§ 313. **How trusts are affected by want of a trustee.**—The trust is never allowed to fail, because there is no trustee to hold the legal estate. And it matters not from what cause the failure of the trustee may arise, equity follows the property into whosoever hands it may fall, and compels them to hold the legal estate subject to the trust. The court will either compel the owner of the legal estate to perform the trust; or it will appoint another to act as trustee, and direct a conveyance to him.¹

§ 314. **Refusal of trustee to serve.**—No one, by the unauthorized appointment of another, can be compelled to act as trustee. To make the performance of the trust obligatory, he must accept the trust expressly, or so interfere with the trust property as to raise the presumption that he has accepted.² But when he has accepted it, expressly or impliedly, he cannot of his own motion abandon it, or refuse to perform the duties. The court may, in the exercise of its discretion, relieve him from his obligation or compel him to serve, whichever course best subverts the interests of the *cestui que trust*.³

¹ Co. Lit. 290 b, note 249, § 4; 1 Cruise Dig. 403, 460; Wilson v. Towle, 36 N. H. 129; Tainter v. Clark, 5 Allen, 66; King v. Donnelly, 5 Paige, 46; Shepherd v. McEvers, 4 Johns. Ch. 136; Stone v. Griffin, 3 Vt. 400; McGirr v. Aaron, 1 Penn. 49; Gibbs v. Marsh, 2 Metc. 243; Adams v. Adams, 21 Wall. 185; Peter v. Beverly, 10 Pet. 532; Burrill v. Shield, 2 Barb. 457; Crocheron v. Jaques, 3 Edw. Ch. 207; Druid Park, & Co. v. Dettinger, 53 Md. 46; Cloud v. Calhoun, 10 Rich. Eq. 358; M. lls v. Haines, 3 Head, 335; Furman v. Fisher, 4 Cald. 626; Miller v. Chittenden, 2 Iowa, 315; White v. Hampton, 10 Iowa, 244; s. c., 13 Iowa, 281; Griffith's Adm'r v. Griffith, 5 B. Mon. 113; Harris v. Rucker, 13 B. Mon. 564; Schlessinger v. Mallard, 70 Cal.

326; Kenaday v. Edwards, 134 U. S. 117; Chestnutt v. Gann, 76 Tex. 150.

² Baldwin v. Porter, 12 Conn. 473; Scull v. Reeves, 2 Green Ch. 4; Shepherd v. McEvers, 4 Johns. Ch. 136; Lewis v. Baird, 3 McLean, 58; Eyrick v. Hetrick, 13 Pa. St. 488; Cloud v. Calhoun, 10 Rich. Eq. 358; Flint v. Clinton Co., 12 N. H. 430; Goss v. Singleton, 2 Head, 67; Lyle v. Burke, 40 Mich. 499; White v. Hampton, 13 Iowa, 259; Hearst v. Pojol, 44 Cal. 230; Montford v. Cadogan, 17 Ves. 485; Ureh v. Walker, 3 My. & Cr. 702; Barclay v. Goodloe's Ex'rs, 83 Ky. 493.

³ Shepherd v. McEvers, 4 Johns. Ch. 136; Tainter v. Clark, 5 Allen, 66; Cruger v. Halliday, 11 Paige, 319; Bowditch v. Banuelos, 1

If the trustee named refuses to act, it would have no greater effect upon the validity of the trust than would his death, or a failure to name a trustee in the deed creating the trust. Another trustee would be appointed to take his place. But the refusal must be a positive disclaimer of the trust; for otherwise the law will presume that the trust is beneficial to the trustee, as well as to the *cestui que trust*, and that they both have accepted it. A mere oral declaration will not prevent the declining trustee from subsequently entering upon the performance of the trust, if his place has not actually been filled by the appointment of another; and, as a general rule, the court will not make such an appointment until the trustee has made a more formal disclaimer.¹

§ 315. **Rights and powers of surviving trustees.**—If there are more than one trustee, they take and hold the legal estate in joint-tenancy. If, therefore, one of them dies, the estate vests in the survivors to the exclusion of the heirs of the deceased trustee, and they are generally competent to administer the trust. This rule is without limitation when applied to executed trusts; but whether an executory trust survives, depends upon the amount of personal confidence reposed in them all as one body.² If the special powers in an executory trust are granted to the trustees *ratione officii*, *i. e.*, given in general terms to “my trustees,” the ordinary construction is that such trust powers survive.³ But if they are granted to them *nominatim*, indicating a personal confidence in the discretion of each, there will be no survivorship.⁴ The same rule governs the right to exercise trust powers of the new trustee appointed by the court. Ordinary trust powers may be exercised by him; but those involving a personal confidence die with the removal of the trustee in whom the confidence was reposed.⁵

Gray, 220; Gilchrist v. Stevenson, 9 Barb. 9; People v. Norton, 9 N. Y. 176; Drane v. Gunter, 19 Ala. 731; Diefendorf v. Speaker, 16 N. Y. 246; *In re* Bernstein, 3 Redf. 20; Wilkinson v. Parry, 4 Russ. 272; Greenwood v. Wakeford, 1 Beav. 576; Forshaw v. Higginson, 20 Beav. 485; Tilden v. Fiske, 4 Dem. 356; Barclay v. Goodloe's Ex'r, 83 Ky. 493.

¹ Tainter v. Clarke, 13 Metc. 220; Judson v. Gibbons, 5 Wend. 224; Goss v. Singleton, 2 Head, 77; McCosker v. Brady, 1 Barb. Ch. 329; White v. Hampton, 13 Iowa, 259; Cloud v. Calhoun, 10 Rich. Eq. 358; Adams v. Adams, 21 Wall. 185; Flint v. Clinton Co., 12 N. H. 430; Eyrick v. Hetrick, 13 Pa. St. 488; Lyle v. Burke, 40 Mich. 499; King v. Donnelly, 5 Paige, 46; Putnam's Free School v. Fisher, 30 Me. 526; Jones v. Moffett, 5 Serg. & R. 523.

² Lane v. Debenham, 11 Hare, 188; Cole v. Wade, 16 Ves. 28; Warburton v. Sands, 14 Sim. 422; Franklin v. Osgood, 14 Johns. 553; Peter v. Beverly, 10 Pet. 564; Jackson v. Schaubert, 7 Cow. 194; Stewart v. Pettus, 10 Mo. 755; Bur-

rill v. Shields, 2 Barb. 457; Saunders v. Schmaelzle, 49 Cal. 59. In New York, if one of two or more trustees resign, the others have not the power to execute the trust, in the same manner as if he were dead. Another trustee must be appointed in his place. Van Wick's Petition, 1 Barb. Ch. 570.

³ Peter v. Beverly, 10 Pet. 564; Jackson v. Given, 16 Johns. 167; Tainter v. Clarke, 13 Metc. 220; Zebach v. Smith, 3 Binn. 69; Gray v. Lynch, 8 Gill, 403; Bloomer v. Waldin, 3 Hill, 365; Dergen v. Duff, 4 Johns. Ch. 308; Franklin v. Osgood, 14 Johns. 553; Co. Lit. 113 a, note 146; Story's Eq. Jur., § 1062; Cole v. Wade, 16 Ves. 28; Wells v. Lewis, 4 Metc. (Ky.) 271; Lewin on Tr. 239.

⁴ See preceding note, and Tiedeman Real Prop., § 566.

⁵ Cole v. Wade, 16 Ves. 44; Hibbard v. Lamb, Ambl. 309; Doyley v. Atty.-Gen., 2 Eq. Cas. Abr. 195; Burrill v. Shield, 2 Barb. 457; Lewin on Tr. 239.

§ 316. **Removal of trustees.**—The court of equity has the general power to appoint new trustees, whenever the interests of the *cestui que trust* demand such appointment. If the trustee leaves the state, loses his mind, becomes insolvent, or does anything else which makes it prejudicial to the *cestui que trust* for him to remain in charge of the trust, the court may remove him and appoint another in his stead.¹ And although at common law the legal estate in trust, upon the death of the trustee, descends to his heirs to be administered by them, and this is still the rule in the absence of the statute, yet, if it would be beneficial to the estate that the new trustee be appointed, the court may do so.² If the trustee devises his trust estate, as he may do if not prohibited by statute, his devisee takes the place of his heir, and may perform the trust.³ By recent statutes in England, and in some of the United States, the appointment of a new trustee is made to operate upon the legal title, and pass it to him from the former trustee.⁴ But where there is no statute of any kind, the appointment does not effect the transfer of the legal estate. A court of equity, in making the appointment, at the same time decrees a conveyance to the new trustee, and will punish for contempt of court, if the holder of the legal title refuses.⁵

§ 317. **Duties and liabilities of trustees in general.**—Their rights and powers must necessarily vary materially with the character and terms of the trust. So, also, do the rights and powers of the *cestui que trust*. The authority of the former is greatest and the powers of the latter are least in the case of executory trusts, while the converse is true of passive trusts. The powers, which either may have in active trusts, and which are peculiar to such trusts, are wholly dependent upon the particular provisions of each trust, and no general rules can be laid down in explanation of them.⁶ It may be said of every species

¹ 2 Washb. on Real Prop. 475; *Suarez v. Pumphelly*, 2 Sandf. Ch. 337; *People v. Norton*, 9 N. Y. 176; *Bowditch v. Banuelos*, 1 Gray, 220; *Farmers' Loan, &c. Co. v. Hughes*, 18 N. Y. 130; *Sparhawk v. Sparhawk*, 114 Mass. 356; *Scott v. Rand*, 118 Mass. 215; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Bloomer's Appeal*, 83 Pa. St. 45; *McPherson v. Cox*, 96 U. S. 404; *Ketchum v. Mobile, &c. R. R.*, 2 Woods, 532; *Bailey v. Bailey*, 2 Del. Ch. 95; *Satterfield v. John*, 53 Ala. 121; *No. Ca. R. R. v. Wilson*, 81 N. C. 223; *Preston v. Wilcox*, 38 Mich. 573; *Green v. Blackwell*, 31 N. J. Eq. 37; *Collier v. Blake*, 14 Kans. 250; *Lane v. Lewis*, 4 Dem. 468; *Re Mayfield*, 17 Mo. App. 684; *City Council v. Walton*, 77 Ga. 517; *Loveman v. Taylor*, 85 Tenn. 1; *Morgan's Estate*, 8 Pa. Co. Ct. 260. Insolvency does not, however, incapacitate the trustee to act, as long as the court does not remove him. *Rankin v. Bancroft*, 114 Ill. 441.

² 2 Washb. on Real Prop. 476, 477; 5 Kent's Com. 311; *Lewin on Tr.* 303; *Boon v. Child*, 10 Pet. 213; *Berrien v. McLane, Hoffm. Ch.* 420; *Clark v. Taintor*, 7 Cush. 567; *Warden v.*

Richards, 11 Gray, 277; *Evans v. Chew*, 71 Pa. St. 47; *Gray v. Henderson*, 71 Pa. St. 369; *Dunning v. Ocean Nat. Bank*, 6 Lans. 396; *Russell v. Peyton*, 4 Ill. App. 473. In New York, by statute the trust is made to vest in the supreme court, instead of descending to the heirs of the deceased trustee. 1 R. S. N. Y. 730, § 68. See *Boss v. Roberts*, 2 Hun, 90; *Clark v. Crego*, 51 N. Y. 647. Such seems also to be the statutory rule in Michigan and Wisconsin. 2 Washb. on Real Prop. 476.

³ *Marlow v. Smith*, 2 P. Wms. 198; *Titley v. Wolstenholme*, 7 Beav. 425.

⁴ *Parker v. Converse*, 5 Gray, 336; *McNish v. Guernard*, 4 Strobb. Eq. 66; *Taylor v. Boyd*, 3 Ohio, 337; *Bennett v. Williams*, 5 Ohio, 461; *King v. Bell*, 25 Conn. 598.

⁵ *O'Keefe v. Calthorpe*, 1 Atk. 17; *Ex parte Greenhouse*, 1 Madd. 109; *Berrien v. McLane, Hoffm. Ch.* 420; *Webster v. Vandeventer*, 6 Gray, 428; *Wallace v. Willson*, 34 Miss. 357; *Shepherd v. Ross Co.*, 7 Ohio, 271; *Young v. Young*, 4 Cranch, 499.

⁶ See *Morse v. Morrell*, 82 Me. 80; *In re Roe*,

of trusts, that possessory actions and actions for the protection of the legal estate, must be brought by the trustee. The *cestui que trust* cannot maintain them. In a court of law, the trustee is deemed to be entitled to the possession of the land, and may even oust the *cestui que trust* from possession. The latter, if in possession, holds it merely as a tenant at sufferance, or at will.¹ Whenever the trustees violate the right of the *cestui que trust*, or fail or refuse to perform their duties, courts of equity are the proper courts to apply to for relief. And the decrees of those courts are paramount in all questions relating to the powers and duties of the parties to a trust.² If the duties of the trustees be purely discretionary, the court will not compel an execution.³ Nor will the court attempt to control the discretion of a trustee in any manner, except to prevent an unreasonable exercise of it, which, on account of the injury to the beneficiaries, could not have been intended by the donor.⁴ An injunction will lie against a trustee for committing waste.⁵ But third parties cannot avoid their contracts with trustees on account of the want of power of the trustees, if they have been ratified by the *cestui que trust*.⁶

§ 318. **Trustees must conform to the directions of the trust.**—One of the first obligations of a trustee, in the performance of his duties as such, is to conform strictly to all of the directions contained in the trust deed or settlement for the administration of the trust. It is impossible for a trustee to violate the provisions or directions of a trust, and claim justification therefor, on the ground that his course appeared at the time to be the better course. His duty is plain, viz.: to conform to these directions; and if he does so in a careful and skillful manner, he is not responsible if injurious consequences follow.

119 N. Y. 509; *Kenaday v. Edwards*, 134 U. S. 117; *Harris v. Petty*, 66 Tex. 514; *Kintner v. Jones*, 122 Ind. 148.

¹ 1 Cruise Dig. 414; 2 Pom. Eq. Jur., § 991; 2 Washb. on Real Prop. 493; *Russell v. Lewis*, 2 Pick. 508; *Woodman v. Good*, 6 Watts & S. 169; *Newton v. McLean*, 41 Barb. 289; *Trustees, &c. v. Stewart*, 27 Barb. 553; *Jackson v. Van Slick*, 8 Johns. 487; *Beach v. Beach*, 14 Vt. 28; *Mordcai v. Parker*, 3 Dev. 425; *Hepburne v. Hepburne*, 2 Bradf. 74; *William's Appeal*, 83 Pa. St. 377; *Freeman v. Cooke*, 6 Ired. Eq. 373; *Allen v. Imlet*, 1 Holt, 641; *May v. Taylor*, 6 Man. & Gr. 261; *White v. Albertson*, 3 Dev. 241; *Aiken v. Smith*, 1 Sneed, 304; *Stone v. Bishop*, 4 Cliff. 593; *Kennedy v. Fury*, 1 Dall. 72; *Brown v. Combs*, 5 Dutch. 38; *Gunn v. Barrow*, 17 Ala. 743; *Fitzpatrick v. Fitzgerald*, 13 Gray, 400. And as the legal owner of the land, he is bound to use all proper diligence in collecting rents and profits, and paying off all taxes and other charges against the estate. *Mansfield v. Alwood*, 84 Ill. 497; *Hepburne v. Hepburne*, 2 Bradf. 74.

² *Jones v. Dougherty*, 10 Ga. 373; *Tucker v. Palmer*, 3 Brev. 47; *Bush v. Bush*, 1 Strobb. Eq. 377; *Don v. Troutman*, 7 Ired. 155; *McLean*

v. Nelson, 1 Jones L. 396; *Robinson v. Mauldin*, 11 Ala. 997; *Iles v. Martin*, 69 Ind. 114; *Pressly v. Stribling*, 24 Miss. 527; *James v. Cowing*, 82 N. Y. 449; *Williams v. Dwinelle*, 51 Cal. 442.

³ *Stanley v. Colt*, 5 Wall. 168.

⁴ *Arnold v. Gilbert*, 3 Sandf. Ch. 531; *Morton v. Southgate*, 28 Me. 41; *Zabriskie's Ex'rs v. Wetmore*, 26 N. J. Eq. 18; *Littlefield v. Cole*, 33 Me. 552; *Leavitt v. Beirne*, 21 Conn. 1; *Goddard v. Brown*, 12 R. I. 31; *Pulpress v. African Ch.*, 48 Pa. St. 204; *Haydell v. Hurck*, 5 Mo. App. 267; *Starr v. Moulton*, 97 Ill. 525; *Vallette v. Bennett*, 69 Ill. 632; *Phelps v. Harris*, 51 Miss. 789; *Luige v. Luchesi*, 12 Nev. 306; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Brophy v. Bellamy*, L. R. 8 Ch. 798; *Banks v. Le Despencer*, 11 Sim. 508; *Costabadie v. Costabadie*, 6 Hare, 410; *Mausser v. Dix*, 8 De G. M. & G. 371; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *In re Shaw's Trusts*, L. R. 12 Eq. 124; *In re Strutt's Trusts*, L. R. 16 Eq. 629; *Evans v. Bear*, L. R. 10 Ch. 76; *Iles v. Martin*, 69 Ind. 114; *James v. Cowing*, 82 N. Y. 449; *Williams v. Dwinelle*, 51 Cal. 442, 446.

⁵ *Moses v. Johnson*, 88 Ala. 517.

⁶ *Matheney v. Sandford*, 26 W. Va. 386.

On the other hand, if he violates or disobeys these directions, he is liable for such deviation from these directions to the beneficiaries, whose rights have been injuriously affected.¹ But in following the directions of the trust, intelligence must be exercised; and the trustees are not confined to the very letter of the instructions. They are permitted, in the exercise of a wise discretion, to vary the exact form of the measures they adopt, as long as the general directions of the instrument creating the trust are complied with, and they fall within the spirit of such instructions.² There is very often in the trust an express permission to the trustee, to exercise a wise discretion, in carrying out or departing from the instrument; and where that is the case, the trustees are vested with full power to determine when, and under what circumstances, the express directions of the instrument must be conformed to. And as long as they practice good faith and reasonable prudence in the exercise of this discretion, a court of equity would not interfere; it would only interfere in the extreme case of an unreasonable use of such discretion, to the almost certain detriment of the beneficiaries.³

§ 319. **Trustees must use due care and diligence.**—The next requirement of a trustee is the exercise of due care and diligence in the administration of his trust. It has been a question of considerable doubt and dispute, what degree of care is required of trustees in the administration of the trust estate; and this difficulty is created by the fact that, for a long time in this country as well as in England—and even now it is still the case in England—a trustee was a voluntary bailee without compensation; and the old distinction between the various classes of bailments—in respect to the kind of care, which could be required of them in the performance of their duties, *i. e.*, between slight, ordinary and extraordinary care—was held by the earlier authorities to determine, that the trustee is only required to exercise slight care in the performance of his trust and is only liable to the beneficiary for gross negligence. But this distinction, as to the kind and degree of negligence, is not now generally applied. In every case of liability for negligence, reasonable care is required, *viz.*:

¹ *Vyse v. Foster*, L. R. 8 Ch. 309; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Roberts v. Moseley*, 64 Mo. 507; *Vose v. Trustees, &c.*, 2 Woods, 647; *Adair v. Brimmer*, 74 N. Y. 539; *Penny v. Cook*, 19 Iowa, 538; *Hill v. Den*, 54 Cal. 6; *Iles v. Martin*, 69 Ind. 114; *Bowman v. Pinkham*, 71 Me. 295; *In re Lewis*, 81 N. Y. 421; *James v. Cowing*, 82 *Id.* 449; *Sharp v. Goodwin*, 51 Cal. 219.

² *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Vallette v. Bennett*, 69 Ill. 632; *Zabriskie's Ex'rs v. Wetmore*, 26 N. J. Eq. 18; *Macon, &c. R. R. v. Georgia, &c. R. R.*, 63 Ga. 103; *Starr v. Moulton*, 97 Ill. 525; *Kokewich v. Marker*, 3 Macn. & G. 310; *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Manser v. Dix*, 8 *Id.* 703; *Leeming v. Lady Murray*, L. R. 13 Ch. D. 123; *Hayes v. Oatley*, L. R. 14 Eq. 1; *Goddard v. Brown*, 12 R.

I. 31; *Aldrich v. Aldrich*, 12 *Id.* 141; *Luige v. Luchesi*, 12 Nev. 306; *Phelps v. Harris*, 51 Miss. 789.

³ *Littlefield v. Cole*, 33 Me. 552; *Hawes Place Cong. Soc. v. Trustees, &c.*, 5 Cush. 454; *Leavitt v. Beirne*, 21 Conn. 1; *Arnold v. Gilbert*, 3 Sandf. Ch. 531; *Mason v. Mason's Ex'rs*, 4 *Id.* 623; *Pulpress v. African Ch.*, 48 Pa. St. 204; *Cochran v. Paris*, 11 Gratt. 348, 356; *In re Beloved Wilkes' Charity*, 3 Macn. & G. 440; *Brophy v. Bellamy*, L. R. 8 Ch. 798; *In re Hodges*, L. R. 7 Ch. D. 754; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Goddard v. Brown*, 12 R. I. 31; *Aldrich v. Aldrich*, 12 *Id.* 141; *Haydel v. Hurck*, 5 Mo. App. 267; *Starr v. Moulton*, 97 Ill. 525; *Morton v. Southgate*, 28 Me. 41.

that care which is reasonable to require of any party under a similar obligation and under similar circumstances.¹ Not only on this account, but likewise because trustees receive compensation, the rule is now very generally recognized, that trustees are required to exercise that amount of care in the administration of the trust, which a reasonably prudent man would exercise in the care of his own property.² In fact, in one particular, viz.: in respect to investments, the law is more exacting than what would be reasonably expected of a prudent man in the care of his own property, as will be explained in a subsequent paragraph. But where the trustee exercises all the care that can be reasonably expected of him, and yet, notwithstanding such care, incurs losses to the estate, the trustee is not liable, as long as such losses are the result of unavoidable casualties.³ A trustee is bound to protect the trust property in every way, and by the exercise of reasonable care, at all times during the continuance of the trust.⁴ He is not only required to take due care of the trust property, after it has come into his possession, but it is his duty, immediately upon his acceptance of the trust, or as soon thereafter as it is possible, to obtain possession of the trust property. Any delay of an unreasonable nature, in procuring the possession of the property, will be a dereliction of duty on his part, for which he would be responsible.⁵ Thus, for example, where, upon the assumption of the trust, there are debts outstanding due to the estate, the trustee must with reasonable

¹ *Mariner v. Smith*, 5 Heisk. (Tenn.) 208; *McPheeters v. Hannibal, &c. R. Co.*, 45 Mo. 22; compare *Mueller v. Putnam Ins. Co.*, 45 Mo. 84; *Wilson v. Brett*, 11 M. & W. (Eng.) 113; *Wyld v. Pickford*, 8 M. & W. (Eng.) 443; *Storer v. Gowen*, 18 Me. 177; *Story on Bailments*, § 11; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Hinton v. Dibbin*, 2 Q. B. 661; *McAdoo v. Richmond, &c. R. Co.*, 105 N. Car. 140; *Steamboat New World v. King*, 16 How. (U. S.) 469; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Deering on Neg.*, § 11, and cases cited; *State v. Boston, &c. R. Co.*, 58 N. H. 410; *Milwaukee, &c. R. Co. v. Arms*, 91 U. S. 494; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

² *Hun v. Cary*, 82 N. Y. 65; *Cartwright v. Cartwright*, 4 Hayw. 134; *Strong v. Wilkson*, 14 Mo. 116; *Pitts v. Singleton*, 44 Ala. 363; see *Ormiston v. Oleott*, 84 N. Y. 339; *Gety's Estate*, 12 Phila. (Pa.) 143; *Lyell v. Hammond*, 2 Lea. (Tenn.) 378; *Wayland v. Wayland*, 79 Va. 602; *Klien v. French*, 57 Miss. 662; *Cooper v. Cooper*, 77 Va. 198; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Dowd v. Sanders*, 1 Harp. Ch. (S. C.) 277; *Perry v. Maxwell*, 2 Dev. Ch. 488; *Whitter v. Webb*, 2 Dev. & Bat. Ch. (N. C.) 442; *Webb v. Bellingier*, 2 Desau. (S. C.) 482; *Huson v. Wallace*, 1 Rich. Ch. (S. C.) 1; *Nyce's Estate*, 5 Watts & S. (Pa.) 254; *Noble v. Jones*, 35 Tex. 692; *Williams v. Maitland*, 1 Ired. Eq. (N. C.) 92; *Deas v. Spann*, 1 Harp. Ch. (S. C.) 176; *Calhoun's Estate*, 6

Watts, (Pa.) 185; *Whitney v. Peddiard*, 63 Ill. 249; *Stevens v. Gage*, 55 N. H. 175; *Upson v. Badeau*, 3 Bradf. Surr. (N. Y.) 13; *Eaves v. Hickson*, 30 Beav. (Eng.) 136; *Hopgood v. Packin, Q. R.* 11 Eq. (Eng.) 74; *Tedds v. Carpenter*, 1 Madd. (Eng.) 298; *Dean v. Rathbone*, 15 Ala. 328; *Harris v. Parker*, 41 Ala. 604; *Mikell v. Mikell*, 5 Rich. Eq. (S. C.) 220; *Twitty v. Houser*, 7 S. C. 153; *Estate of Bosie*, 2 Ashm. (Pa.) 437; *Rubottom v. Morrow*, 24 Ind. 202.

³ *Rubottom v. Morrow*, 24 Ind. 202; *Estate of Secondo Bossio*, 2 Ashm. (Pa.) 437; *Neff's Appeal*, 57 Pa. St. 91; *Stirling v. Lawrason*, 31 La. An. 169; *Stevens v. Gage*, 55 N. H. 175; 2 Cen. Law Jur. 589; see *State v. Meager*, 44 Mo. 356; *Fudge v. Dam*, 51 Mo. 264; *Farnam v. Coe*, 1 Caines, 96 Campbell v. Miller, 36 Ga. 304; *Mikell v. Mikell*, 5 Rich. Eq. (S. C.) 220.

⁴ *Adair v. Brimer*, 74 N. Y. 539; *Foscue v. Lyon*, 55 Ala. 440; *Wasson v. Carrett*, 58 Tenn. 477; *Mansfield v. Alwood*, 84 Ill. 497; *Sharp v. Goodwin*, 51 Cal. 219; *Gettins v. Scudder*, 71 Ill. 86; *Wiles v. Gresham*, 5 De G. M. & G. 770; *Lloyd v. Attwood*, 3 De G. M. & J. 614; *Goddard v. Brown*, 12 R. I. 31; *Pool v. Dial*, 10 S. C. 440; *Vose v. Trustees, &c.*, 2 Woods, 647; *Carpenter v. Carpenter*, 12 R. I. 544; *Gilmore v. Tuttle*, 32 N. J. Eq. 611; *Russell v. Peyton*, 4 Ill. App. 473; *Morrow v. Saline Co. Comm'rs*, 21 Kans. 484.

⁵ *Salway v. Salway*, 2 Russ. & M. 215; *Butler v. Carter*, L. R. 5 Eq. 276.

diligence collect such debts; and he is liable for the loss that might result from any unreasonable delay in making the collection.¹ Where money is collected, or is in possession of the trustee prior to the securing an investment, he must exercise reasonable care in the selection of a bank of deposit; and the money must be deposited in such bank to the credit of such trust estate. And when that is done, the trustee is not liable for any loss, which might be occasioned by the failure of the bank.² The trustee is also required to make payment of all debts which the estate might owe, whenever there are sufficient funds in his hands to pay such debts. And if, in consequence of his neglect, the estate becomes liable for accruing interest, the trustee is liable for such interest, on the ground that it is a damage to the estate, due to his dereliction of duty.³ The trustee, on the other hand, must see that payments are only made to those, to whom there is an indebtedness due; and if he makes wrongful payments, the loss falls upon him, and not upon the estate. The trustee is chargeable with all such wrongful payments. The liability, however, is confined to those cases, where the wrongful payment is traced to a want of care and diligence, in the consideration of the question of liability of the estate. If, on the other hand, the payment is made with the exercise of reasonable care and prudence, yet wrongfully, the trustee is not obliged to bear the loss.⁴

§ 320. **Duty of trustees as to investments.**—The most important duty, which the trustee has to perform in the protection and administration of the trust, is the making of investments. The trustee is not only charged with the safe custody of the trust property, but his chief duty is to make that property productive. He cannot leave

¹ *Moore v. Mitchell*, 2 Woods, 483; *Dockery v. French*, 73 N. C. 420; *Mansfield v. Alwood*, 84 Ill. 497; see *Wiles v. Gresham*, 2 Drew, 258; 5 De G. M. & G. 770; *Grove v. Price*, 26 Beav. 103; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *Ex parte Ogle*, L. R., 8 Ch. 711; *Bacot v. Heyward*, 5 S. C. 441; *Paddon v. Richardson*, 7 De G. M. & G. 563; *Denike v. Harris*, 84 N. Y. 89; *Tomkies v. Reynold*, 17 Ala. 109; *Garesche v. Priest*, 78 Mo. 126; s. c., 9 Mo. App. 270; *Moyer v. Petway*, 76 N. C. 327; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333; *Matter of Mount*, 2 Redf. (N. Y.) 405; *Sherin v. Public Admr.*, 2 Redf. (N. Y.) 421; *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Crane v. Howell*, 35 N. J. Eq. 374; *Lefever v. Hasbrouck*, 2 Dem. (N. Y.) 567; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 258; *Sullivan v. Howard*, 20 Md. 194; *Johnson's Appeal*, 43 Pa. St. 471; *Wilson's Appeal*, (Pa.) 9 Atl. Rep. 473; compare *Brown v. Campbell*, *Hopk.* (N. Y.) Ch. 233; *State v. Johnson*, 7 Blackf. (Ind.) 529; *Wms. Exrs.* (7th Eng. ed.) 1809; *Terry v. Terry*, *Prec. Chanc.* (Eng.) 273; s. c., *Gillb. Eq. Rep.* 10; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Adey v. Feuille-veau*, 1 Cox, (Eng.) 24; s. c., 3 Swanst. (Eng.) 84, note; *Vigras v. Binfield*, 3 Madd. (Eng.) 62;

Bacon v. Clark, 3 My. & Cr. (Eng.) 294; see *Moore v. Hamilton*, 4 Fla. 712; *Moore v. Felkel*, 7 Fla. 44; *King v. King*, 3 Johns. Ch. (N. Y.) 552; *Davis v. Yerby*, 1 Sm. & M. Ch. (Miss.) 508; *King v. Talbot*, 40 N. Y. 77.

² *Fenwicke v. Clarke*, 31 L. J. Ch. (Eng.) 728; *Norwood v. Harness*, 98 Ind. 134; s. c., 49 Am. Rep. 739; *Twitty v. Houser*, 7 S. C. 153; *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Knight v. Lord Plymouth*, 3 Atk. (Eng.) 486; s. c., 1 Dick. (Eng.) 120; *Adams v. Claxton*, 6 Ves. (Eng.) 26; *Johnson v. Newton*, 11 Hare, (Eng.) 160; *Mendes v. Guedalla*, 2 Johns. & H. (Eng.) 259; *Lord Cottenham*, in *Clough v. Bond*, 3 My. & Cr. (Eng.) 496; *Wms. Ex'rs*, (7th Eng. ed.) 1817-1820; *Churchill v. Hobson*, 1 P. Wms. (Eng.) 1818; *Carpenter v. Carpenter*, 12 R. I. 544; *Crane v. Moses*, 13 S. C. 561; *Rowth v. Howell*, 3 Ves. 565; *Swinfen v. Swinfen*, 20 Beav. 211; *Pennell v. Deffell*, 4 De G. M. & G. 372.

³ *Adair v. Brimmer*, 74 N. Y. 539; *King v. Talbot*, 40 N. Y. 76; s. c., 50 Barb. 453.

⁴ *Forshaw v. Higginson*, 8 De G. M. & G. 827; *Aveline v. Melhuish*, 2 De G. J. & S. 288; *Haydel v. Hurck*, 5 Mo. App. 267; *Singleton v. Lowndes*, 9 S. C. 465; *Wasson v. Garrett*, 58 Tenn. 477; *Draper v. Stone*, 71 Me. 175.

money lying idle in the bank for an unreasonable time, without assuming an extraordinary liability. Not only would he be liable in such a case for a loss of the principal, resulting from the failure of the bank, in which the funds were deposited,¹ but he would likewise be responsible to the beneficiaries for all the rents and profits, interest or income which he did not receive, but which he could have received, if he had exercised reasonable diligence in the administration of the property, for the purpose of making it profitable.²

On the other hand, the trustee cannot escape responsibility from a failure to make a judicious investment by diligence in securing the investment—his liability is of a double character. He is not only liable, if he fails to make an investment within a reasonable time; but he is also required to make a judicious and safe investment, and is liable if he makes an injudicious one. Where the instrument creating the trust gives directions for the making of investments, a conformity with such directions will relieve the trustee of liability, if he carries out the directions of the trust with reasonable care and prudence. Even when a general discretion as to the choice of securities is expressly given by the instrument, his discretion is required to be exercised with reasonable diligence.³ In regard to the making of investments by trustees, when the trust instrument contains no directions therefor, a stricter rule of care is imposed upon the trustee, than what would be expected of a reasonably prudent man; in other words, in making an investment for a trust estate, securities must be selected in which the element of uncertainty or of speculation is very limited or reduced to a minimum. Ample security for the payment of the debt is also required; and in determining the extent of the trustee's discretion, the courts of equity have laid down rather minutely the

¹ *Matthews v. Brise*, 6 Beav. 239; *Moyle v. Moyle*, 2 Russ. & M. 710; *Salway v. Salway*, 2 Id. 215; see *post*, § 1076; *Challen v. Shippam*, 4 Har. 555; *Johnson v. Newton*, 11 Id. 160; *Swinfen v. Swinfen*, 29 Beav. 211; *Rehden v. Wesley*, Id. 213.

² *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *In re British, &c. Co.*, L. R. 14 Ch., D. 335; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Atty.-Gen. v. Alford*, 4 Id. 843; *Baud v. Fardell*, 7 Id. 628; *Ashby v. Blackwell*, 2 Eden, 299, 302; *Eaves v. Hickson*, 30 Beav. 136; *Sporle v. Barnaby*, 10 Jur., n. s., 1142; *Haydel v. Hurck*, 5 Mo. App. 267; *Succession of Pool*, 14 La. Ann. 677; *Sandborn v. Goodhue*, 28 N. H. 48; *Griswold v. Chandler*, 5 N. H. 492; *Cook v. Cook*, 29 Md. 538; *Bowen v. Montgomery*, 48 Ala. 353; *Hepburn v. Hepburn*, 2 Bradf. Sur. (N. Y.) 74; *Romp'y v. M. R.*, in *Clark v. Holland*, 19 Beav. (Eng.) 271, 272; *Stiles v. Guy*, 16 Sim. (Eng.) 230; see *Mitchell v. Trotter*, 7 Gratt. (Va.) 136; *Nelson v. Page*, 7 Gratt. (Va.) 160; *Lowson v. Copeland*, 2 Bro. C. C. (Eng.) 156; *Ivey v. Coleman*, 42 Ala. 409; *Miller's Ex'rs v. Simpson*, 2 S. W. Rep. 171; *Smith v. Collamer*, 2 Dem. (N. Y.) 147; *Travease v. Ball*, 1 McCord, 456; *Campbell v. Miller*, 38

Ga. 304; *King v. King*, 15 Ala. 323; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Dean v. Rathbone*, 15 Ala. 328; *Browne v. Montgomery*, 48 Ala. 353; *Anderson v. Piercy*, 20 W. Va. 282; *Julian v. Abbott*, 73 Mo. 580; *James v. Wingo*, 7 Lea. (Tenn.) 148; *Ratcliff v. Winch*, 17 Beav. (Eng.) 217; *Gates v. Whetstone*, 8 S. C. 244; *Schaffer's Estate*, 46 Pa. St. 131; *Cooley v. Van Syckle*, 14 N. J. Eq. 496; *Jennings v. Weeks*, 1 Rice, (S. C.) 453; *Moore v. Beauchamp*, 4 B. Mon. (Ky.) 71; *Abercrombie v. Skinner*, 42 Ala. 633; *Stirling v. Wilkinson*, (Va.) 3 S. E. Rep. 533; *Coco's Succession*, 32 La. Ann. 325; *Sanderson v. Sanderson*, 20 Fla. 292; *Glover v. Glover*, 1 McMullan Ch. (S. C.) 153; *O'Dell v. Young*, 1 McMullan, 155; *Bryant v. Russell*, 23 Pick. (Mass.) 566; *Traddell's Appeal*, 5 Pa. St. 15; *Sollee v. Croft*, 7 Rich. Eq. (S. C.) 46; *Neff's Appeal*, 57 Pa. St. 91; *Gray v. Lynch*, 8 Gill, 403.

³ *Nancrede v. Voorhis*, 32 N. J. Eq. 524; *Adair v. Brimmer*, 74 N. Y. 539; *Denike v. Harris*, 84 Id. 89; *Clark v. St. Louis, &c. R. R.*, 58 How. Pr. 21; *Foscue v. Lyon*, 55 Ala. 440; *Bowman v. Pinkham*, 71 Me. 295; *Lewis v. Nobbs*, L. R. 8 Ch. D. 591; *Pickard v. Anderson*, L. R. 13 Eq. 608; *Baud v. Fardell*, 7 De G. M. & G. 628.

class of securities, in which trustees might invest the trust fund with safety to both. And unless the instrument creating the trust authorizes other investments, the trustee is liable if he makes an investment in other than the authorized securities, although such an investment would be held to be a prudent investment, if the funds belonged to himself. As a general proposition, the trustee, independently of statute, is confined in his investments to the purchase of government securities and first mortgages on real estate.¹ It has also been held that trustees who invested trust funds in the bonds of the Confederate Government were liable for all such losses.² Municipal bonds and bonds of counties and other *quasi* municipal organizations, are not held to be safe securities for trust investments, unless they are authorized, either by the instrument creating the trust, or by statute.³ Under no circumstances can a trustee invest the trust funds in a loan on a mere personal security,⁴ or in the stocks and bonds of private corporations.⁵ It is also generally held to be the rule, independently of statutory regulations, or express authorization in the trust, to be an improper investment for a trustee to purchase securities of foreign governments, or securities of any kind located beyond the jurisdiction

¹ *Denike v. Harris*, 84 N. Y. 89, reversing s. c., 23 Hun, 213; *Baldwin v. Hatchett*, 56 Ala. 461; see *Mosman v. Bender*, 80 Mo. 579; *Brown v. Litton*, 1 P. Wms. (Eng.) 141; *Norbury v. Norbury*, 4 Madd. (Eng.) 191; *Farrar v. Baraclough*, 2 Sm. & G. (Eng.) 231, 235; *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718; *Wilson v. Stats*, 33 N. J. Eq. 524. He cannot invest in second mortgages. *Nancrede v. Voorhis*, 32 N. J. Eq. 524; *Gilmore v. Tuttle*, 32 N. J. Eq. 611.

² *Patteson v. Horsley*, 29 Gratt. 263; *Dockery v. French*, 73 N. C. 420; *Moore v. Mitchell*, 2 Woods, 483; *Kirby v. Goodykoontz*, 26 Gratt. 298; see, however, *Rockhold v. Blevins*, 6 Baxter, (Tenn.) 715; *West v. Canthen*, 9 S. C. 45; *Ferguson v. Epes*, 77 Va. 499; *Sharpe v. Rockwood*, 78 Va. 24; *Wilson v. Powell*, 75 N. Car. 468; *Cabell v. Cox*, 27 Gratt. (Va.) 182; *Tosh v. Robertson*, 27 Gratt. (Va.) 182; *Tosh v. Robertson*, 27 Gratt. (Va.) 270; *Young v. Cabell*, 27 Gratt. (Va.) 761; *Mills v. Mills*, 28 Gratt. (Va.) 442; *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676; *Estill v. McClintie*, 11 W. Va. 399; see *Tompkins v. Tompkins*, 18 S. C. 1; *Robertson v. Trigg*, 32 Gratt. (Va.) 76; *Douglas v. Stevenson*, 75 Va. 747; *Le Grand v. Fitch*, 76 Va. 635; *Wayland v. Crank*, 79 Va. 602; *Lipse v. Spear*, 4 Hughes, (C. Ct.) 535; *Moffit v. Loughridge*, 51 Miss. 211; *Succession of Womack*, 29 La. An. 577; *Brandon v. Rowe*, 58 Ga. 536; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *Patterson v. Bondurat*, 30 Gratt. (Va.) 94; *Stewart v. Lee*, 56 Ala. 53; *Hutchinson v. Owen*, 59 Ala. 532; *Carter v. Dulaney*, 30 Gratt. (Va.) 192.

³ *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349, 358; see *Woodruff v. Ward*, 85 N. J. Eq. 467; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333.

⁴ *Tucker v. Tucker*, 33 N. J. Eq. 235; *Crane v.*

Howell, 35 N. Y. Eq. 374; *Lefever v. Hasbrouck*, 2 Dem. N. Y. 567; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 258; *Sullivan v. Howard*, 20 Md. 194; *Johnson's Appeal*, 43 Pa. St. 471; *Wilson's Appeal*, (Pa.) 9 Atl. Rep. 473; compare *Brown v. Campbell*, Hopk. (N. Y.) Ch. 233; *State v. Johnson*, 7 Blackf. (Ind.) 529; *Wms. Ex'rs*, (7th Eng. ed.) 1809; *Terry v. Terry*, Prec. Chanc. (Eng.) 273; s. c., *Gilb. Eq. Rep.* 10; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Adye v. Feuilleateau*, 1 Cox, (Eng.) 24; s. c., 3 Swanst. (Eng.) 84, note; *Vigrass v. Binfield*, 3 Madd. (Eng.) 62; *Bacon v. Clark*, 3 My. & Cr. (Eng.) 294; see *Moore v. Hamilton*, 4 Fla. 712; *Moore v. Felkel*, 7 Fla. 44; *King v. King*, 3 Johns. Ch. (N. Y.) 552; *Davis v. Yerby*, 1 Sm. & M. Ch. (Miss.) 508; *King v. Talbot*, 40 N. Y. 77; *Tomkies v. Reynold*, 17 Ala. 109; *Garesche v. Priest*, 78 Mo. 126; s. c., 9 Mo. App. 270; *Moyer v. Petway*, 76 N. C. 327; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333; *Matter of Mount*, 2 Redf. (N. Y.) 405; *Sherin v. Public Adm'r*, 2 Redf. (N. Y.) 421; *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Paddon v. Richardson*, 7 De G. M. & G. 563; *Denike v. Harris*, 84 N. Y. 89.

⁵ *Trafford v. Boehm*, 3 Atk. 440, 441; *Howe v. Earl of Dartmouth*, 7 Ves. 137, 150; *Adair v. Brimmer*, 74 N. Y. 539; *King v. Talbot*, 40 N. Y. 76; s. c., 50 Barb. 453; *Barney v. Saunders*, 16 How. (U. S.) 535; *Kimball v. Reding*, 31 N. H. 352; *Lovell v. Minot*, 20 Pick. 116; *Harvard Coll. v. Amory*, 9 Pick. 446; *Smith v. Smith*, 4 Johns. Ch. 281, 445; *Thompson v. Brown*, *Id.* 619, 628; *Ackerman v. Emott*, 4 Barb. 626; *Worrell's Appeal*, 9 Barr. 508; *Swoyer's Appeal*, 5 *Id.* 377; *Twaddell's Appeal*, *Id.* 15; *Murray v. Feinour*, 2 Md. Ch. 418, 419; *Evans v. Iglehart*, 6 Gill & J. 171, 192; *Ellig v. Naglee*, 9 Cal. 683; *Tucker v. The State*, 72 Ind. 242.

of the court, or of the state, in which the trustee resides and the trust estate is located. But this is a general rule, which is subject to the discretion of a court of equity, which may permit such investment, when under the peculiar circumstances of the case it is wise and proper to make it.¹ In many of the states, however, statutes have been passed, determining what kind of investments the trustee may invest trust funds in.

Whenever there has been an improper investment of the trust fund, in securities which the trustee was not authorized to purchase, the beneficiaries, in the settlement of the estate with such trustee, can refuse to accept the unauthorized securities, whether they have depreciated or not.²

§ 321. **Good faith in dealing with trust property.**—The trustee is also required to exercise the utmost good faith in dealing with the trust property. He must not only exercise reasonable care and diligence in the administration of the trust, but he must not so deal with the trust property that he may acquire any benefit from such administration of the trust, beyond the compensation which the law might and ordinarily does concede to him. If, in the management of the trust property he acquires any advantage or profit, it is a case of constructive fraud, for which he is liable to the estate. In cases of an improper investment, or of the use of the trust property for the benefit of the trustee, the beneficiary has the right to claim all the profit created by such misuse of the trust funds, and to impose upon the trustee all the losses which might have resulted from such employment or misuse of the funds.³ He must, also, in the care and management of the trust fund, keep such funds and property separate and distinct from his own property; and where in the administration of the trust he fails to do this, and mingles the trust property with his own, so that the two become more or less indistinguishable, either in the case of corporal property or in the case of money being deposited to his own account at a bank instead of a separate account to the credit of the trust estate; in all such cases, the trustee will assume all loss that might result to such property from the confusion of it with his own goods or property. And where it is impossible to separate his own property from the trust property, the entire property or fund becomes pri-

¹ *Ormiston v. Olecott*, 84 N. Y. 339.

² *King v. Talbot*, 40 N. Y. 76; s. c., 50 Barb. 453.

³ *Docker v. Simes*, 2 My. & K. 655; *Willett v. Blanford*, 1 Hare, 253; *Heathcote v. Hulme*, 1 J. & W. 122; *Moons v. De Bernales*, 1 Russ. 301; *San Diego, &c. R. R.*, 44 Cal. 106, 112-116; *Page v. Naglee*, 6 *Id.* 241; *Gunter v. Janes*, 9 *Id.* 643, 660-662; *Commonwealth v. McAlister*, 28 Pa. St. 480; *Chapman v. Porter*, 69 N. Y. 276; *Barnes v. Brown*, 80 N. Y. 527, 535; *Duncomb v. N. Y., &c. R. R.*, 84 *Id.* 190; *Davis v. Rock Creek, &c. Co.*, 55 Cal. 359; *Chamberlain v. Pacific Wool, &c. Co.*, 54 *Id.* 103; *Staats v. Bergen*, 17 *Id.* 554, 562, 563; *Trull v. Trull*, 13

Allen, 407; *Marsh v. Renton*, 99 Mass. 132, 135; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Gilman v. Gilman*, 2 Lans. 1; *Diffenderfer v. Winder*, 3 Gill & J. 311; *Morrow v. Saline Co. Comm'rs*, 21 Kans. 484; *Heath v. Waters*, 40 Mich. 457; *Malone v. Kelley*, 54 Ala. 532; *Baker v. Disbrow*, 18 Hun, 29; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; *Blauvelt v. Ackerman*, 20 *Id.* 141, 148, 149; *Sweet v. Jeffries*, 67 Mo. 420; *Vason v. Beall*, 58 Ga. 500; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Roberts v. Moseley*, 64 Mo. 507; *Fulton v. Whitney*, 66 N. Y. 548; 5 Hun, 16; *Fast v. McPherson*, 98 Ill. 496; *Coltrane v. Worrell*, 30 Gratt. 434.

marily the property of the trust estate; and the burden of proving his private property is thrown upon the trustee. Until such proof is presented by him, the entire property will be held for the benefit of the trust estate.¹ So, also, is the trustee prohibited from buying property from himself for the trust estate, and from selling trust property to himself. In both cases a species of constructive fraud arises, and both transactions can be avoided by the beneficiary.²

The trustee is also required to abstain from the acceptance of any position or appointment which would in any way interfere with the performance of his duty to his beneficiary; and where he assumes any such obligation, he is liable to the beneficiary for such violation of duty, and may be relieved from the trust on such a ground.³

§ 322. **Trustee cannot delegate his authority.**—The office of a trustee is personal in its character, and involves the repose of a personal confidence in such trustee or trustees. The trustee cannot, therefore, delegate his trust to anyone else, and thus escape the responsibility of the maladministration of a trust by such a delegate, unless he has been authorized by the trust to so delegate his authority. In the absence of such an authorization, the delegation of his trust would not release him from responsibility for the trust estate, and he would be liable for the losses which were occasioned by the fraud, negligence, or want of good faith of the delegate.⁴ But the trustee is

¹ *Mumford v. Murray*, 6 Johns. Ch. 1; *Kip v. Bank of N. Y.*, 10 Johns. 63; *Commonwealth v. McAlister*, 28 Pa. St. 480; *Gunter v. Janes*, 9 Cal. 643, 660-662; *Livingston v. Wells*, 8 S. C. 347; *Woodruff v. Boyden*, 3 Abb. N. C. 29; *Malone v. Kelley*, 54 Ala. 532; *Davis v. Coburn*, 123 Mass. 377; *Marine Bk. v. Fulton Bk.*, 2 Wall. 252; *Case v. Abeel*, 1 Paige, 393; *Utica Ins. Co. v. Lynch*, 11 *Id.* 520; *Ditmar v. Bogle*, 53 Ala. 169, 171; *Henderson v. Henderson*, 58 Ala. 582; *McKenzie v. Anderson*, 2 Woods, (U. S. C. C.) 357, 359, 364; *State v. Cheston & Carey*, 51 Md. 352, 381; *Kirby v. State*, 51 Md. 383; *Thomson v. Brooke*, 76 Va. 160; *Newton v. Poole*, 12 Leigh, (Va.) 112; *Calvert v. Marlow*, 6 Ala. 337; *Hendricks v. Tuckwiller*, 20 W. Va. 489; *Hanbest's Estate*, 12 Phila. (Pa.) 72; *Williams v. Williams*, 55 Wis. 390; s. c., 42 Am. Rep. 708; *Wren v. Kirton*, 21 Ves. (Eng.) 377; *Robinson v. Ward, Ry. & Mood*, (Eng.) 274; 2 C. & P. (Eng.) 59; *Robinett's Appeal*, 36 Pa. St. 174; *Gilbert's Appeal*, 78 Pa. St. 266; *Nettles v. McCown*, 5 S. C. 43; *McKenzie v. Anderson*, 2 Woods, (U. S. C. C.) 357; *Kirkman v. Benham*, 28 Ala. 501; *Ditmar v. Bogle*, 53 Ala. 169; *Kellett v. Rathbun*, 4 Paige, (N. Y.) 102; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Leake's Exrs. v. Leake*, 75 Va. 792; *Hagthorpe v. Hook*, 1 Gill & J. (Md.) 270; *Rorke v. McConville*, 4 Redf. (N. Y.) 291; *Perkins' Estate*, (Vt.) 7 Atl. Rep. 605; *Lacoste's Estate*, *Myrick's Probate*, (Cal.) 67.

² *Munn v. Berges*, 70 Ill. 604; *Bush v. Sherman*, 80 *Id.* 160; *Star Fire Ins. Co. v. Palmer*, 41

N. Y. Super. Ct. 267; *Spencer's Appeal*, 80 Pa. St. 317; *Tatum v. McLellan*, 50 Miss. 1; *Union Slate Co. v. Tilton*, 69 Me. 244; *James v. James*, 55 Ala. 525; *Higgins v. Curtiss*, 82 Ill. 28; *Ferguson v. Lowery*, 54 Ala. 510; see, also, *In re Bloye's Trust*, 1 Macn. & G. 488; *Knight v. Marjoribanks*, 2 *Id.* 10; *Hickley v. Hickley*, L. R. 2 Ch. D. 190; *Ellis v. Barker*, L. R. 7 Ch. 104; *Boerum v. Schenck*, 41 N. Y. 182. See *ante*, § 312, where the whole doctrine of constructive fraud in the performance of fiduciary duties is more fully set forth.

³ *Gardner v. Butler*, 30 N. J. Eq. 702; *Sweet v. Jeffries*, 67 Mo. 420; *Roberts v. Moseley*, 64 *Id.* 507; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Fast v. McPherson*, 98 *Id.* 496; *Morrow v. Saline Co. Comm'rs*, 21 Kans. 434; *Fulton v. Whitney*, 66 N. Y. 548; N. Y. Central Ins. Co. v. Nat. Protec. Ins. Co., 14 *Id.* 85; *St. James' Ch. v. Ch. of the Redeemer*, 45 Barb. 356; *Davis v. Rock Creek, &c. Co.*, 55 Cal. 359; *Chamberlain v. Pac. Wool, &c. Co.*, 54 *Id.* 103; *San Diego v. San Diego, &c. R. R.*, 44 *Id.* 106, 112-118; *Stewart v. Lehigh Val. R. R.*, 9 Vroom, 505; *Twin-Lick Oil Co. v. Marbury*, 1 Otto, 587; *Risley v. Indianapolis, &c. R. R.*, 62 N. Y. 240; *Hoyle v. Plattsburgh, &c. R. R.*, 54 *Id.* 314, 328; *Butts v. Wood*, 37 *Id.* 317; *Smith v. Lansing*, 22 *Id.* 520, 531; *Gardner v. Ogden*, *Id.* 327.

⁴ *Berger v. Duff*, 4 Johns. Ch. 368; *Hawley v. James*, 5 Paige, 318; *Pearson v. Jamison*, 1 McLean, 197; *Vose v. Trustees, &c.*, 2 Woods, 647; *Seely v. Hills*, 49 Wis. 473; *Ex parte Rigley*, 19 Ves. 463; *Adams v. Clifton*, 1 Russ. 297.

not thereby prohibited from employing agents, whose services, under his direction, are indispensable or necessary to the due administration of the estate; for the employment of such agents, under the discretionary supervision of the trustee, is a necessary implication of the trust. And if the trustee has exercised reasonable care and prudence in the selection of such agents, he is not responsible for any losses occasioned by the fraud or negligence of such agent.' Not only can the trustee or trustees not delegate his or their authority to an entire stranger; but one trustee is also prohibited from transferring to a co-trustee the entire control of the trust estate; and where he does this, he is liable for the maladministration of the trust by the co-trustee. But this is only the case where there has been an absolute transfer of the control of the trust to the co-trustee; and where there is an absolute abstention by one trustee from the management and administration of the trust.² But if the trustees agree among themselves for a division of labor in the general administration of the trust, subject to the general supervision of the estate by all, then the trustees in general would not be responsible for any misappropriation or maladministration of the acting trustee of the funds of the estate, even though the other trustees should join with the acting trustee in signing a receipt for money paid to such acting trustee.³

§ 323. **Trustee's duty to account.**—The main duty of a trustee in this connection is to keep a regular and accurate account of the affairs of the trust property, and be able to render at any time a full account of the property and the moneys which have come into his possession, and the moneys paid out at any time during his administration of the trust. He must keep this account separate and distinct from his own private property, and be ready at all times to explain to the beneficiaries the

¹ *Bacon v. Bacon*, 5 Ves. (Eng.) 334, 335; *Castle v. Warland*, 32 Beav. (Eng.) 660; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Edmond v. Peake*, 70 Beav. (Eng.) 239; *Christy v. McBride*, 2 Ill. 75; *Julian v. Abbott*, 73 Mo. 580; *Watson v. Stone*, 40 Ala. 451; *Dockey v. McDonald*, 40 Ala. 476; *Neilson v. Cook*, 40 Ala. 498; compare *Lyon v. Lyon*, 1 Tenn. Ch. 225; *Succession of Baum*, 9 La. An. 412; *Marshall v. Moore*, 27 B. Mon. (Ky.) 69; *Green v. Hanbury*, 2 Brock. (C. C.) 403; *Telford v. Barry*, 1 Iowa, 591; *Calhoun's Estate*, 6 Watts, (Pa.) 185; *Blight v. Schenck*, 10 Pa. St. 285; *Hawley v. James*, 5 Paige, (N. Y.) 187; *Lewis v. Reed*, 11 Ind. 239; *Case v. Abeel*, 1 Paige, (N. Y.) 393; *Kellet v. Rathbun*, 4 Paige, (N. Y.) 102.

² *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 296; *Ames v. Armstrong*, 106 Mass. 18; *Deaderick v. Cantiell*, 10 Yerg. (Tenn.) 254; *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 401; *Jones' Appeal*, 8 Watts & S. (Pa.) 147; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Barrings v. Willing*, 4 Wash. (C. C.) 251; *Mesick v. Mesick*, 7 Barb. (N. Y.) 120; *Clark v. Clark*, 8 Paige, (N. Y.) 153; *Schenck v. Schenck*, 1 Green, (N. J.) 174;

Wyman v. Jones 4 Md. Ch. 500; *Stewart v. Conner*, 9 Ala. 803; *Ducommon's Appeal*, 17 Pa. St. 268; *McNair's Appeal*, 4 Rawle, (Pa.) 154; *Hewitt v. Foster*, 6 Beav. (Eng.) 259; *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. (Eng.) 16; *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166; *Hall v. Carter*, 8 Ga. 388; *Bates v. Underhill*, 3 Redf. 365; *Gray v. Reamer*, 11 Bush, 113; *Spencer v. Spencer*, 11 Paige, 299; *Monell v. Monell*, 5 Johns. Ch. 283; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Pim v. Downing*, 11 Serg. & R. 66; *Clough v. Bond*, 3 My. & Cr. 490, 497; *Burrows v. Walls*, 5 De G. M. & G. 233; *Styles v. Guy*, 1 Macn. & G. 422; *Paddon v. Richardson*, 7 De G. M. & G. 563; *Thompson v. Finch*, 8 Id. 560, 563, 564; *Wayman v. Jones*, 4 Md. Ch. 500; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Maccubbin v. Cromwell's Ex'rs*, 7 Gill & J. 157; *Royall's Adm'r v. McKenzie*, 25 Ala. 363; *State v. Gilford*, 15 Ohio, 593.

³ *Brice v. Stokes*, 11 Ves. 319; *Ingle v. Partridge*, 32 Beav. 661; *Peter v. Beverly*, 10 Pet. 531; 1 How. 134; *Taylor v. Benham*, 5 How. 235; *Sinclair v. Jackson*, 8 Cow. 543; see *Ormiston v. Olcott*, 84 N. Y. 339; *Brice v. Stokes*, 2 Eq. Lead. Cas. 1748, 1805.

condition of the estate.¹ When, of course, the trust is concluded, he is required to produce and make a full and final account of his conduct in the management of the estate.

§ 324. **Duty to surrender trust property.**—Finally, when the trust is ended, and the time has come for his withdrawal from the management of the trust property, it becomes the duty of such trustee or trustees to make a complete and full surrender to the parties entitled thereto, of all the property of the trust estate. And whenever in the performance of this duty the execution of a conveyance is necessary, he is required to do so.²

§ 325. **Right to compensation and allowance for expenses.** Formerly, the trustee was not entitled to any compensation for his services, it being considered a matter of honor. The policy of the law in respect thereto has since been changed; and it is now almost the universal rule, that trustees receive a reasonable percentage—usually five per cent.—upon all disbursements made by them. But they are not permitted to make any further charge against the trust estate, and for the performance of which they may have hired others. But he is permitted to give himself credit for the moneys paid out by him in the employment of agents in the administration of the trust, where the employment of such an agent be reasonable and advantageous to the estate.⁴ In general explanation of this statement, it may be added that it will be considered a just and proper allowance for the service of agents, where the services are necessary to the performance of the trust, even though the trustee was capable of performing the duty himself, as long as the duty did not constitute one of the ordinary duties of a trustee. Thus, for example, an attorney at law, acting as a trustee, cannot charge himself with compensation over and above the percentage which the law allows him for serving the estate in the capacity of an attorney. If he performs these professional duties to the estate, he must perform them gratuitously; but he is not obliged to perform them. He may employ another attorney to conduct the suits, that must be prosecuted in behalf of the estate, and pay such attorney a reasonable fee for such services. The same rule ap-

¹ *McDonnell v. White*, 11 H. L. Cas. 570; *Cramer v. Bird*, L. R. 6 Eq. 143; *Clark v. Moody*, 17 Mass. 145, 148; *Cooley v. Betts*, 24 Wend. 203; *Lockwood v. Thorne*, 11 N. Y. 170; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Miller v. Simonton*, 5 S. C. 20; see *Pearse v. Green*, 1 J. & W. 135; *Freeman v. Fairlee*, 3 Meriv. 40, 42; *White v. Lady Lincoln*, 8 Ves. 363.

² *Cramer v. Bird*, L. R. 6 Eq. 143; *Stokes' Appeals*, 80 Pa. St. 337; *Pennock v. Lyons*, 118 Mass. 92; *King v. Mullins*, 1 Drew. 309; *Goodson v. Ellison*, 3 Russ. 583.

³ *Story Eq. Jur.*, § 1266; 1 *Cruise Dig.* 451; *Robinson v. Pett*, 2 Eq. Ld. Cas. 512, 538-600 (4th Am. ed.); *Meacham v. Sternes*, 9 Paige Ch. 398; *In the matter of Schell*, 53 N. Y. 9 Paige, 263; *Denny v. Allen*, 1 Pick. 147; *Barrell v. Joy*, 16

Mass. 221; *Singleton v. Lowndes*, 9 S. C. 465; *Hall v. Hall*, 78 N. Y. 535; *Warbass v. Armstrong*, 2 Stockt. Ch. 263; *Wagstaff v. Lowerne*, 23 Barb. 209; but see *Constant v. Matteson*, 23 Ill. 546; *Mayor v. Galluchat*, 6 Rich. Eq. 1.

⁴ *Macnamara v. Jones*, 2 Dick. 587; *Bright v. North*, 2 Phil. 216, 220; *Worrall v. Hartford*, 8 Ves. 4, 8; *Phene v. Gillan*, 5 Hare, 1, 9; *Douglas v. Archbutt*, 2 De G. M. & J. 148; *Benett v. Wyndham*, 4 De G. F. & J. 259; *Duncan v. Findlater*, 6 Cl. & Fin. 894; *Heriot's Hospital v. Ross*, 12 Id. 507; *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686; L. R. 1 H. L. 93; *Jervis v. Wolferstan*, L. R. 18 Eq. 18; *Ellig v. Naglee*, 9 Cal. 683; *Beatty v. Clark*, 20 Id. 11, 30; *New v. Nicoll*, 73. N. Y. 127.

plies in regard to any other aid or service, which a trustee might perform, for which he cannot secure compensation; as where the trustee is a carpenter or mason, and makes repairs upon the trust estate; he cannot obtain any compensation, but he may employ others for this service, and obtain in the final settlement an allowance for such expenses. And where the trustee is not in possession of sufficient trust funds to pay for the necessary services thus rendered to the estate, it has been held that he may advance the necessary money, and have for the same a lien upon the trust estate, in order to secure his reimbursement.¹

If the estate is held in trust for the life of the *cestui que trust*, and provides for a distribution of the property at her death, the costs of administration, including the compensation of the trustee, should be charged up to the account of the *cestui que trust* for life.²

§ 326. **Breach of trust and liability therefor.**—Whenever a trustee violates his trust in any way whatever, whether by a want of good faith, negligence, fraud or embezzlement—it matters not whether the act is criminal in its character or only involves a civil liability—in any case, such wrongful act is denominated a breach of trust; and the beneficiaries are entitled to the protection of whatever remedies are necessary to a sufficient redress of their wrongs.³ These remedies, according to the character of the offense and liability, may be enforced against the trustee himself, or after his death against his estate.⁴ Unless the Statute of Limitations expressly provides for application of its provisions to actions for breaches of trust, no lapse of time will interfere with the prosecution of the action.⁵ The liability of a trustee, however, for breach of trust may always be defended by showing that the beneficiaries who are affected by the trust acquiesced in or ratified such breach of trust. But in order that

¹ *Macnamara v. Jones*, 2 Dick. 587; *Bright v. North*, 2 Phil. 216; *New v. Nicoll*, 73 N. Y. 127; *Ellig v. Naglee*, 9 Cal. 683; *Beatty v. Clark*, 20 Cal. 11, 30; *Noyes v. Blakeman*, 6 N. Y. 567; 3 Sandf. 531; *Stanton v. King*, 8 Hun. 4; *Morrison v. Morrison*, 7 De G. M. & G. 214; *Tennant v. Trenchard*, L. R. 4 Ch. 537; *Randall v. Dusenbury*, 63 N. Y. 645; s. c., 39 N. Y. Super. 174. But see *contra*, *Taylor v. Clark*, 56 Ga. 309; *Steele v. Steele's Adm'r*, 64 Ala. 438. See, also, generally, on the subject of liens or trust estates, *Starr v. Moulton*, 97 Ill. 525; *Bradbury v. Birchmore*, 117 Mass. 569, 580-582; *Ryder v. Sisson*, 7 R. I. 341; *Kearney v. Kearney*, 17 N. J. 59; *Ferry v. Laible*, 27 N. J. Eq. 146; *Williams v. Smith*, 10 R. I. 280, 283; *Rensselaer & R. R. v. Miller*, 47 Vt. 146; *Robinson v. Hersey*, 60 Me. 225.

² *Cammann v. Cammann*, 3 Demarest, (N. Y.) 211.

³ *Vernon v. Vawdry*, 2 Atk. 119; *Adey v. Arnold*, 2 De G. M. & G. 432; *Rackham v. Siddall*, 1 Macn. & G. 607; *Lord v. Wrightwick*, 4 De G. M. & G. 803; *Life Ass'n of Scotland v.*

Siddall, 3 De G. F. & J. 58; *Pearce v. Pearce*, 22 Beav. 248; *Hennessey v. Bray*, 33 Id. 96; *Lockhart v. Reilly*, 1 De G. & J. 464; *Obee v. Bishop*, 1 De G. F. & J. 137; *Ex parte Blencowe*, L. R. 1 Ch. 393; *Holland v. Holland*, L. R. 4 Ch. 449; *Wynch v. Grant*, 2 Drew. 312; *Benbury v. Benbury*, 2 Dev. & Bat. Eq. 235, 238.

⁴ *Cook v. Addison*, L. R. 7 Eq. 466; *Beatty v. Curson*, L. R. 7 Eq. 194; *Jacobs v. Rylance*, L. R. 17 Eq. 341; *Livingston v. Wells*, 8 S. C. 347; *Leedom v. Lombaert*, 80 Pa. St. 381; *Brown v. Lombert's Adm'r*, 33 Gratt. 256; *Cosser v. Radford*, 1 De G. J. & S. 585; *Bostock v. Floyer*, L. R. 1 Eq. 26; *Sutton v. Wilders*, L. R. 12 Eq. 373; *Hopgood v. Parkin*, L. R. 11 Eq. 74; *In re Grabowski's Settlement*, L. R. 6 Eq. 12.

⁵ *Burdick v. Garrick*, L. R. 5 Ch. 233; *Stone v. Stone*, L. R. 5 Ch. 74; *Dixon v. Dixon*, L. R. 9 Ch. D. 587; *Pinson v. Gilbert*, 57 Ala. 35; *Rowe v. Bentley*, 29 Gratt. 756; *Devaynes v. Robinson*, 24 Beav. 86; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *Wood v. Wightman*, L. R. 13 Eq. 434; *Taylor v. Cartwright*, L. R. Eq. 167.

any acquiescence or ratification may have the effect of barring actions for breaches of trust, it must be shown that such acquiescence took place, after such beneficiary had acquired full information of all the facts of the case, and also after full knowledge of his legal rights under the circumstances.¹ Mere delay is no defense; but if there is great delay after knowledge of the breach of trust, and, particularly, where there is some act which involves a recognition or condonation of the wrongful act of the trustee, then such delay might be considered as having the effect of an acquiescence.²

§ 327. **Right of contribution among co-trustees.**—For all breaches of trust,* the trustee or trustees are jointly liable to the beneficiary for the whole loss sustained; and the whole amount due by such trustees, and the joint judgment against all of them, may be enforced in full against any one of such trustees.³ Where one of them has thus been called upon to satisfy the joint judgment, it will be found that the right of contribution against the co-trustees, for the satisfaction of a joint judgment for breaches of trust, will depend upon the character of the wrongful act, which served as a foundation for the judgment. If the breach of trust was a technical liability of duty, or acts of negligence, or any other acts which were not of a fraudulent or criminal character, then the trustees may be called upon to contribute towards the settlement of the joint judgment, where one has been compelled to make such a settlement to the beneficiary.* But where the breach of trust is actually tortious or criminal in its nature; as where it constitutes an actual fraud upon the beneficiaries, or was a criminal embezzlement of the trust funds—and perhaps also in cases of criminal negligence and the participation of the trustee in a fraudulent or criminal breach of trust—then there is no right of contribution recognized by the courts in behalf of any one of them; and if one of them has been compelled to satisfy in full the joint judgment against them all, he is without any remedy to secure contribution from the co-trustees. This is only a special application of the general rule that there is no right of contribution between joint wrong-doers.⁵

¹ *March v. Russell*, 3 My. & Cr. 31; *Lloyd v. Attwood*, 3 De G. & J. 614; *Aveline v. Melhuish*, 2 De G. J. & S. 288; *Farrant v. Blanchford*, 1 Id. 107, 119, 120; *Williams v. Reed*, 3 Mason, 405; *Bond v. Bond*, 7 Allen, 1; *Negley v. Lindsay*, 67 Pa. St. 217; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Walker v. Symonds*, 3 Sw. 1, 64; *Wedderbuen v. Wedderbuen*, 4 My. & Cr. 41; *Clark v. Clark*, 8 Paige, 152; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Monell v. Monell*, 5 Johns. Ch. 283; *Jones' Appeal*, 8 Watts & S. 141, 147; *Pim v. Downing*, 11 Serg. & R. 66; *Wayman v. Jones*, 4 Md. Ch. 500; *Ringgold v. Ringgold*, 1 Harr. & G. 11; *State v. Guilford*, 15 Ohio, 593; *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

² *Bright v. Legerton*, 2 De G. F. & J. 606; *Hodgson v. Bibby*, 32 Beav. 221; *Clanricarde v. Henning*, 30 Id. 175; *Browne v. Cross*, 14 Id. 105;

Obee v. Bishop, 1 De G. F. & J. 137; *Scott v. Haddock*, 11 Ga. 258.

³ *Weetjen v. Vibbard*, 5 Hun, 265; *Heath v. Waters*, 40 Mich. 457.

⁴ *Perry on Trusts*, § 848; *Lingard v. Bromley*, 1 V. & B. 114, 117; *Sherman v. Parish*, 53 N. Y. 483, 489; *Priestman v. Tindall*, 24 Beav. 244; *Baynard v. Woolley*, 20 Id. 583; *Birks v. Micklethwait*, 33 Id. 409; *Wilson v. Goodman*, 4 Hare, 54; *Munch v. Cockerell*, 8 Sim. 219; *Pitt v. Bonner*, 1 Y. & C. Ch. 670; *Atty.-Gen. v. Daugars*, 33 Beav. 621, 624; *Perry v. Knott*, 4 Id. 179, 180; *Coppard v. Allen*, 2 De G. J. & S. 173, 177, *per* Turner, L. J.; *Fletcher v. Green*, 33 Beav. 513, 515.

⁵ *Cunningham v. Pell*, 5 Paige, 607, *per* Walworth, Ch., and in *Heath v. Erie R. R. Co.*, 8 Blatch. 347; *Smith v. Rathbun*, 23 Hun, 150;

§ 328. Liability of third persons for performance of the trust.

—It has been held in England, and in some of the American states, where a trustee has a power of sale, that the land in the hands of purchasers is subject to a constructive trust, which compels the purchaser to see to the proper application of the purchase money. This doctrine has been warmly contested and denied in many of the states, and presumably the rule is generally limited to such cases, where the trust is special and the sale is for a special purpose; as for the satisfaction of a particular debt or claim. Where the trust is general, it is impossible for the purchaser to secure a proper application of the purchase money, and he is not held liable for any misappropriations by the trustees.¹

§ 329. Liability of quasi trustees or other fiduciary persons.—

The conception of a trust relation, between parties having obligations towards each other, runs through every part of equity jurisprudence; and whenever the court of equity desires or finds it necessary to assume jurisdiction over such an obligation, in order to prevent injury to the rights of the parties, or to secure enforcement of the obligation, the relation created between the parties to such obligation will be treated as practically that of a trust, although the party, upon whom the court will impose the duties of a trustee, has not the legal title to the property concerned in the agreement. But inasmuch as the effect of the non-performance of the duty of such a person is the same, as in the case of the formal trust, these parties are treated in equity as essentially under the duty and liability of trustees and are, therefore, considered as *quasi*-trustees. Executors and administrators constitute one of these classes.² So, also, will the court of equity treat as a trustee the guardians or committees, who have control of the person and property of insane persons and other persons laboring under disabilities.³ So, likewise, does the court of equity treat as a trustee the guardian of infants,⁴ and any fiduciary agent.⁵ The directors of a stock or other corporation are also subject to the same conception, and treated for many purposes by a court of equity as trustees, not only for the corporation, but likewise for the stockholders; and under that doctrine, the court assumes jurisdiction over cases of maladministrations of officers

Atty.-Gen. v. Brown, 1 Sw. 265; Lord Hardwicke's Charitable Corporation Case, (2 Atk.) 400, 406; Atty.-Gen. v. Wilson, Cr. & Ph. 1, 28.

¹ Story Eq. Jur., §§ 1127, 1130; 1 Cruise Dig. 450; Potter v. Gardner, 12 Wheat. 498; Duffy v. Calvert, 6 Gill, 487; Dunch v. Kent, 1 Vern. 260; Spalding v. Shalmer, 1 Vern. 301; Andrews v. Sparhawk, 13 Pick. 393; Davis v. Christian, 15 Gratt. 11; Stall v. Cincinnati, 16 Ohio St. 169.

² See *post*, Chapt. XIX, for an explanation of the equitable jurisdiction in the administration of decedent's estates.

³ *Polis v. Tice*, 28 N. J. Eq. 432; *Cole's Com. v. Cole's Adm'r*, 28 Gratt. 365; *Moody v. Bibb*, 50 Ala. 245; *Stephens v. Marshall*, 23 Hun,

641; *Stumph v. Guard. of Pfeiffer*, 58 Ind. 472.

⁴ *Wickiser v. Cook*, 85 Ill. 68; *Reed v. Timmins*, 52 Tex. 84; *Hoyt v. Sprague*, 13 Otto, 613; *Micou v. Lamar*, 724; *In re Dean*, 86 N. Y. 398; *Chanslor v. Chanslor's Tr's*, 11 Bush, 663; *Tanner v. Skinner*, 11 Id. 120; *Wood v. Stafford*, 50 Miss. 370; *Sledge v. Boone*, 57 Id. 222; *McNeill v. Hodges*, 83 N. C. 504; *Lanier v. Griffin*, 11 S. C. 565; *Smith v. Davis*, 49 Md. 470; *Sage v. Hammonds*, 27 Gratt. 251; *Wyckoff v. Hulse*, 32 N. J. Eq. 697; *Lewis v. Allred*, 57 Ala. 628, overruling *Spence v. Spencer's Ex'r*, 50 Id. 445; *Monnin v. Beroujon*, 51 Id. 196; *Corbett v. Carroll*, 50 Id. 315.

⁵ *Thornton v. Thornton*, 31 Gratt. 212.

of such corporations, not only for the protection of the corporations as a totality, but also for the protection of the interests of the individual stockholder. The director, in other words, is treated as being a trustee, in respect to the interests confined to his care, both of the corporation and of the individual stockholder.¹ But, inasmuch as the duties of directors are generally questions of law, and grow out of the simple relation of principal and agent, it is not necessary in this connection to explain in detail their duties, or the circumstances under which the court of equity will enforce those duties under the conception of a trust relation.²

¹ *Forbes v. McDonald*, 54 Cal. 98; *Davis v. Rock Creek, &c. Co.*, 55 *Id.* 359; *Booth v. Robinson*, 55 Md. 419; *Chouteau v. Allen*, 70 Mo. 290; *Van Dyck v. McQuade*, 86 N. Y. 38, 45, 46, *per* Danforth, J.; *Chase v. Vanderbilt*, 62 N. Y. 307; *Black v. Delaware, &c. Co.*, 22 N. J. Eq. (7 C. E. Green) 130, 393; *Simons v. Vulcan Oil, &c. Co.*, 61 Pa. St. 202; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Deaderick v. Wilson*, 8 Baxt. 108; *Corbett v. Woodward*, 5 Saw. 403; *Ryan v. Leavenworth, &c. Ry.*, 21 Kans. 365; *Duncomb v. N. Y., H. & N. R. R.*, 84 N. Y. 190;

Smith v. Rathbun, 22 Hun, 150; *Hun v. Cary*, 82 N. Y. 65, 70; *Forbes v. Memphis, &c. R. R.*, 2 Woods, 323; *Jackson v. Ludeling*, 21 Wall. 616; *Smith v. Poor*, 3 Ware, 148; *Ex parte Chippendale*, 4 De G.M. & G. 19, 52; *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114, 130, 131; 2 Hall & T. 201; *Foss v. Harbottle*, 2 Hare, 461, 493, 494; *Russell v. Wakefield, &c. Co.*, L. R. 20 Eq. 474, 479.

² See *ante*, § 233, where it is fully explained how parties in confidential relations may be guilty of constructive fraud.

CHAPTER XVIII.

POWERS OF APPOINTMENT.

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Suspension and destruction of powers	330 c	Successive execution	330 p
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By whom the powers may be executed	330 h	The rights of creditors of the beneficiary	330 w
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§ 330. **The nature of powers in general.**—A power, in the most comprehensive sense in which the word can be used, is an authority conferred upon a person to do a thing. But in its present application it signifies an authority to dispose of property, which is vested either in the person exercising the power, or in some other person. Under this latter signification three distinct classes of powers will be recognized: *First*, statutory powers; *second*, powers of attorney; and *third*, what are generally called powers of appointment, or simply powers. A statutory power is one which is created and vested in a person by legislative enactment. It is an act of the government; it derives its authority from the legislature, and is subject to the same rules of interpretation and construction as statutes in general.¹ Powers of attorney are authorities conferred by a principal upon an agent to perform certain acts in the manner indicated in the instrument of authority. The exercise of this power is the act of the principal through, or by means of, the agent. It is exercised in the name of the principal, and requires as much formality in execution as if the principal were acting himself. This class of powers, so far as they pertain to the law of real property, will be more specifically explained in subsequent pages.² In both classes of powers just mentioned, statutory powers and powers of attorney, the legal title to the property thus disposed of is conveyed, not by the creation of the power, but by the deed of conveyance made in pursuance of the power. The title remains in the original owner, unaffected by the creation of the power, until its execution. It is divested only when the deed of conveyance is executed and delivered.³

¹ *Baltimore v. Porter*, 18 Md. 284; see, also, *Markham v. Porter*, 33 Ga. 508; In the matter of *Bull*, 45 Barb. 334; *Leak v. Richmond Co.*, 64 N. C. 132.

² See *post*, §§ 805, 806.

³ 2 Washb. on Real Prop. 610; 1 Sugden on Pow. (ed. 1856) 1, 171, 174; 3 Washb. on Real Prop. 277-279.

§ 330 a. **Powers of appointment.**—The third class of powers, enumerated above, is what concerns us at present, viz.: powers of appointment. These powers, which are generally known simply as powers, are modes of disposition of property, which operates under the Statute of Uses or the Statute of Wills. The creation of the power invests in the person to whom it is granted, called the donee, a present indefeasible executory interest in the land. It is a right to convey the land, and cannot be revoked by the donor.¹ The common law knows of no class of powers which will in themselves, by their very creation, convey an interest in real property, and thus encumber the title thereof.² There are only two modes of creating such a power. One is by way of a use. The power in such a case is “a right to limit a use.” (Kent.) In the exercise of the power a use is created, which is immediately executed into a legal estate by the Statute of Uses in the person to whom the use has been limited, and who is called the *appointee*. The estates created by means of these powers are either contingent, springing or shifting uses, according to their relation with the other limitations in the deed or will creating the power, and are governed by the same rules of construction.³ An ordinary contingent use vests upon the happening of an uncertain event. In the case of an estate created by means of a power of appointment, the uncertain event is the exercise of the power.⁴ The other mode of creating this kind of power is by will under the Statute of Wills. The estate so created is an executory devise, deriving its force and effect from the will itself. All powers in a will operate under the Statute of Wills, except where it takes the form of a power to limit a use, and there is a special seisin raised by the will to support the use thus limited. Then it operates under the Statute of Uses, as a contingent or future use.⁵ Whether the power be created by deed or by will, the appointee’s estate will have the same characteristics as it would have had if, instead of the power, it had been limited in the instrument creating the power. And in order to determine the rights of the appointee, and the validity and character of the estate appointed to his use, it must be tested by the relation it would bear to the other limitations of the property, if it had occupied the place of the power in the original instrument. The appointor is merely an instrument employed to limit the estate; the appointee is in by the original instrument, which creates the power.⁶ The foregoing explanation of the doctrine of powers is true as to this country generally,

¹ Roland v. Coleman, 76 Ga. 652.

² Sugden on Pow. (ed. 1856) 4; Co. Lit. 237 a; see *contra*, Chance on Pow., §§ 5-12.

³ Co. Lit. 271 b, n. 231; Bac. Law Tr. 314; 1 Spence Eq. Jur. 455; 4 Kent’s Com. 334; Williams on Real Prop. 394.

⁴ Co. Lit. 271 b, Butler’s note, 231; Tud. Ld. Cas. 264; Sheph. Touch. 529; Williamson on Real Prop. 294; Rnsh v. Lewis, 21 Pa. St. 72; Rodgers v. Wallace, 5 Jones L. 182.

⁵ 1 Sugden on Pow. (ed. 1856) 240; Prest. Abst. 347

⁶ 1 Sugden on Pow. (ed. 1856) 171, 242; Co. Lit. 271 b, Butler’s note, 231, § 3, pl. 4; Gilbert on Uses, 127 n; 4 Kent’s Com. 337; 4 Cruise Dig. 220; 2 Washb. Real Prop. 636, 637; Doolittle v. Lewis, 7 Johns. Ch. 45; Bringle v. Goodson, Bing. N. C. 726; Roach v. Wadham, 6 East, 289; Doe v. Britain, 2 B. & Ald. 93; Mosley v. Mosley, 5 Ves. 256; Bradish v. Gibbs, 3 Johns. Ch. 550.

with the, perhaps, single exception of New York. In that state all powers, heretofore known as operating under the Statute of Uses and the Statute of Wills, have been abolished, and only certain powers, enumerated in the statute, can now be created. But they have received at the hands of the courts of that state practically the same construction as powers in other states, so that what is subsequently said of powers of appointment is equally applicable to powers in New York, the only difference being that there they operate under the statute of New York, instead of the old English Statutes of Uses and Wills, and are confined to certain objects.¹

§ 330 b. **Kinds of powers.**—Powers of appointment may be conferred upon persons having an interest or estate of some kind in land, or they may be given to persons who are otherwise altogether strangers to the property. In the latter case they are called *collateral* or *naked* powers; the power is not attached to any present estate, and the donee possesses the mere right to exercise the power.² In the former case the power is either *appendant* or *in gross*, according to its relation to the estate, to which it is attached. Any power whose execution creates an estate, which issues partly or wholly out of an estate vested in the donee, is a power *appendant*. Thus, where a tenant for life has the power to make leases in possession, which are to continue until their natural termination independent of the lessor's life estate, it is called a power *appendant*. The lease granted takes effect immediately in derogation of the tenant's life estate, and binds the remainder-man, if it does not expire during the continuance of the life estate.³ Powers *in gross* are those which do not conflict with the estate of the donee, and authorize the limitation of estates, which take effect out of the interest or estate of some one else. Such would be a power given to a life tenant to dispose of the remainder, to raise a jointure for his wife, to make leases commencing at his death. The exercise of these powers cannot by any possibility affect the estates to which they are attached.⁴ Powers are also divided into *general*, and *special* or *particular*. If the donee has the power to appoint to whom he pleases it is a general power; and if he can appoint to only certain particular persons, it is a special or particular power.⁵ Then again a general power may be for the benefit of the donee, or one in trust for certain beneficiaries.⁶ If the power be to create a new estate, it is

¹ N. Y. Rev. Stat., Art. 3, § 86-148; Hotchkiss v. Elting, 36 Barb. 38.

² Tud. Ld. Cas. 286; Williams on Real Prop. 294; 1 Sugden on Pow. 107; 2 Washb. on Real Prop. 639; Bergen v. Bennett, 1 Caines' Cas. 15; Edwards v. Slater, Hard. 416; Richardson v. Hunt, 59 Hun, 627; Potter v. Couch, 141 U. S. 296.

³ Williams on Real Prop. 310; 2 Washb. on Real Prop. 639, 640; Edwards v. Slater, Hard. 416; Bergen v. Bennett, 1 Caines' Cas. 15; Maundrell v. Maundrell, 10 Ves. 246; Wilson v. Troup, 2 Cow. 236.

⁴ 1 Sugden on Pow. 114; 4 Cruise's Dig. 220; Gorin v. Gordon, 38 Miss. 214; Wilson v. Troup, 2 Cow. 236; Tud. Ld. Cas. 293.

⁵ 2 Washb. on Real Prop. 641; Co. Lit. 271 b, Butler's note, 231, pl. 4, § 3; Williams on Real Prop. 309; Roach v. Wadham, 6 East, 289; Commonwealth v. Williams, 1 Harris, 29; Wright v. Wright, 41 N. J. 382.

⁶ Tud. Ld. Cas. 294; Williams on Real Prop. 307, 308; Chance on Pow., § 34; Howell v. Tyler, 91 N. C. 207.

called a power of appointment. If it be simply to destroy an estate already vested, it is called a power of revocation. A power of appointment always implies a power of revocation, but as a rule an express power of revocation will not raise by implication a power of appointment. A power of appointment cannot be exercised without revoking a previous limitation; by the exercise of the power of revocation, where there is no express power of appointment, the land reverts to the grantor and his heirs.¹

§ 330 c. **Suspension and destruction of powers.**—All general powers given for the benefit of the donee, may be released by him to one holding the freehold, whether in possession, remainder, or reversion, and thus destroyed. And this, too, whether the power be appendant, *in gross*, or collateral. For, it being given for the sole benefit of the donee, if he releases it, he will not be allowed thereafter to exercise it in derogation of his own release.² But a special power, or a general power in trust for certain beneficiaries, cannot be extinguished or released by any act of the donee alone. The power in such cases is in the nature of a trust, and the beneficiaries have rights therein which are beyond the power of the donee to destroy.³ And where the exercise of the special power is mandatory, thereby imposing upon the donee a peremptory duty to exercise it; or where the discretion, if any is given to the donee as to its exercise, is to be exerted and employed at some future time, the donee has no power to extinguish or release it, even though persons interested in, and to be benefited by its exercise, consent to the release, and join in the deed.⁴ But if it is within the discretion of the donee when and whether, if at all, he should execute the power, a joint deed of release by himself and the beneficiaries will extinguish the power.⁵ Where the power is appendant, the conveyance of the entire estate to which the power is annexed will destroy the power. The power can only be exercised in derogation of the estate, and the donee will not be permitted to defeat his own grant by executing the power.⁶ But if he conveys only a part of his estate, leaving a reversion in him, the exercise of the power will only be suspended or postponed to the estate so granted, and the

¹ 4 Cruise's Dig. 219, 220; Sandf. on Uses, 154; Tud. Ld. Cas. 264; 4 Kent's Com. 415; Wright v. Tallmadge, 15 N. Y. 307; Ricketts v. Louisville, &c. R. R. Co., (Ky. '91) 15 S. W. 182.

² Tud. Ld. Cas. 294; Edwards v. Slater, Hard. 416; Chance on Pow., § 3115; 1 Sugden on Pow. 112; Williams on Real Prop. 310; Smith v. Death, 5 Mad. 371; Horner v. Swann, Turn. & Russ. 430; Albany's Case, 1 Rep. 11 b, 113 a; West v. Bernly, 1 Russ. & M. 431; Grosvenor v. Bowen, 15 R. I. 549.

³ Co. Lit. 237 a, 265 b; 1 Sugden on Pow. 117; Doe v. Smyth, 6 B. & C. 172; s. c., 9 Dowl. & Ry. 136; Townson v. Tickell, 3 B. & A. 31; Begbie v. Croak, 2 Bing. N. C. 70; Tuick v. Ludborough, 3 Bulstr. 30; Tud. Ld. Cas. 286, 295; Chance on Pow., § 3105; Tippet v. Eyres, 5 Mod. 457;

Cunynghame v. Thurlow, 1 Russ. & M. 436 n; West v. Barney, 1 Russ. & M. 431; Tainter v. Clark, 13 Metc. 220; Norris v. Thompson, 4 Green L. 307.

⁴ 2 Washb. on Real Prop. 643; Chance on Pow., § 3121; Williams on Real Prop. 310; see Dave v. Johnson, 141 Mass. 287.

⁵ Brown & Sterritt's Appeal, 27 Pa. St. 62; Allison v. Wilson's Ex'rs, 13 Serg. & R. 330.

⁶ Goodright v. Cato, Dougl. 460; Wilson v. Troup, 2 Cow. 195; Noel v. Henry, McClell. & Yo. 302; Bullock v. Thorne, Moore, 615; Anon., Moore, 612; Yelland v. Fieles, Moore, 788; 1 Sugden on Pow. 113-115; Penn v. Peacock, For. 41; Cas. temp. Talb. 43; Webb v. Shaftesbury, 3 Myl. & Kee. 599; Parker v. White, 11 Ves. Jr. 209; Walmsley v. Jowett, 23 Eng. L. & E. 353;

estate created by the power will vest upon the termination of the prior demise.¹ The power may be exercised at any time; only the enjoyment of the estate thus created is postponed.² But no conveyance of the estate of the donee, except by feoffment, will cause an extinguishment of the power *in gross*. As a rule a release is the only mode of extinguishing this kind of power.³

§ 330 d. **How powers may be created.**—Powers may be created by deed or by will. They may be incorporated in the same instrument which conveys the property, or they may be endorsed thereon, or even granted by a separate instrument. If the instrument be a deed operating by transmutation of possession, the conveyance of the legal estate is necessary for the creation of the power. In the case of every other instrument of conveyance, there can be a valid grant of a power without a transfer of the legal estate.⁴ No particular words or phrases are required. Any words which clearly indicate the intention of the donor to create a power, and which define its scope with a reasonable degree of certainty, will be sufficient. This rule governs all classes of powers, whether operating under the Statute of Uses or the Statute of Wills.⁵ Where the deed, which creates the power, operates by transmutation of possession, and a seisin is therefore raised by the deed to support the use, which is to be created under the power, the legal estate so conveyed must be as extensive as the

Jones v. Winwood, 4 Meas. & Wels. 653; *Chance on Pow.*, §§ 3155, 3159; *Maundrell v. Maundrell*, 10 Ves. 246; *Doe v. Britain*, 2 B. & Ald. 93; *Williams on Real Prop.* 310; *Tud. Ld. Cas.* 260, 290; 4 *Cruise's Dig.* 157; *Bringloe v. Goodson*, 4 Bing. N. C. 726.

¹ *Ren v. Bulkeley*, Dougl. 292; *Tyrrell v. Marsh*, 3 Bing. 31; *Roper v. Halifax*, 8 Taunt. 845; *Doe v. Scarborough*, 3 Adolp. & Ell. 2; *Bringloe v. Goodson*, 4 Bing. N. C. 726; 4 *Cruise's Dig.* 221; *Goodright v. Cator*, Dougl. 477; *Tud. Ld. Cas.* 287.

² 1 *Sugden on Pow.* 114, 115, citing *Bringloe v. Goodson*, 4 Bing. N. C. 726; *Anon.*, *Moore*, 612; *Bullock v. Thorne*, *Moore*, 615; *Ren v. Bulkeley*, Dougl. 292; *Tyrrell v. Marsh*, 3 Bing. 31; *Davies v. Bush*, *McClell. & Yo.* 58; *Wilson v. Troup*, 2 Cow. 237; *Dalby v. Pullen*, 2 Bing. 144; *Tud. Ld. Cas.* 546; *Chance on Pow.*, § 402. *Contra*, *Snape v. Turton*, *Cro. Car.* 472; *Mordaunt v. Petersborough*, 3 Keb. 305. But if the power appendant enables only the creation of estates in possession, as where it is a power to make leases in possession and not *in futuro*, the exercise of the power is altogether suspended. *Bringloe v. Goodson*, 4 Bing. N. C. 726; 1 *Sugden on Pow.* 116.

³ *Chance on Pow.*, § 3172; *Edwards v. Slater*, *Hard.* 416; *Savile v. Blacket*, 1 P. Wms. 777; 2 *Washb. on Real Prop.* 643; 1 *Sugden on Pow.* 112.

⁴ *Outon v. Weeks*, 2 Keb. 803; *Fitz v. Smallbrook*, 1 Keb. 134; 1 *Sugden on Pow.* 217, 228-231; *Gilbert on Uses*, 46; *Williams on Pers.*

Prop. 246; *Co. Lit.* 271 b, III, § 5, *Butler's note*; *Powell on Devises*; 1 *Sandf. on Uses*, 195; *Andrews' Case*, *Moore*, 107; *Popham v. Bampfild*, 1 Vern. 79; *Thompson v. Lawley*, 2 Bos. & Pul. 311; *Doe v. Finch*, 4 Barn. & Adolph. 283; *Perry v. Phillips*, 1 Ves. Jr. 255; *Fearne Cont. Rem.* 128; *Rash v. Lewis*, 21 Pa. St. 72; 3 *Kent's Com.* 319; *Maundrell v. Maundrell*, 10 Ves. 255; 6 *Cruise's Dig.* 490.

⁵ 2 *Washb. on Real Prop.* 650; 1 *Sugden on Pow.* 118; *McCord v. McCord*, 19 Ga. 602; *Chooftall v. Powell*, 1 *Grant's Cas.* 19; *Bradley v. Wescott*, 13 Ves. 445; *Smith v. Bell*, 6 Pet. 68; *Scott v. Perkins*, 28 Me. 22; *Harris v. Knapp*, 21 Pick. 416; *Porcher v. Daniels*, 12 Rich. Eq. 349; *Brant v. Va. Coal Iron Co.*, 93 U. S. 326; *Jones v. Hurst*, 7 Ired. Eq. 134; *Withington's Appeal*, 32 Pa. St. 419; *Dominick v. Michael*, 4 *Sandf.* 374; *Gregory v. Congill*, 19 Mo. 415; *Turner v. Timberlake*, 53 Mo. 371; *Putnam School v. Fisher*, 30 Me. 523; *Mather v. Norton*, 8 Eng. L. & E. 255; *Bateman v. Bateman*, 1 Atk. 421; *Conover v. Hoffman*, 1 Bosw. 214; *Mundy v. Sawter*, 3 *Gratt.* 518; *Dunn v. Keeling*, 2 Dev. 283; *Owen v. Ellis*, 64 Mo. 77; *Best v. Best*, (Ky.) 11 S. W. 600; *Goudie v. Johnston*, 109 Ind. 427; *Logue v. Bateman*, 43 N. J. Eq. 434; *Fritsch v. Klansing*, (Ky.) '90 13 S. W. 241; *Watson v. Suro*, 86 Cal. 500; *Woerz v. Rademacher*, 120 N. Y. 62; *In re Carr*, 16 R. I. 645; *Brown v. Crittenden*, (Ky.) 1 S. W. 421; *Coaghan v. Ockershausen*, 5 N. Y. Super. Ct. 286; *Ames v. Ames*, 15 R. I. 12; *Cheray v. Greene*, 115 Ill. 591; *Wright v. Wright*, 41 N. J. Eq. 382.

use to be thus created. The appointee under the power cannot take a larger estate than that granted to the feoffee to uses. This is only a special application of a general rule governing all classes of uses.¹

§ 330 e. **Powers distinguished from estates.**—As a consequence of this liberal rule concerning words necessary to create a power, it is very often difficult to determine whether the intention of a testator was to give an estate in the land, or only a naked power. Since technical words are used to create an estate by deed, it rarely happens that doubt will arise in the construction of a power by deed. The question, therefore, possesses importance only in relation to wills. The intention of the testator will always govern whenever it can be clearly ascertained, even though the literal meaning of the words used would indicate a different conclusion.³ The most numerous cases have arisen under devises, in which executors are directed to sell lands for the purpose of distribution. If the executors are intended to have possession until sale under the power, then it is, of course, a power coupled with an interest, and the estate does not descend for the time being to the donor's heirs.⁴ Succinctly stated, if the devise be that "the executor shall sell," or that "the land shall be sold," only a naked power is granted. But a devise to the executor to sell, or words of similar import, will vest the legal title in him; it will be a power coupled with an interest.⁵ All doubt is, of course removed where the will makes some other disposition of the legal estate.⁶ In New York, by statute, the executor in all such cases takes only a naked power, unless some duty is imposed upon him in regard to the management of the property, which would require its possession.⁷

¹ Co. Lit. 271 b, Butler's note, 231; Cleveland v. Hallett, 6 Cush. 403; Norceum v. D'Oench, 17 Mo. 98; Exeter v. Ociorme, 1 N. H. 232; 1 Sugden on Pow. 231.

² 4 Kent's Com. 319; Sharpsteen v. Tillon, 3 Cow. 651; Jameson v. Smith, 4 Bibb, 307; Gray v. Lynch, 8 Gill, 403; Peter v. Beverly, 10 Pet. 532; Jackson v. Jansen, 6 Johns. 73; Jackson v. Schaubert, 7 Cow. 187; Clary v. Frayer, 8 Gill & J. 403; Walker v. Quigg, 6 Watts, 87; Ladd v. Ladd, 8 How. 10; Richardson v. Hunt, 59 Hun, 627; Potter v. Couch, 141 U. S. 296.

³ Bloomer v. Waldron, 3 Hill, 361; see cases cited in preceding note; Franklin v. Osgood, 14 Johns. 527; Brearly v. Brearly, 1 Stockt. 21; Digges' Lessee v. Jarman, 4 Har. & McH. 468; Jackson v. Ferris, 15 Johns. 346; Nelson v. Carrington, 4 Munf. 332, pl. 9; Zeback v. Smith, 3 Binn. 69; De Vaughan v. McLeroy, 82 Ga. 687.

⁴ Gray v. Lynch, 8 Gill, 403; Hartley v. Minor's App., 53 Pa. 212; Clary v. Frayer, 8 Gill & J. 403; 4 Kent's Com. 320.

⁵ Yates v. Crompton, 3 P. Wms. 308; Lancaster v. Thornton, 2 Burr. 1027; Bergen v. Bennett, 1 Caines' Cas. 16; Doe v. Shotter, 8 Adol. & Ell. 905; Patton v. Crow, 26 Ala. 426; Clinefelter v. Ayers, 10 Ill. 329; Gregg v. Currier, 36 N. H. 200; Thornton v. Gaillard, 3 Rich. 418; Bayard v. Rowan, 1 A. K. Marsh. 214; Snowhill v.

Snowhill, 3 Zab. 447; Killam v. Allen, 52 Barb. 605; Inman v. Jackson, 4 Greenl. 237; McKnight v. Wimer, 38 Mo. 132; 1 Williams on Ex. 540; 4 Kent's Com. 326; 1 Sugden on Pow. 189-194; Mosby v. Mosby, and Miller v. Jones, 9 Gratt. 584; Fluke v. Fluke, 1 Greenl. 478; Fay v. Fay, 1 Cush. 93; Howell v. Barnes, Cro. Car. 382; Haskell v. House, 3 Brev. 242; Ferebee v. Proctor, 2 Dev. & B. 439; Jackson v. Schaubert, 7 Cow. 18; Peck v. Henderson, 7 Yerg. 12; Bloomer v. Waldron, 3 Hill, 361; Co. Lit. 113 a, Hargrave's note, 2; Greenough v. Wells, 10 Cush. 571; Gordon v. Overton, 8 Yerg. 121; Warfield v. English, (Ky.) 11 S. W. 662; Herberts v. Herberts' Ex'rs, 85 Ky. 134; Traphager v. Levy, 45 N. J. Eq. 448; Perkins v. Presnell, 100 N. C. 220; Naar v. Naar, 41 N. J. 88.

⁶ Den v. Aweling, 1 Dutch. 449; Hemingway v. Hemingway, 22 Conn. 462; Peter v. Beverly, 10 Pet. 532; Ladd v. Ladd, 8 How. 10.

⁷ N. Y. Rev. Stat., Art. 2, § 68; Aldrich v. Green, 1 N. Y. S. 549; s. c., 16 State Rep. 535. In Pennsylvania a statute provides that in all such cases, whatever may be the phraseology used, the executor takes the power coupled with the estate. Cobb v. Biddle, 14 Pa. St. 444; Brown v. Sterritt, 27 Pa. St. 32; Shippen's Heirs v. Clapp, 29 Pa. St. 265.

§ 330 f. **Power enlarging the interest with which it is coupled.**—If the power is general and coupled with an interest, the duration of which is not clearly defined, as where there is a devise of lands generally, with full power to dispose of them by deed or by will, the devise will be construed to be that of an estate in fee, and not simply a life estate with a general power *in gross* attached thereto. But if the power is special, or a particular estate is expressly given with a general power of disposal, the power will not enlarge the estate, and the testator's heirs will take as reversioners, if the power is not exercised.¹ In every case the limitation of the power of disposal must be clear, especially in a will; for where the limitation of the estate is expressly for life, the power of disposal may be limited in its operation to the life estate.²

§ 330 g. **Who can be donees.**—Anyone, who is capable of holding and disposing of his own property, can be the donee of the power. It seems also that a purely collateral power may be exercised by an infant; but this is doubtful, and it is to be supposed that, where the power is to be executed by means of an instrument which an infant is not capable of making, he will not be able to execute the power until he becomes of age.³ But a married woman can exercise a power as freely as if she were a *femme sole*. This is a common mode of enabling a married woman to dispose of the property secured to her by marriage settlement.⁴

¹ 1 Sugden on Pow. 179, 180; Flintham's App., 11 Serg. & R. 23, 24; Agee v. Agee, 22 Mo. 366; Fairman v. Beal, 14 Ill. 244; Bradley v. Westcott, 13 Ves. 445; Ramsdell v. Ramsdell, 21 Me. 288; Jennor v. Hardie, 1 Leo. 283; Jackson v. Robbins, 16 Johns. 537; Ward v. Amory, 1 Curt. C. Ct. 419; Burleigh v. Clough, 52 N. H. 272; Collins v. Carlisle's Heirs, 7 B. Mon. 13; Deadrick v. Armour, 10 Humph. 588; Jackson v. Coleman, 2 Johns. 391; McGaughey's Adm'r v. Henry, 15 B. Mon. 383; Maundrell v. Maundrell, 10 Ves. 246; Herrick v. Babcock, 12 Johns. 389; Reinders v. Koppelman, 68 Mo. 482; 30 Am. Rep. 482; Green v. Sutton, 50 Mo. 190; Gregory v. Cowgill, 19 Mo. 415; Ruby v. Barrett, 12 Mo. 1; Randall v. Schrader, 20 Ala. 338; Ulrich's App., 86 Pa. St. 386; 27 Am. Rep. 707; Page v. Roper, 21 Eng. L. & E. 499; Crozier v. Bray, 120 N. Y. 366; Glover v. Reid, (Mich. '90) 45 N. W. 91; Jenkins v. Compton, (Ind. '90) 23 N. E. Rep. 1091; Cashman's Estate, 28 Ill. App. 346; Kibler v. Huver, ('90) 10 N. Y. S. 375; Hood v. Haden, 52 Va. 588; Lininger's App., 110 Pa. St. 398; Douglass v. Sharp, 52 Ark. 113; Rood v. Watson, 54 Hun, 85; Lewis v. Pitman, ('90, Mo.) 14 S. W. 52; Sanborn v. Sanborn, 62 N. H. 631; Miller's Adm'r v. Potterfield, (Va. '90) 11 S. E. 486; Wittemore v. Russell, 80 Me. 297; Glover v. Stillson, (Conn. '88) 15 Atl. Rep. 754; Gray v. Missionary Soc., ('88) 2 N. Y. S. 873; Forsythe v. Forsythe, 108 Pa. St. 129; Cresap v. Cresap, 34 W. Va. 310; Dull's Estate, 137 Pa. St. 112; Holsen v. Kockhouse, 83 Ky. 233; Peckham v. Lego, 87 Conn. 553; Gaven v. Allen, 100 Mo. 293; Graves v. True-

blood, 96 N. C. 395; see Best v. Best, (Ky.) 11 S. W. 600; *In re Cager's Will*, 111 N. Y. 343; Richardson v. Richardson, 80 Me. 585; McConnell v. Wilcox, (Ky.) 12 S. W. 469; *In re Foster's Will*, 76 Iowa, 36. But this is not an absolutely invariable rule. If, from the whole will, it appears to have been the testator's intention to give a fee simple estate, the estate will be enlarged by the power, notwithstanding the devisee's estate has been expressly limited for life. *Goodtitle v. Otway*, 2 Wils. 6; *Bradford v. Street*, 11 Ves. 135; *Doe v. Lewis*, 3 Adol. & Ell. 123; *Wilson v. Gaines*, 9 Rich. Eq. 420; *Andrews v. Brumfield*, 32 Miss. 107; *Denson v. Mitchell*, 26 Ala. 360; *Hoy v. Master*, 6 Sim. 568; *Robinson v. Dugdale*, 2 Vt. 181; *Burke v. Stiles*, (N. H.) 18 Atl. Rep. 657; *Walker v. Pritchard*, 121 Ill. 221; *Lienan v. Summerfield*, 41 N. J. Eq. 381; *Russell v. Eubanks*, 84 Mo. 82; *Morford v. Dieffenbacher*, 54 Mich. 593; *Bowen's Adm'r v. Bowen's Adm'r*, (Va. '91) 12 S. E. 885. And where the power annexed enlarges the estate into a fee, it will, if not expressly qualified, render any subsequent limitation void. *Jones v. Bacon*, 68 Me. 34; s. c., 28 Am. Rep. 1; *McKenzie's App.*, 41 Conn. 607; 19 Am. Rep. 525; *Rona v. Meier*, 47 Iowa, 607; 29 Am. Rep. 493.

² *Patty v. Goolsby*, 51 Ark. 61; *Douglass v. Sharp*, (Ark.) 12 S. W. Rep. 202; *Cox v. Sims*, 125 Pa. St. 522; *Fernbacher v. Fernbacher*, 4 Dem. 227; 17 Abb. N. C. 339.

³ 4 Kent's Com. 324, 325; 1 Sugden on Pow. 181, 211; 2 Washb. on Real Prop. 652.

⁴ 1 Sugden on Pow. 182; 4 Kent's Com. 325;

§ 330 h. **By whom the power may be executed.**—As a general proposition, only those who are named as the donees in the instrument creating the power can execute the power. In testamentary powers, the executor will be impliedly vested with the power, if no donee is specially named or described.¹ The donee cannot assign it unless he is expressly authorized, nor can his personal representatives execute it unless expressly named.² This, however, is not true of powers in trust, or powers coupled with an interest, the execution of which does not require the exercise of a special discretion reposed in the particular donee. In the case of a power in trust, the court will not allow any accident to or neglect of the trustee—not even his death—to defeat the trust power. It will either compel the trustee to execute it or appoint a new trustee in his stead, who will have the same power.³ But the trustee cannot delegate his power without authority.⁴ It would, however, not be a delegation of power for the donee to direct his agents to do the subordinate ministerial acts.⁵ A power coupled with an interest will ordinarily, not only survive the donee, but can be exercised by him, to whom the interest has been assigned, provided always the power is not expressly personal to the donee.⁶ Where the power is limited to several as a class, such as executors, trustees, or sons, although all must join in the execution, if alive, the power will survive the death of one or more; but there must be at least two surviving, in order to comply with the plural description of the donee.⁷ In the case of executors, the rule is so far relaxed that a single survivor may execute the power; and where the power is coupled with an interest, the power may be exercised by those who qualify as executors; it is not necessary for the others to join in the execution of the power.⁸ Its exercise does not, however, depend upon their qualification as executors; they may insist upon their right to join in the execution, even though they or any of them have failed to qualify or have resigned

Doe v. Eyre, 3 C. B. 578; s. c., 5 C. B. 741; *Ladd v. Ladd*, 8 How. 27; *Hoover v. Samaritan Society*, 5 Whart. 445; *Wright v. Tallmadge*, 15 N. Y. 307; *Leavitt v. Pell*, 25 N. Y. 474; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Barnes v. Irwin*, 1 Dall. 201; *Rush v. Lewis*, 21 Pa. St. 72; *Doe v. Vincent*, 1 Houst. 416, 427. See *ante*, § 276, note.

¹ *Officer v. Board of Home Missions*, 47 Hun. 372.

² 1 Sugden on Pow. 214, 215; 4 Cruise's Dig. 211; *Cole v. Wade*, 16 Ves. 27; *Tainter v. Clarke*, 13 Metc. 220, 226; *Broom's Leg. Max.* 665.

³ 2 Sugden on Pow. 158; *Greenough v. Wells*; *Hunt v. Rousmanier*, 8 Wheat. 207; *Gibbs v. Marsh*, 2 Metc. 243; *Wilson v. Troup*, 2 Cow. 236, 237; *Leeds v. Wakefield*, 10 Gray, 517.

⁴ *Story's Eq. Jur.* 1062; *Osgood v. Franklin*, 2 Johns. Ch. 21; *Berger v. Duff*, 4 Johns. Ch. 368; *Franklin v. Osgood*, 14 Johns. 562, 563; *Peter v. Beverley*, 10 Pet. 565; *Hertell v. Van Buren*, 3 Edw. Ch. 20; *Zebach v. Smith*, 3 Binn.

69; *Cole v. Wade*, 16 Ves. 28 n; 1 Sugden on Pow. 214, 216; *Lewis on Tr.* 228.

⁵ *Toder v. Herring*, (Miss. '90) 6 So. Rep. 840.

⁶ *Hunt v. Rousmanier*, 8 Wheat. 203; *Wilson v. Troup*, 2 Cow. 236; *Bergen v. Bennett*, 1 Caines' Cas. 15; *Hartley's v. Minor's App.*, 53 Pa. St. 212; *Jencks v. Alexander*, 11 Paige Ch. 619; *Doolittle v. Lewis*, 7 Johns. Ch. 45.

⁷ 1 Sugden on Pow. 144, 146; *Story's Eq. Jur.*, §§ 1061, 1062 n; 4 Greenl. Cruise Dig. 211 n; *Co. Lit.* 113, *Hargrave's note*, 146; *Tainter v. Clark*, 13 Metc. 220; *Franklin v. Osgood*, 14 Johns. 553; *Peter v. Beverley*, 10 Pet. 564; *Montefiore v. Browne*, 7 H. L. Cas. 261.

⁸ 4 Kent's Com. 320; *Bergen v. Bennett*, 1 Caines' Cas. 16; 1 Sugden on Pow. 144, 146; *Osgood v. Franklin*, 2 Johns. Ch. 19; *Franklin v. Osgood*, 16 Johns. 553; *Peter v. Beverley*, 10 Pet. 564; *Tainter v. Clark*, 13 Metc. 220; *Drayton v. Grimko*, 1 Bailey Eq. 392; *Naunborf v. Schunlann*, 41 N. J. Eq. 14; *Vernor v. Coville*, 44 Mich. 281; *In re Bailey*, 15 R. I. 60.

their executorships.¹ So, also, may the power be executed by the executors, after they have been discharged from the administration of the estate.² But this is the case only when the power is given to the executors *nominatim*. If the power be given *virtute officii*, the power can only be exercised by the acting executors.³ And although by the law the executor, appointed by will in one state, may not be able to exercise the ordinary powers of an executor over lands situated in another state, yet he may execute a testamentary power of sale when so directed to do.⁴ Where the power is given to several donees *nominatim*, it indicates the repose of a personal discretion in each, and the power will not survive the death of one of them.⁵ So, also, if a power is given to one or more executors by name, it cannot be exercised by an administrator with the will annexed.⁶ But it is, otherwise, if the power is given to the executor as such.⁷

§ 330 k. **Mode of execution.**—In the execution of the power the donee must observe strictly all the conditions and restrictions imposed by the donor, both as to the manner and the time of execution. The donor has the right to impose whatever conditions he pleases, and however unessential they may appear to be, a neglect of them would make the execution defective. They must be strictly complied with.⁸ Thus a power to appoint by deed cannot be exercised by will; but if there is no restriction as to the kind of instrument, it may be either by deed or by will.⁹ So must all other special directions be observed.¹⁰ If the power be to sell, the property can be sold only in the manner prescribed by the donor, and a power of sale will not ordinarily imply a power to mortgage,¹¹ and a power to rent or lease does not include the power to sell absolutely.¹² It is customary for the donee's instrument of conveyance to contain a recital of the power under which he acts, but this recital is not competent evidence of the existence of the power, and if it is questioned, it must be established by other testimony.¹³

¹ *Tainter v. Clarke*, 13 Metc. 220; *Clarke v. Tainter*, 7 Cush. 567; *Tredwell v. Cordis*, 5 Gray, 341; *Dunning v. Ocean Nat. Bank*, 6 Lans. (N. Y.) 296.

² *Scholl v. Olmstead*, 84 Ga. 603.

³ *Yates v. Compton*, 2 P. Wms. 309; *Waters v. Mayerson*, 10 P. F. S. (Pa.) 39; *Evans v. Chew*, 21 P. F. S. 47.

⁴ *Doolittle v. Lewis*, 7 Johns. Ch. 45-48; but see, *Hutchins v. State Bank*, 12 Metc. 425.

⁵ *Co. Lit.* 113, *Hargrave's note*, 146; 4 *Greenl. Cruise Dig.* 211 n; *Story's Eq. Jur.*, §§ 1061, 1062; 1 *Sugden on Pow.* 144-146; *Loring v. Marsh*, 27 *Law Repos.* 377; *Peter v. Beverley*, 10 *Pet.* 563; *Franklin v. Osgood*, 14 *Johns.* 553; *Tainter v. Clarke*, 13 *Metc.* 220; *Cole v. Wade*, 16 *Ves.* 27.

⁶ *Re Bierbaum*, 40 *Hun.* 500; *Compton v. McMahon*, 19 *Mo. App.* 490.

⁷ *Griggs v. Veghte*, (N. J. '90) 19 *Atl.* 867.

⁸ 1 *Sugden on Pow.* 211, 250, 278; *Langford v. Eyre*, 1 P. Wms. 740; *Habergham v. Vincent*, 2 *Ves.* 231; *Hawkins v. Kemp*, 3 *East*, 410; *Ben-*

tham v. Smith, *Cheves Eq.* 33; *Andrews v. Royce*, 12 *Rich.* 546; *Vincent v. Bishop*, 5 *Exch.* 683; *Ladd v. Ladd*, 8 *How.* 30-40; *Burdett v. Spilsbury*, 6 *Mann. & Gr.* 386; *Wright v. Wakeford*, 17 *Ves.* 454; *Wright v. Barlow*, 3 *Maule & S.* 512; *Ives v. Davenport*, 3 *Hill.* 373; *Williams on Real Prop.* 255.

⁹ *Todd v. Sawyer*, (Mass. '89) 17 *N. E. Rep.* 527.

¹⁰ *Ladd v. Ladd*, 8 *How.* 30-40; *Moore v. Diamond*, 5 *R. I.* 130; *Alley v. Lawrence*, 12 *Gray*, 375; *Majoribanks v. Hovenden*, 1 *Drury*, 11; 1 *Chance on Pow.* 273; *Doe v. Peach*, 2 *Maule & S.* 576; *Hopkins v. Myall*, 2 *Russ. & Mylne*, 86; *Rustin v. Oakes*, 117 *N. Y.* 577; *Rose v. Hatch*, 55 *Hun.* 457; *Jennert v. Houser*, 4 *Ohio C. C.* 353; *Valentine v. Wyson*, (Ind. '90) 23 *N. E.* 1076.

¹¹ 1 *Sugden on Pow.* 513; 4 *Kent's Com.* 331; *Bloomer v. Waldron*, 3 *Hill*, 361; *Leavitt v. Pell*, 25 *N. Y.* 474; *Ives v. Davenport*, 3 *Hill*, 373.

¹² *Roe v. Vingut*, 117 *N. Y.* 204.

¹³ *Hershy v. Berman*, 45 *Ark.* 309.

§ 330 l. **Who may be appointees.**—If it be a general power, any one whom the donee selects may take under the power. A wife may appoint the estate to her husband, and so may the husband to his wife.¹ The donee may appoint himself.² And if the donee appoints to A. to the use of B., the Statute of Uses will execute the use in A., leaving the use in B. unexecuted, it being a use upon a use.³ But this rule would not apply to powers which operated under the Statute of Wills. If it be a special power, it can be exercised only in favor of the special objects named. Thus a power of appointment to children will not support an appointment to grandchildren, unless in some unusual cases, strongly impregnated with circumstances, such as the non-existence of children at the time when the power was created, and the impossibility of other children being subsequently born, which clearly show an intention to refer to grandchildren under the name of children.⁴ But the term *issue* is generally capable of embracing all descendants of every generation.⁵

§ 330 m. **Execution by implication.**—In order to insure a valid execution, the power should be expressly referred to in the instrument of execution; but this is not necessary if it appears in any way, upon the face of the instrument, or from the facts of the case, to have been the intention of the donee to exercise the power.⁶ And the courts have of late years so far relaxed the rule as to construe the instrument to be, by necessary intendment, a good execution of the power, if it cannot operate in any other way, notwithstanding the deed or will purports to dispose only of the individual property of the donee.⁷ A specific reference to the property subject to the power will be sufficient in the case of a collateral or naked power; but where the power is appendant or *in gross*, if there be no express reference to the power, only the legal estate, to which it is attached, will pass. The capacity of the instrument to operate upon the estate of the donee negatives any implied or presumed intention to exercise the power. And where the power is not coupled with an interest, if the donee has no property which he could dispose of by means of the instrument executed, it will be a good execution of the power, though neither the power nor the property was referred to.⁸

¹ 1 Sugden on Pow. 182; 4 Kent's Com. 325; Doe v. Eyre, 3 C. B. 578; s. c., 5 C. B. 741; Hoover v. Samaritan Society, 5 Whart. 445; Barnes v. Irwin, 2 Dall. 201; Ladd v. Ladd, 8 How. 27; Bradish v. Gibbs, 3 Johns. Ch. 523; Wright v. Tallmadge, 15 N. Y. 307; Leavitt v. Pell, 25 N. Y. 474; 2 Sugden on Pow. 24.

² 2 Washb. on Real Prop. 660; Williams on Real Prop. 295, n. 1.

³ Sugden on Pow. 229; 2 Prest. Abst. 248; 2 Washb. on Real Prop. 613.

⁴ 2 Sugden on Pow. 253; 4 Kent's Com. 345; Tud. Ld. Cas. 306; Wythe v. Thurlston, Ambl. 555; Horwitz v. Norris, 49 Pa. St. 211.

⁵ Wythe v. Thurlston, Ambl. 555; Freeman v.

Parsley, 3 Ves. 421; Drake v. Drake, 56 Hun. 390.

⁶ 1 Sugden on Pow. 232; 4 Kent's Com. 334; Story's Eq. Jur., § 1062 a.

⁷ Doe v. Vincent, 1 Houst. 416, 427; Taylor v. Erstman, 92 N. C. 601.

⁸ 4 Kent's Com. 335; Amory v. Meredith, 7 Allen, 397; Blagge v. Miles, 1 Story, 426; White v. Hicks, 38 N. Y. 392; Jones v. Wood, 16 Pa. St. 25; Hay v. Mayer, 8 Watts, 203; Probert v. Morgan, 1 Atk. 440; 1 Sugden on Pow. 432; 4 Cruise Dig. 212; Co. Lit. 271 b, Butler's note, 231; 2 Washb. on Real Prop. 612; Doe v. Rooke, 6 B. & C. 730; Bepper's Will, 1 Pars. Eq. Cas. 440; Maryland Mut. Benev. Society v. Clendiner, 44 Md. 429; 22 Am. Rep. 52; Patterson v. Wilson,

§ 330 n. **Excessive execution.**—To what extent an excessive execution will affect the validity of the appointment depends upon the ability to separate the good part from the bad part. If the excess can be separated and clearly distinguished [from what would have been a valid execution, the latter will be sustained, and only the excess declared void. But if such a separation cannot be made without destroying the evidence of the donee's intention to exercise the power in the manner in which he could, the whole will be avoided, and a failure of execution will be decreed.¹ Thus, if the appointment be made to a number of persons, some of whom can take and others cannot, it will be good as to the former, at least, in the case of a general power. If the power be special, it would be good as to those who can take, provided the partial execution of the power in this manner does not affect the lawful rights of the others.² So also if the donee appoints a larger sum or a larger estate than the power authorizes, the execution will be good within the limits of the power; or if he annexes to the appointment conditions which are prohibited or not authorized by the terms of the power, the illegal conditions will be void, and the appointee will take an absolute estate.³ In this connection it may be stated that the *cy pres* doctrine of construction applies to powers executed by will, as it does to all testamentary dispositions. If an appointment by will be void in part, when literally construed, and there appears on the face of the will a general intent, which would be a good execution of the power were it not for the special intent manifested by the manner in which he executes it, the general intent will prevail, and the appointment will be held to be good. Thus, if the appointment be to an unborn son for life, with remainder to his (the son's) unborn sons in tail, since the latter limitation is void as against the rule of perpetuity, the court would construe the appointment an estate tail in the first taker, instead of a life estate, there appearing to have been a general intent to that effect.⁴

§ 330 p. **Successive execution.**—The appointment of a less estate than what may be created under the power will be good, unless there is an express restriction against a partial execution.⁵ And as long as the power is not exhausted it may be exercised successively, at different times over different parts of the property, or over different estates in the same tract of land, whether the power is one of appointment or of revocation. And where it is intended that the power shall

64 Mo. 193; Mut. Life Ins. Co. v. Shipman, 119 N. Y. 324; Hood v. Haden, 82 Va. 588; Lee v. Simpson, 134 U. S. 572.

¹ Tud. Ld. Cas. 306; 2 Sugd. Pow. 55, 62, 75; 4 Cruise Dig. 205; Crompe v. Barrow, 4 Ves. 681; Warner v. Howell, 3 Wash. C. Ct. 12; Hay v. Watkins, 3 Dru. & Warr. 339; Alexander v. Alexander, 2 Ves. Sr. 640; Funk v. Eggleston, 92 Ill. 515; 34 Am. Rep. 136.

² Sadler v. Pratt, 5 Sim. 632.

³ Parker v. Parker, Gibb. Eq. 168; 2 Sugden on

Pow. 85; Tud. Ld. Cas. 317-319; Alexander v. Alexander, 2 Ves. Sr. 640; 4 Cruise Dig. 202; Roe v. Prideaux, 10 East, 158; Powcey v. Bowen, 1 Chan. Cas. 23; Campbell v. Leach, Amb. 740.

⁴ 2 Sugden on Pow. 60, 61; 2 Washb. on Real Prop. 666; Robinson v. Hardcastle, 2 T. R. 241; Leeds v. Wakefield, 10 Gray, 514, 519.

⁵ 4 Cruise Dig. 205; 2 Washb. on Real Prop. 621-668; Butler v. Heustis, 68 Ill. 594; 18 Am. Rep. 589.

not be subsequently exercised, it is the custom to release it, where that is possible.¹

§ 330 s. **Revocation of appointment.**—The donee cannot revoke his appointment, unless he expressly reserves the power of revocation in the instrument of appointment, or it is granted to him in the instrument of creation. And if the power may be exercised by deed or by will, the revocation of an appointment by deed will revive the power to appoint by will.²

§ 330 t. **Defective executions and non-executions, how and when cured.**—The subject-matter, which would properly fall within this subdivision of the subject of powers, has been already fully explained in a preceding connection,³ and the reader is referred thereto for information.

§ 330 u. **Rules of perpetuity applied to powers.**—The rule against perpetuity finds application both to the limitations of the power and to the estates created under the power. If the power can be exercised only at a time beyond that within which all limitations must take effect in possession, viz.: a life or lives in being and twenty-one years thereafter, the power is void. It is, therefore, generally necessary to place a limitation upon the time within which the power may be exercised. A power to one and his heirs, without express or implied limitation, would be void, at least so far as the heirs are concerned.⁴ The greatest difficulty has been experienced in applying the rule against perpetuity to the estates appointed under the power. If the power is special, and the appointment is limited to a person or to persons, none of whom can take from being too remote under the rule, the power is absolutely void. But if the power permits an appointment among a class, some of whom can take, and a discretion is left in the donee as to which individuals of the class shall be appointed, the power will be void as to those who cannot take. The possibility of an illegal appointment will not invalidate the power, if it is in the end properly exercised by an appointment to lawful persons.⁵ In determining the validity of an appointment under a special power in respect to perpetuity, the appointment must be viewed in its relation to, and as a part of, the original instrument creating the power, and must be considered in the light of the circumstances surrounding the estate and the parties thereto, when the original instrument was executed, if the power be created by deed, and at the death of the testator, if by will. Thus, a power to appoint among grandchildren cannot be exercised in favor of such grandchildren, whose parents

¹ 1 Sugden on Pow. 342; 2 *Id.* 43-45; 4 Cruise Dig. 200, 201; Digges' Case, 1 Rep. 174; Co. Lit. 271 b, Butler's note, 231; Woolston v. Woolston, 1 W. Bl. 281.

² 2 Sugden on Pow. 243; Co. Lit. 271 b, Butler's note, 231; Saunders v. Evans, 8 H. L. Cas. 721.

³ See *ante*, §§ 178, 179.

⁴ Bristow v. Warde, 2 Ves. 350; Ware v. Polhill, 11 Ves. 283.

⁵ 1 Sugden on Pow. 471-475; 2 Washb. on Real Prop. 672-675; Co. Lit. 271 b, Butler's note, 231; Gilbert's Uses, 160 n; Marlborough v. Godolphin, 2 Ves. Sr. 61; Routledge v. Dorril, 2 Ves. Jr. 368; Griffith v. Pownall, 13 Sim. 393.

were not in being at the time that the power was created.¹ But if it be a general power, it is so much like an estate in fee, in respect to the restriction against alienation, an appointment will be good if at the time when the power was exercised it did not offend the doctrine of perpetuity. The validity of an appointment under a general power is determined by its condition when made, and not considered as a part of the instrument in which the power was created. An appointment under such a power to unborn children of parents who are *in esse* at the time of execution, but unborn at the time of creation of the power, would be good. The restriction upon alienation only began when the appointment was made.²

§ 330 v. **Rights of donee's creditors in the power.**—The power not being an estate in the land, if the donee's creditors have any interest in the same or in the estate created under the power, it can only be an equitable claim. The donee's creditors have no legal rights in the power.³ Where the power is general and coupled with an interest, a sale of the interest will prevent the subsequent exercise of the power.⁴ In no case can the donee's creditors acquire an interest in, or prevent the execution of a special power. It is also definitely settled that where the donee has not exercised his general power, there is no interest in the donee to which the rights of creditors may attach.⁵ Nor can the creditors, through their assignee in bankruptcy, under the bankrupt law of 1867, execute the power for their benefit.⁶ But it has been held that where the appointment is made under the power to a voluntary appointee, the creditors may levy upon the estate in the appointee's hands; and that the appointee always takes the estate subject to the payment of the donee's debts, if the donee might have exercised the power in favor of his creditors.⁷ Since the creditors have no interest in the power itself, and cannot execute it or compel its execution in their favor; and since the donee never had any other interest in the property except the power, and the estate of the appointee passed to him directly from the donor, it is difficult to understand by what course of reasoning the position of these two courts can be sustained.

§ 330 w. **The rights of creditors of the beneficiaries.**—As a matter of course, if a special power or trust is exercised, the judgment-creditors may levy upon the beneficiary's share in the proceeds of sale.

¹ 2 Washb. on Real Prop. 671; Co. Lit. 271 b, Butler's note, 231; 1 Sugden on Pow. 471-475; 2 Prest. Abst. 165, 166; Routledge v. Dorril, 2 Ves. Jr. 357; Hockley v. Mawbey, 1 Ves. Jr. 150; Dana v. Murray, 122 N. Y. 604; *In re Christie*, 59 Hun, 153.

² 2 Washb. on Real Prop. 671; Fearne's Exec. Dev. 5, Powell's note; 1 Sugden on Pow. 516; Mifflin's Appeal, 121 Pa. St. 205; Appleton's Appeal, 136 Pa. St. 354.

³ Blake v. Irwin, 3 Kelly, 345; Johnson v. Cushing, 15 N. H. 298; Townsend v. Windham,

2 Ves. Jr. 3; Covendale v. Aldrich, 19 Pick. 391.

⁴ Hobbs v. Smith, 15 Ohio St. 419; see *ante*, § 330 c.

⁵ Tallmadge v. Sill, 21 Barb. 34; Johnson v. Cushing, 15 N. H. 298; Lavender v. Lee, 14 Ala. 688; Strong v. Gregory, 19 Ala. 146; see Thorpe v. Goodall, 17 Ves. Jr. 338, 460; Holmes v. Coghill, 12 Ves. 206; Jenny v. Andrews, 6 Madd. 264.

⁶ Jones' Assignee v. Clifton, U. S. Cir. Ct. Dist. of Kentucky, (1878) 7 Cent. L. J. 89.

⁷ Johnson v. Cushing, 15 N. H. 398; Tallmadge v. Sill, 21 Barb. 34.

But they cannot compel the donee to execute the power.¹ And if the legal title descended to the beneficiary, subject to a power of sale, whatever interests the beneficiary's creditors and grantees acquire in the estate will be defeated by the subsequent exercise of the power, but they will in equity attach at once to the beneficiary's share in the proceeds of sale.²

¹ *Chew's Ex'rs v. Chew*, 28 Pa. St. 17.

² *Allison v. Wilson v. Wilson's Ex'rs*, 13 Serg. & R. 330; *Reed v. Underhill* 12 Barb. 113.

CHAPTER XIX.

RIGHTS OF PROPERTY AND CONTRACTUAL POWERS OF MARRIED WOMEN IN EQUITY.

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§ 331. **Legal status of married women.**—The common law rule, in respect to the legal status of married women, pronounced a complete absorption of her legal personality in that of her husband; in other words, the husband and wife constituted but one legal personality, of which the husband was the head and representative. In conformity with this fundamental principle, the husband acquired at the marriage, complete control of the management of the estates and property of the wife. He acquired, not only the right to become absolutely possessed of all her legal personal property by reducing it to possession, but, likewise, the right during the marriage to appropriate to his own use the rents and profits of her real estate. Growing, also, out of this principle of the married woman's loss of legal personality, was the doctrine of the legal disability of married women to make contracts during the marriage, which would be binding upon her and upon her husband. The contract which was made in her name was absolutely void. Nor could she make any disposition of her property except with the consent and co-operation of the husband; not even in respect to her interest in real property, to which the husband's rights in anywise attach. Such may be accepted as a concise statement of the common law in respect to the contracting disabilities of married women and her rights in and to her property, as they obtain, wherever the common law has not been changed by statute. This statement will serve as an introduction to the consideration of the rights of property and contractual powers of married women in equity.

§ 332. **A married woman's equitable separate estate.**—In consequence of the many cases of hardship and injustice growing out of the inflexible common law rule, which gave to the husband complete control of the wife's property, and took away from her the capacity

to make contracts in her own name; equity devised the means for an escape from this hardship, while at the same time it recognized the full force and effect of the common law rules. In obedience to the equitable maxim that "equity follows the law," it did not attempt to give to the ordinary property of a married woman any other character than what was conceded to it at law; but a plan was devised, whereby property could be settled upon a married woman, to be held by her as her sole and separate property; and this separate property was declared by equity to be held by her, in accordance with the purpose of the settlement, free from the marital claims of the husband and his right of control. In such cases, the wife is the *cestui que trust*, having only an equitable estate, and the legal title is in someone else as her trustee. While at an early day it was the more common practice for the property to be expressly conveyed to trustees, to be held by them for her sole and separate use; and although it has been held that such a formal conveyance to trustees was necessary, in order to make the the property thus conveyed to the married woman her separate estate;¹ yet it is well settled, in England and in this country, that it is not necessary for this formal mode of transfer to trustees to be observed. In obedience to the equitable doctrine, that equity will not allow the trust to fail for the want of a trustee, it will fasten upon a direct conveyance to the married woman of the legal estate its equitable character as her separate estate, whenever the grantor or donor declares that to be the purpose of the transfer. Independently of statute, the wife could not under such a direct conveyance hold the legal title to such property as her separate estate. But while such legal title would under those circumstances pass under the control of the husband, in accordance with the common law rules as to his marital rights; yet equity will arrest the equitable and beneficial interest of such property, and retain it in the wife as her sole and separate property, and as an equitable estate, in accordance with the wishes and expressed intention of the donor or grantor, and compel the husband to hold the legal title, which he has thus acquired, as trustee for the wife.² This declaration, that the husband will take the legal title as

¹ *Harvey v. Harvey*, 1 P. Wms. 125, *per* Lord Chan. Cowper.

² *Tullett v. Armstrong*, 4 My. & Cr. 377; *In re Gaffee*, 1 Macn. & G. 541; *Green v. Green*, 5 Hare, 400 n; *Allen v. Walker*, L. R. Ex. 187; *Newlands v. Paynter*, 4 My. & Cr. 408; *Gardner v. Gardner*, 1 Giff. 126; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 369, 375; *Fears v. Brooks*, 12 Ga. 195; *Hamilton v. Bishop*, 8 Yerg. 33; *Long's Adm'r v. White's Adm'r's*, 5 J. J. Marsh. 226; *Freeman v. Freeman*, 9 Mo. 772; *Bennet v. Davis*, 2 P. Wms. 316; *Slanning v. Style*, 3 P. Wms. 334, 337-339; *Lucas v. Lucas*, 1 Atk. 270; *Ellis v. Woods*, 9 Rich. Eq. 19; *Boykin v. Ciples*, 2 Hill's Ch. 200; *Whitten v. Jenkins*, 34 Ga. 297; *Darley v. Darley*, 3 Atk. 399; *Lee v. Prieaux*, 3 Bro. Ch. 381, 385; *Major v. Lansley*,

2 Russ. & M. 355; *Woodmeston v. Walker*, 2 Russ. & M. 197; *McKenna v. Phillips*, 6 Whart. 571; *Trenton Bk. Co. v. Woodruff*, 1 Green's Ch. 117; *Steel v. Steel*, 1 Ired. Eq. 452; *McMillan v. Peacock*, 57 Ala. 127; *Miller v. Voss*, 62 Ala. 123; *Pepper v. Lee*, 53 Ala. 33; *Crooks v. Crooks*, 34 Ohio St. 610; *Blanchard v. Blood*, 2 Barb. 352; *Varner's Appeal*, 80 Pa. St. 140; *Vance v. Nogle*, 70 Pa. St. 176, 179; *Shonk v. Brown*, 61 Pa. St. 320; *Jamison v. Brady*, 6 Serg. & R. 466; *Pribble v. Hall*, 13 Bush, 61; *Thomas v. Harkness*, Bush, 23; *Jones v. Clifton*, 11 Otto, (101 U. S.) 225; *Porter v. Bk. of Rutland*, 19 Vt. 410; *Shirley v. Shirley*, 9 Paige, 363; *Bradish v. Gibbs*, 3 Johns. Ch. 523, 540; *Firemen's Ins. Co. v. Bay*, 4 Barb. 407; *Payne v. Twyman*, 68 Mo. 339; *Loomis v. Brush*, 36 Mich. 40; *Holthaus v.*

trustee for the wife in the case of a direct conveyance to the wife for her separate use, applies only to common law and statutory conveyances. If, however, the deed of conveyance to the wife is a bargain and sale, or *covenant to stand seized* to her use, or any other conveyance which operates under the Statute of Uses, the wife as bargainee or covenantee does not by virtue of the conveyance itself acquire the legal title to such property; only the equitable. And inasmuch as she is declared in such bargain and sale deed, or covenant to stand seized, to take whatever interest she does get by such conveyance as her sole and separate property, the use or equitable estate, thus created in her, will remain unexecuted by the Statute of Uses. The legal title remains in the bargainor or covenantor who will ever after hold it to her sole and separate use.¹ And where the conveyance employed has a dual character; that is, it can operate as a common law or statutory conveyance, as well as a conveyance under the Statute of Uses; the location of the legal title will be in the husband as trustee of the wife where the conveyance is construed to be a common law conveyance; and in the bargainor or covenantor where it is construed to be a conveyance under the Statute of Uses, and that construction as to the character of the conveyance, will prevail, which will best effectuate the intention of the parties to the deed.²

§ 333. **By what modes and instruments separate property may be settled.**—A wife's separate property may include any kind of property, whether real or personal, and whether her interests in such property are absolute or limited; and may be created or settled upon her by almost any legal instrument, which is capable of operating as a legal transfer of property. Thus, such separate estate may be created as ante-nuptial agreements and marriage settlements.³ So, likewise, by post-nuptial agreements and settlements of the husband upon the wife. As to them, there may be a conflict between the wife's interests and the husband's creditors; but, otherwise, such settlements would be as valid and as binding on the parties thereto and their privies, as in the case of ante-nuptial agreements and settlements.⁴ So, also, may

Hornbostle, 60 Mo. 439; Barron v. Barron, 24 Vt. 375; City Nat. Bk. v. Hamilton, 34 N. J. Eq. 158; Davis v. Davis, 43 Ind. 561.

¹ See *ante*, §§ 258, 276, 300; Tiedeman Real Prop., §§ 774-776.

² Tiedeman Real Prop., § 782.

³ Head v. Temple, 4 Heisk. 34; Wallace v. Wallace, 82 Ill. 530; Tucker's Appeal, 75 Pa. St. 354; Hardy v. Holly, 84 N. C. 661; Caulk v. Fox, 13 Fla. 148; Warden v. Jones, 2 De G. & J. 76, 84; Spurgeon v. Collier, 1 Eden, 55, 61; Herring v. Wickham, 29 Gratt. 628; Brown v. Foote, 2 Tenn. Ch. 255; Reynolds v. Brandon, 3 Heisk. 593; see Simmons v. Simmons, 6 Hare, 352, 359; see Smith v. Lucas, L. R. 18 Ch. D. 531; Dawes v. Tredwell, L. R. 18 Ch. D. 354; Kane v. Kane, L. R. 16 Ch. D. 207; Coatney v. Hopkins, 14 W. Va. 338; Radford v. Carwile, 13

W. Va. 572; Bk. of Greensboro' v. Chambers, 30 Gratt. 202; *Ex parte* Bolland, L. R. 17 Eq. 115; Campbell v. Bainbridge, L. R. 6 Eq. 269; *In re* Edwards, L. R. 9 Ch. 97; Hastie v. Hastie, L. R. 2 Ch. D. 304; Viret v. Viret, L. R. 17 Ch. D. 365 n; *In re* Jones' Will, L. R. 2 Ch. D. 362; *In re* Campbell's Policies, L. R. 6 Ch. D. 686; Tullett v. Armstrong, 1 Beav. 1, 21; 4 My. & Cr. 377; *In re* Gaffee, 1 Macn. & G. 541.

⁴ Dukes v. Spangler, 35 Ohio St. 119; Sproul v. Atchison Nat. Bk. 22 Kans. 336; Blakeslee v. Mobile Life Ins. Co., 57 Ala. 205; Kilby v. Godwin, 2 Del. Ch. 61; Perkins v. Perkins, 1 Tenn. Ch. 537; Warden v. Jones, 2 De G. & J. 76, 84; Pride v. Bubb, L. R. 7 Ch. 64; Payne v. Hutcheson, 32 Gratt. 812; Majors v. Everton, 89 Ill. 56; Jones v. Clifton Ins. Co., 57 Ala. 206; Perkins v. Perkins, 1 Tenn. Ch. 537.

there be absolute gifts from the husband to the wife during marriage, to be held by her as her separate property, and which, for that reason, would not be included in her paraphernalia.¹ So, may there also be settlements of property to the married woman's separate use, where the property comes from third persons, and it consists of personal property in the shape of absolute gifts,² or of interests in both real and personal property, having a limited duration, as during life or coverture.³ In all of these settlements of property upon a married woman to her separate use, the form of the settlement is of no value. The special purpose of the courts will be carried out, whether the property is directly conveyed to her, or indirectly, through trustees. But the instrument, which operates as a settlement of property upon her to her separate use, must contain language indicating the intention of the parties, that the property transferred to or settled upon her, shall constitute her separate property to be held by her free from the control and the marital rights of the husband. If the intention that she shall take the property free from the control of the husband, is not manifest in the instrument, which settled the property upon her; whether the estate or interest which was given to her be a legal or an equitable estate, the husband's marital rights will attach thereto.⁴ What

¹ *Loomis v. Brush*, 36 Mich. 40; *Majors v. Everton*, 89 Ill. 56; *Thomas v. Harkness*, 13 Bush, 23; *Irvine v. Greever*, 32 Gratt. 411; *Graham v. Londonderry*, 3 Atk. 393; *Mews v. Mews*, 15 Beav. 529; *Grant v. Grant*, 34 Beav. 623; *Byam v. Byam*, 19 Beav. 58; *McC Campbell v. McC Campbell*, 2 Lea. 661; *Pribble v. Hall*, 13 Bush, 61; *Jones v. Reid*, 12 W. Va. 350; *Rycroft v. Christy*, 3 Beav. 238; *M'Lean v. Longlands*, 5 Ves. 71; *Rich v. Cockell*, 9 Ves. 369; *Hoyes v. Kindersley*, 2 Sm. & Giff. 195, 197; *Haden v. Ivey*, 51 Ala. 381; *Mounger v. Duke*, 53 Ga. 277; *Woodford v. Stephens*, 51 Mo. 443; *Brookville Nat. Bk. v. Kimble*, 76 Ind. 195; *Lloyd v. Pughe*, L. R. 14 Eq. 241; L. R. 8 Ch. 88; *Marshall v. Crutwell*, L. R. 20 Eq. 228; *Ashworth v. Outram*, L. R. 5 Ch. D. 923; *Syracuse, &c. Co. v. Wing*, 85 N. Y. 421; *Campbell v. Bowles' Adm'r*, 30 Gratt. 652; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *In re Eykyn's Trusts*, L. R. 6 Ch. D. 115; *Parker v. Lechmere*, L. R. 12 Ch. D. 256; *Linker v. Linker*, 32 N. J. Eq. 174; *Crooks v. Crooks*, 34 Ohio St. 610; *Helmetag v. Frank*, 61 Ala. 67; *McMillan v. Peacock*, 57 Ala. 127.

² *Holthaus v. Hornbostle*, 60 Mo. 439; *Haden v. Ivey*, 51 Ala. 381; *Steedman v. Poole*, 6 Hare, 193; *Graham v. Londonderry*, 3 Atk. 393.

³ *Austin v. Austin*, L. R. 4 Ch. D. 233; *Miller v. Voss*, 62 Ala. 122; *Robinson v. O'Neal*, 56 Ala. 541; *Goulder v. Camm*, 1 De G. F. & J. 146; *In re Brenton*, L. R. 19 Ch. D. 277; *Bland v. Dawes*, L. R. 17 Ch. D. 794; *Humphrey v. Humphrey*, 1 Sim., n. s., 536; *Grain v. Shipman*, 45 Conn. 572; *Gray v. Robb*, 4 Helsk. 74; *Buckalew v. Blanton*, 7 Coldw. 214; *Gurney v. Goggs*, 25 Beav. 334; *Troutbeck v. Boughey*, L. R. 2 Eq. 534; *Radford v. Willis*, L. R. 7 Ch. 7; *Robertson v. Wilburn*,

1 Lea. 633; *Morrison v. Thistle*, 67 Mo. 596; *Metropolitan Bk. v. Taylor*, 53 Mo. 444; see *Cecil v. Juxon*, 1 Atk. 278; *Prout v. Roby*, 15 Wall. 471; *Musson v. Trigg*, 51 Miss. 172.

⁴ *Heathman v. Hall*, 3 Ired. Eq. 414; *Davis v. Cain's Ex'r*, 1 Ired. Eq. 304; *Rudisell v. Watson*, 2 Dev. Eq. 430; *In re Peacock's Trusts*, L. R. 10 Ch. D. 490, 495, 496; *Bland v. Dawes*, L. R. 17 Ch. D. 794, 797; *Ellis v. Woods*, 9 Rich. Eq. 19; *Martin v. Bell*, 9 Rich. Eq. 42; *Tennant v. Ex'r of Stoney*, 1 Rich. Eq. 222; see *Stanton v. Hall*, 2 Russ. & My. 175, 180; *Darley v. Darley*, 3 Atk. 499; *Moore v. Morris*, 4 Drew. 33, 37; *Massy v. Rowen*, L. R. 4 H. L. 288, 301; *Ballard v. Taylor*, 4 Desau. 550; *Williams v. Avery*, 38 Ala. 115; *Ozley v. Ikelheimer*, 26 Ala. 332; *Cuthbert v. Wolfe*, 19 Ala. 373; *Brown v. Johnson*, 17 Ala. 232; *Tyler v. Lake*, 2 Russ. & My. 183, 188; *Massey v. Parker*, 2 My. & K. 174, 181; *Prout v. Roby*, 15 Wall. 471; *Hale v. Stone*, 14 Ala. 803; *Cook v. Kennerly*, 12 Ala. 42; *Newman v. James*, 12 Ala. 29; *Williams v. Claiborne*, 7 Sm. & Mar. 488; *Wood v. Polk*, 12 Helsk. 230; *Buck v. Wroten*, 24 Gratt. 250; *Woodford v. Stephens*, 61 Mo. 443; *Charles v. Coker*, 2 S. C. 122; *Warren v. Haley*, 1 Sm. & Mar. Ch. 647; *Coatney v. Hopkins*, 14 W. Va. 338; *Griffith's Vdm'r v. Griffith*, 5 B. Mon. 113; *Bridges v. Wood*, 4 Dana, 620; *Hamilton v. Bishop*, 8 Yerg. 33; *Somers v. Craig*, 9 Humph. 467; *Beaufort v. Collier*, 6 Humph. 487; *Woodrum v. Kirkpatrick*, 2 Swan, 218; *Morrison v. Thistle*, 67 Mo. 596; *Comp. Lippincot v. Mitchell*, 4 Otto, 787; *Nix v. Bradley*, 6 Rich. Eq. 43, 48; *Evans v. Gillespie*, 1 Swan, 128; *Houston v. Embry*, 1 Sneed, 480; *Gardenhire v. Hinds*, 1 Head, 402; *Burnley v. Thomas*, 63 Mo. 390, 392; see, also,

will constitute a sufficient expression of the intention to make the estate the separate property of the wife, will depend upon the language of the will or deed or other instrument of settlement. It is not required, however, that that intention should be manifest by any formal or technical language; any language, however informal, which indicates clearly the intention to give to the married woman a separate property, will be sufficient. The ordinary expression used to indicate that intention is, "for her sole and separate use;" but other expressions of the same general meaning will be sufficient, although there may be a slight deviation from the common form. Thus, it has been held that there is a sufficient expression of an intention to create a separate use, where it is declared to be for her "sole benefit," "for her own use independently of her husband," "to be at her disposal to do with it as she should see fit," "to be delivered to her when she should demand it," "to her absolutely," and the like.¹ On the other hand, it has been held insufficient to create a separate estate, where it is declared to be given "to be applied by her to, and for the maintenance of herself and children," "for her use and benefit," and, "that the property is not liable for debt." The idea, that it shall be for her sole and separate use, must in some form be expressed in the instrument.² Where a wife has a separate property, the rent, income and profit of such estate is subjected to the same character; and she is entitled to retain them as her separate property, as well as the vested interests, which are the source of such income; and if she should invest any part of such income, the investment so made will become a part of her separate

Bullock v. Menzies, 4 Ves. 798; *Barrow v. Barrow*, 18 Beav. 528; *Blacklow v. Laws*, 2 Hare, 40, 49; *Radford v. Willis*, L. R. 7 Ch. 7; *Austin v. Austin*, L. R. 4 Ch. D. 233; *Nightingale v. Hidden*, 7 R. L. 115; *Jarvis v. Prentice*, 19 Conn. 273; *Stuart v. Kissam*, 2 Barb. 493; *Snyder v. Snyder*, 10 Barr. 423; *Boal v. Morgner*, 46 Mo. 48; *Clark v. Maguire*, 16 Mo. 302; *Roane v. Rives*, 15 Ark. 328, 330; *Hulme v. Tenant*, 1 Bro. Ch. 16; 1 Eq. Lead. Cas. 679, 709-713, 732-734 (4th Am. ed.); *Tritt's Adm'r v. Colwell's Adm'r*, 7 Casey, 228; *Clevenstine's Appeal*, 3 Harris, 495, 499; *Craig v. Watts*, 8 Watts, 498; *Evans v. Knorr*, 4 Rawle, 66; *Lewis v. Adams*, 6 Leigh, 320; *West v. West's Ex'rs*, 3 Rand. 373, 378; *Goodrum v. Goodrum*, 8 Ired. Eq. 313; *Turton v. Turton*, 6 Md. 375; *Brandt v. Mickle*, 28 Md. 436; *Carroll v. Lee*, 3 Gill & J. 504; *Nixon v. Rose*, 12 Gratt. 425.

¹ *Parker v. Brooke*, 9 Ves. 583; *Miller v. Voss*, 62 Ala. 122; *Robinson v. O'Neal*, 56 Ala. 541; *Sprague v. Shields*, 61 Ala. 423; *Blakeslee v. Mobile Life Ins. Co.*, 57 Ala. 205; *Pepper v. Lee*, 53 Ala. 33; *Shewell v. Dwarries, Johns*, 172; *Dixon v. Olimus*, 2 Cox, 414; *Inglefield v. Coghlan*, 2 Coll. 247; *Lumb v. Milnes*, 5 Ves. 517; *Kirk v. Paulin*, 7 Vin. Abr. 95, pl. 43; *Tyrrell v. Hope*, 2 Atk. 558, 561; *Lee v. Prieaux*, 3 Bro. Ch. 381; *Cooper v. Wells*, 11 Jur., n. s., 923; *Ex parte Ray*, 1 Madd. 199; *Lindsell v. Thacker*,

12 Sim. 178; *Hobson v. Ferraby*, 2 Coll. 412; *Pichard v. Ames*, T. & R. 232; see *Glover v. Hall*, 16 Sim. 568; *Margetts v. Barringer*, 7 Sim. 482; *Wagstaffe v. Smith*, 9 Ves. 520; *In re Tarsey's Trust*, L. R. 1 Eq. 561; *Green v. Britten*, 1 De G. J. & S. 649; *Bland v. Dawes*, L. R. 17 Ch. D. 794; *Williman v. Holmes*, 4 Rich. Eq. 475, 479; *Perry v. Boileau*, 10 Serg. & R. 208; *Good v. Harris*, 2 Ired. Eq. 630; *Jamison v. Brady*, 6 Serg. & R. 466; *Garland v. Pamplin*, 32 Gratt. 305; *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *Charles v. Coker*, 2 S. C. 122; *Gray v. Robb*, 4 Heisk. 74; *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Short v. Battle*, 52 Ala. 456.

² *Fears v. Brooks*, 12 Ga. 195, 198; *Ashcraft v. Little*, 4 Ired. Eq. 236; see *Lewis v. Elrod*, 38 Ala. 17; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551; *Young v. Young, Jones' Eq.* 216; *Martin v. Bell*, 9 Rich. Eq. 42; *Paul v. Leavitt*, 53 Mo. 595; *Massey v. Rowen*, L. R. 4 H. L. 288; *Gilbert v. Lewis*, 1 De G. J. & S. 38; *Lewis v. Matthews*, L. R. 2 Eq. 177; *Spirett v. Willows*, 11 Jur., n. s., 80; *Johnes v. Lockhart*, 3 Bro. Ch. 383 n; *Kensington v. Dollond*, 2 My. & K. 184; *Roberts v. Spicer*, 5 Madd. 491; *Tyler v. Lake*, 2 Russ. & My. 183; *Massey v. Parker*, 2 My. & K. 174; *Lumb v. Milnes*, 5 Ves. 517; *Wardle v. Claxton*, 9 Sim. 524; *Jacobs v. Amyatt*, 1 Madd. 376 n; *Winns v. Sayers*, 4 Madd. 409.

rate estate.¹ And this is the rule, whether the income of the married woman proceeds from a separate estate of lands or of personal property.² With the agreement of the husband, the wife's earnings will also be considered a part of her separate estate.³

But while a married woman is fully protected in respect to her separate estate from any attempt of her husband to control such property, and appropriate it to his own use without the consent of the wife; as a general rule, the wife can authorize the husband to collect and appropriate to his own use the rents and profits of such estate, and after an actual appropriation by him of such income, no action will lie for its recovery, except upon the charge that it had been procured by his exercise of an undue influence over her.⁴

§ 334. **Her power of disposition.**—Inasmuch as the married woman is considered in equity as having, in respect to her separate property, the character of a *femme sole*, it is not surprising that she is conceded the power to dispose of all such separate property by her own acts, and without the co-operation of her husband. According to the English cases, it is not definitely settled that she has the power of disposing of all such separate property, except where in the settlement of such property, restrictions upon or prohibitions of such disposition of such property are imposed.⁵ It was at one time supposed that a difference in respect to her independent power of disposition would be made between the cases, where her separate property had been expressly conveyed to trustees for her use, and those in which the property is conveyed directly to her and declared to be for her sole and separate use. But that distinction is no longer recognized, so that she is conceded to have full power of disposition of her sepa-

¹ *Humphrey v. Richards*, 2 Jur., n. s., 432; *Newlands v. Paynter*, 4 My. & Cr. 408; *Gage v. Lister*, 2 Bro. P. C. 4; *Gore v. Knight*, 2 Vern. 535; but see *Ordway v. Bright*, 7 Heisk. 681; *Askew v. Rooth*, L. R. 17 Eq. 426; *Muggeridge v. Stanton*, 1 De G. F. & J. 107; *Brooke v. Brooke*, 25 Beav. 342; *Barrack v. McCulloch*, 3 K. & J. 110.

² *Joyce v. Haines*, 33 N. J. Eq. 99; *Justis v. English*, 30 Gratt. 566; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158; *Beal's Ex'r v. Storm*, 28 N. J. Eq. 372; *Kidwell v. Kirkpatrick*, 70 Mo. 214.

³ *Jones v. Reid*, 12 W. Va. 350; *Haden v. Ivey*, 51 Ala. 381; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Pribble v. Hall*, 13 Bush, 61.

⁴ *Hughes v. Wells*, 9 Hare, 749, 773; *Darkin v. Darkin*, 17 Beav. 578; *Scales v. Baker*, 28 Beav. 91, and cases cited in note (1) under § 1037; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Dunn v. Sargent*, 101 Mass. 336; *Meth. Epis. Ch. v. Jaques*, 3 Johns. Ch. 77, 90-92; *Coleman v. Semmes*, 56 Miss. 321; *Green v. Carlill*, L. R. 4 Ch. D. 882; *Howard v. Digby*, 8 Bligh, n. s., 224; 2 Cl. & Fin. 634; *Beresford v. Archb. of Armagh*, 13 Sim. 643; *Dalbiac v. Dalbiac*, 16 Ves. 116, 126; *Parkes v. White*, 11 Ves. 209, 225, *Squire v.*

Dean, 4 Bro. Ch. 326; *Payne v. Little*, 26 Beav. 1; *Gardner v. Gardner*, 1 Giff. 126; *Rowley v. Unwin*, 2 K. & J. 138, 142; *Caton v. Rideout*, 1 Macn. & G. 599, 601, 603; *Milnes v. Rusk*, 2 Ves. 488; *Powell v. Hankey*, 2 P. Wms. 82.

⁵ *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268, 274; *Wilcocks v. Hannyngton*, 5 Id. 38; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Fettiplace v. Gorges*, 1 Ves. 46; 3 Bro. Ch. 8; *Rich v. Cockell*, 9 Ves. 369; *Wagstaffe v. Smith*, 9 Ves. 520; *Sturgis v. Corp*, 13 Ves. 190; *Taylor v. Meads*, 4 De G. J. & S. 597, 604-607, *per* Lord Westbury; *Hall v. Waterhouse*, 5 Giff. 64; 11 Jur., n. s., 361; *Lady Arundell v. Phipps*, 10 Jur., n. s., 139; *Anderson v. Anderson*, 2 My. & K. 427; *Calvert v. Johnston*, 3 K. & J. 556; *Stead v. Nelson*, 2 Beav. 245; *Wainwright v. Hardisty*, 2 Beav. 363; *Major v. Lansley*, 2 Russ. & My. 355, 357; *Adams v. Gamble*, 12 Ir. Chan. Rep. 102; *Pride v. Bubb*, L. R. 7 Ch. 64; and see *Cooper v. Macdonald*, L. R. 7 Ch. D. 283; *Thackwell v. Gardiner*, 5 De G. & Sm. 58; *Hodgson v. Hodgson*, 2 Keen, 704; *Humphrey v. Richards*, 2 Jur., n. s., 432; *Troutbeck v. Boughey*, L. R. 2 Eq. 534; *Lechmere v. Brotheridge*, 32 Beav. 353; *Winter v. Easum*, 2 De G. J. & S. 272, *Farington v. Parker*, L. R. 4 Eq. 116.

rate property, in whatever form such property may have been settled upon her.¹ In this country, where the question has not been modified or controlled by modern statute, the courts have divided themselves into two classes, according to the view they entertain of the power of a married woman to dispose of the property. In the majority of the American States the English doctrine has been accepted and acted upon, generally without qualification or limitation; so that in these states a married woman is conceded to have the power of disposition of her separate estate, unless that power is taken away or restrained in the deed of settlement.² In some of these states, which are included in these classes, the distinction is made in respect to the wife's separate estate in fee, between the disposition of the rents and profits, and of the *corpus* of the property. In these states the older English doctrine is adhered to, that the wife cannot, without express authority being given to her, dispose of the *corpus* of her separate property; that she has only the implied power to dispose of the rents and profits.³

In the second class of cases the courts, following the lead of the court of South Carolina, have repudiated the English doctrine altogether, and deny to the wife all power to dispose of her separate property, except where such power is expressly given to her in the deed of settlement. In these states, therefore, the power of disposition

¹ *Hall v. Waterhouse*, 5 Giff. 64; 11 Jur., n. s., 361; *Essex v. Atkins*, 14 Ves. 542; *Hodgson v. Hodgson*, 2 Keen, 704.

² *Vermont*: *Dale v. Robinson*, 51 Vt. 20; *Caldwell v. Renfrew*, 33 Vt. 213; *Frary v. Booth*, 37 Vt. 78. *Connecticut*: *Inlay v. Huntington*, 20 Conn. 148. *New York*: *Gardner v. Gardner*, 7 Paige, 112, 116; *Knowles v. McCamly*, 10 Paige, 342, 346; *Cumming v. Williamson*, 1 Sandf. Ch. 17, 25; *Curtis v. Engel*, 2 *Id.* 287, 289; *Mallory v. Vanderheyden*, 3 Barb. Ch. 10; 1 N. Y. 452, 462; *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450; *Dickerman v. Abrahams*, 21 Barb. 551; *Coon v. Brook*, Barb. 546; *Jaques v. Meth. Epis. Ch.*, 17 Johns. 548, overruling decision of Chancellor Kent in 3 Johns. Ch. 77; *Dyett v. North Am. Coal Co.*, 20 Wend. 570; 7 Paige, 9, 14; *Powell v. Murray*, 2 Edw. Ch. 636, 643; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Wadhams v. Am. Home, &c. Soc.*, 12 N. Y. 415. *New Jersey*: *Peake v. La Baw*, 21 N. J. Eq. 269, 282; *Homeopathic Mut. Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Leaycraft v. Hedden*, 3 Green's Ch. 512, 551; *Perkins v. Elliott*, 23 N. J. Eq. 526. *Delaware*: *Kilby v. Godwin*, 2 Del. Ch. 61. *Maryland*: *Buchanan v. Turner*, 26 Md. 1, 5; *Cooke v. Husbands*, 11 Md. 492. *Virginia*: *Bank of Greensboro' v. Chambers*, 30 Gratt. 202; *Justis v. English*, 30 Gratt. 565; *McChesney v. Brown's Heirs*, 25 Gratt. 393; *Penn v. Whitehead*, 17 Gratt. 503; *Nixon v. Rose*, 12 *Id.* 425; *Vizonneau v. Pegram*, 2 Leigh, 183. *West Virginia*: *Patton v. Merchants' Bank*, 12 W. Va. 587; *Radford v. Carwile*, 13 W. Va. 572; *Coatney v. Hopkins*, 14 W. Va. 338. *North Carolina*: *Har-*

ris v. Harris, 7 Ired. Eq. 111; *Newlin v. Freeman*, 4 Ired. Eq. 312; but see *Hardy v. Holly*, 84 N. C. 661. *Georgia*: *Fears v. Brooks*, 12 Ga. 195, 200; *Wylly v. Collins*, 9 Ga. 223; *Dallas v. Heard*, 32 Ga. 604; *Roberts v. West*, 15 Ga. 122. *Florida*: *Lewis v. Yale*, 4 Fla. 418. *Alabama*: *Miller v. Voss*, 62 Ala. 122; *Bradford v. Greenway*, 17 Ala. 797, 805; *Jenkins v. McConico*, *Id.* 213; *Ozley v. Ikelheimer*, 26 *Id.* 332; *Glenn v. Glenn*, 47 *Id.* 204; *Denechaud v. Berrey*, 48 *Id.* 591; *Short v. Battle*, 52 *Id.* 456; *Robinson v. O'Neal*, 56 *Id.* 541; *Blakeslee v. Mobile Life Ins. Co.*, *Id.* 205; *McMillan v. Peacock*, 57 *Id.* 127; *Sprague v. Shields*, 61 *Id.* 428. *Arkansas*: *Collins v. Wassell*, 34 Ark. 17. *Missouri*: *Whitesides v. Cannon*, 23 Mo. 457; *Segond v. Garland*, 23 Mo. 547; *Coats v. Robinson*, 10 Mo. 757; *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Kimm v. Weippert*, 46 Mo. 532. *Kentucky*: *Burch v. Breckinridge*, 16 B. Mon. 482; *Lillard v. Turner*, 16 B. Mon. 374; *Bell v. Kellar*, 13 *Id.* 381; *Coleman v. Wooley's Ex'r*, 10 *Id.* 320. *Minnesota*: *Pond v. Carpenter*, 12 Minn. 430. *California*: *Miller v. Newton*, 23 Cal. 554. *District of Columbia*: *Smith v. Thompson*, 2 MacArthur, 291.

³ *Bank of Greensboro' v. Chambers*, 30 Gratt. 202; *Justis v. English*, 30 Gratt. 565; *McChesney v. Brown's Heirs* 25 Gratt. 393; *Penn v. Whitehead*, 17 Gratt. 503; *Nixon v. Rose*, 12 *Id.* 425; *Vizonneau v. Pegram*, 2 Leigh, 183; *Coatney v. Hopkins*, 14 W. Va. 338, *Radford v. Carwile*, 13 W. Va. 572; *Patton v. Merchants' Bank*, 12 *Id.* 587.

is dependent solely upon the express provisions of the instrument, by which the separate property is conveyed to her.¹

Where a married woman has only a life estate in her separate property, she may also have added to such life estate the power of appointment over the reversion or expectant estate. And where that is the case, her power of control over the *corpus* of the property is limited to the exercise of the power of appointment.²

In such a case her creditors could not proceed against the property in the hands of the appointee; except, perhaps, where a fraud has been practiced upon the creditors, in which the appointee has participated.³

§ 335. **Restraint upon anticipation.**—In these states, in which married women are conceded to have the power of disposition of property without any express grant of such power, it is always possible to limit such power of disposition, or to absolutely take it away by a declaration to that effect, contained in the deed of settlement. Inasmuch as this general or absolute power of her disposition of her separate property renders her in many cases liable to the undue influence of her husband, which might be exerted to her detriment; it is very often desired by parties settling property upon a married woman for her separate use, to prevent injury to herself by the improper exercise of this power of disposition in favor of the husband. For this reason, when the court of equity proceeded to construct the married woman's separate estate in direct opposition to the common law, it gave to that estate in detail such characteristics as were considered to be most advantageous to the wife, and permitted, therefore, the donor, in the deed or other instrument to expressly limit the wife's

¹ *Rhode Island*: *Metcalf v. Cook*, 2 R. I. 355; but see *Ives v. Harris*, 7 R. I. 413. *New Hampshire*: *Cutter v. Butler*, 25 N. H. 343. *Pennsylvania*: *Wallace v. Coston*, 9 Watts, 137; *Thomas v. Folwell*, 2 Whart. 11, 16; *Lancaster v. Dolan*, 1 Rawle, 231; *Penn. Co. for Ins. v. Foster*, 35 Pa. St. 134; *Wright v. Brown*, 44 Pa. St. 224; *Rogers v. Smith*, 4 Barr. 93; *Lyne's Ex'r v. Course*, 1 Pa. St. 111; *Maurer's Appeal*, 86 Pa. St. 380; *Hepburn's Appeal*, 65 Pa. St. 468; *Wells v. McCall*, 64 Pa. St. 207; *Jones' Appeal*, 57 Pa. St. 369; *McMullin v. Beatty*, 56 Pa. St. 389; *Shonk v. Brown*, 61 Pa. St. 320. *Maryland*: *Tarr v. Williams*, 4 Md. Ch. 68; *Miller v. Williamson*, 5 Md. 219. *Virginia*: (See last note). *North Carolina*: *Hardy v. Holly*, 14 N. C. 661 (for earlier cases, see last note). *South Carolina*: *Adams v. Mackey*, 6 Rich. Eq. 75; *Reid v. Lamar*, 1 Strobh. Eq. 27, 37; *Ewing v. Smith*, 3 Dessau, 417; *Oliver v. Grimbail*, 14 S. C. 556; *Porcher v. Daniels*, 12 Rich. Eq. 349; *Magwood v. Johnston*, 1 Hill's Ch. 228; *Robinson v. Ex'rs of Dart*, Dudley's Eq. 128. *Mississippi*: *Doty v. Mitchell*, 9 Sm. & Mar. 435, 447; *Montgomery v. Agricultural Bk.*, 10 Sm. & Mar. 566, 576; *Armstrong v. Stovall*, 26 Miss. 275; *Musson v. Trigg*, 51 Miss. 172. *Tennessee*: *Hix v. Gosling*, 1 Lea. 560; *Robertson v. Wilburn*, 1 Lea. 633;

Marshall v. Stevens, 8 Humph. 159, 173; but see *Young v. Young*, 7 Coldw. 461; *Head v. Temple*, 4 Heisk. 34; *Gray v. Robb*, Heisk. 74; *Kirby v. Miller*, 4 Coldw. 3; *Ware v. Sharp*, 1 Swan, 489; *Brown v. Foote*, 2 Tenn. Ch. 255; *Cheat-ham v. Huff*, Tenn. Ch. 616; *Reynolds v. Brandon*, 3 Heisk. 593. *Ohio* (partially): *Machir v. Burroughs*, 14 Ohio St. 519. *Illinois*: *Wallace v. Wallace*, 82 Ill. 530; *Cookson v. Toole*, 59 Ill. 515; *Carpenter v. Mitchell*, 50 Ill. 470; *Rogers v. Higgins*, 48 Ill. 211; *Cole v. Van Riper*, 44 Ill. 58; *Swift v. Castle*, 23 Ill. 209; *Bressler v. Kent*, 61 Ill. 426, overruling *Young v. Graff*, 28 Ill. 20.

² *Socket v. Wray*, 4 Bro. Ch. 483; *Lee v. Mugeridge*, 1 V. & B. 118; *Nixon v. Nixon*, 2 Jo. & Lat. 416; see 1 Eq. Lead. Cas. 690; *Brady v. Westcott*, 13 Ves. 445, 451; *Reid v. Shergold*, 10 Ves. 370, 380; and see *Noble v. Willock*, L. R. 8 Ch. 778; *Bishop v. Wall*, L. R. 3 Ch. D. 194; *Anderson v. Dawson*, 15 Ves. 532; *Heatley v. Thomas*, Ves. 596; *Richards v. Chambers*, 10 Ves. 580.

³ *Blatchford v. Woolly*, 2 Dr. & Sm. 204; but see *London Bk. of Australia v. Lempriere*, L. R. 4 P. C. 572; *Shattock v. Shattock*, L. R. 2 Eq. 182; 35 Beav. 489; *Hobday v. Peters*, 28 Beav. 354, 356; 1 Eq. Lead. Cas. 690, 691 (4th Am. ed.); *Vaughan v. Vanderstegen*, 2 Drew. 165, 363.

power of disposition by restrictions, which were intended to serve as a protection against her own indiscretions. The most common restraint upon the power of disposition has been that against anticipation of the rents and profits of the property, as well as the assignment or sale of the *corpus* of the property. The restraint against anticipation, therefore, confined a wife's powers to the periodical receiving of the rents and profits, as they were collected or became due. She was not treated as having all the powers of a single woman in respect to such property, but only such powers as were permitted to her or granted to her in the deed or other instrument of settlement. The courts have given full force and effect to clauses which restrict anticipation of the income or disposition of a married woman's separate estate;¹ but in order that the restraint may be imposed, the intention to impose it must be clearly manifest in the deed or will, by which the property has been settled to the married woman's sole and separate use. No formal or technical expressions are required, in order to manifest this intention; but the intention must be made clear and explicit.² If the expressions are not explicit or clear in the manifestation of the intention to restrain anticipation or sale of the property, then there will be no implication of such intention from words of double meaning. "The restraint upon her power of alienating property settled to her separate use, must be equivalent to an express restraint; it will not be implied from her being authorized to dispose of the property in a particular manner. The *jus disponendi*, and the liability to payment of all debts incurred, can only be taken away or limited by express words, or by an intent so clear as to be equivalent to express words."³

The latter statements are applicable only to those states in which the power of disposition of her separate property is conceded to the married woman, unless such power is taken away. Where the power of disposition in any form is not conceded to the married woman, unless the instrument settling the property upon her contains an authority for the exercise of such power, the restraint upon alienation would be inferred from the general tenor of such instrument and from the absence of an express grant of the power of disposition. On the absence of permissive language rests the presumption, that there is no power to dispose of the property, or to anticipate the income.⁴

¹ *Brandon v. Robinson*, 18 Ves. 429; *In re Gaffee*, 1 Macn. & G. 541; 1 Eq. Lead. Cas. 713-722, 735-748, 765-772; *Baggett v. Meux*, 1 Coll. 138; 1 Phil. 627; *Rennie v. Ritchie*, 12 Cl. & Fin. 204; *Tullett v. Armstrong*, 1 Beav. 1, 23; 4 My. & Cr. 390, 405; *Pybus v. Smith*, 3 Bro. Ch. 340; *Jackson v. Hobhouse*, 2 Meriv. 483, 487.

² *Spring v. Pride*, 10 Jur., n. s., 646; *Re Sarel*, 10 Jur., n. s., 876; *Baker v. Bradley*, 7 De G. M. & G. 597; *Field v. Evans*, 15 Sim. 375; *Moore v. Moore*, 1 Coll. 54, 57; *Harrop v. Howard*, 3 Hare, 624; *Brown v. Bramford*, 1 Phil. 620; *Herbert v. Webster*, L. R. 15 Ch. D. 610; *Radford v. Carwile*, 13 W. Va. 572; *Harnett v.*

Macdougall, 8 Beav. 187; *Steedman v. Poole*, 6 Hare, 193; *Goulder v. Camm*, 1 De G. F. & J. 146; *Baggett v. Meux*, 1 Coll. 138; 1 Phil. 627; *per contra*, *Medley v. Horton*, 14 Sim. 222.

³ *Radford v. Carwile*, 13 W. Va. 572; see, also, *Baker v. Bradley*, 7 De G. M. & G. 597; *Field v. Evans*, 15 Sim. 375; *Pybus v. Smith*, 3 Bro. Ch. 340; *Witts v. Dawkins*, 12 Ves. 501; *Sturgis v. Corp*, 13 Ves. 190; *Acton v. White*, 1 S. & S. 429; *In re Ross' Trust*, 1 Sim., n. s., 196; *Symonds v. Wilkes*, 11 Jur., n. s., 659; see, also, *Perkins v. Hays*, 3 Gray, 405; *Nixon v. Rose*, 12 Gratt. 425; *Nix v. Bradley*, 6 Rich. Eq. 43; *Weeks v. Sego*, 9 Ga. 199.

⁴ *Nix v. Bradley*, 6 Rich. Eq. 43.

Where such a restraint has been imposed upon anticipation or alienation of the married woman's separate property, it deprives her altogether, or to the extent to which the limitation is imposed, of her power of disposition of the property.¹

But the restraint will only continue or be in force during the marriage. Property might be settled upon a single woman to her sole and separate use, and subject to these restraints against anticipation; but it will not become a separate estate as to her until she marries. So, also, if she should marry, and then subsequently survive the husband; his death, and the consequent termination of the coverture, will revive her independence as a single woman, and her restraint upon anticipation will cease to control her rights in and to that property; so, that, notwithstanding the restraint upon anticipation or alienation, the wife can, before marriage, and after the death of her husband, freely dispose of or charge the property which she holds for her sole and separate use during the marriage. For, except during the coverture, the wife's separate estate is governed by the general laws concerning property, and is not at all affected by the equitable rules concerning the separate property of a married woman.² The clause in restraint of anticipation or alienation of property may be expressly limited in its operation to some one particular coverture; and where such limitation is clear, it will not be operative or be revived, in case of a second marriage.³ But the general rule is, as laid down by the courts of England and of most of the American states, that, although the provisions for the separate estate with all these limitations as to power of disposition, become suspended during widowhood, they are revived in case of a second marriage as against the second husband, unless they are clearly restricted to one coverture; and unless, of course, the widow exercises her power of disposition of the property during widowhood; so, that, when the second marriage takes place, what was once her separate property belongs to another.⁴ But in a few of the

¹ *Arnold v. Woodhams*, L. R. 16 Eq. 29; *Clive v. Carew*, 1 J. & H. 199; *Stanley v. Stanley*, L. R. 7 Ch. D. 589; *In re Brettell*, 2 DeJ. & S. 79; *In re Ridley*, L. R. 11 Ch. D. 945; but see *Cooper v. Macdonald*, L. R. 7 Ch. D. 288; *Clive v. Clive*, L. R. 7 Ch. 433; *Kenrick v. Wood*, L. R. 9 Eq. 333; *In re Brenton*, L. R. 19 Ch. D. 277; *In re Ellis' Trust*, L. R. 17 Eq. 409; *Pike v. Fitzgibbons*, L. R. 17 Ch. D. 454; *Horlock v. Horlock*, 2 De G. M. & G. 644; *In re Sykes' Trusts*, 2 J. & H. 415.

² *Ash v. Bowen*, Phila. 96; *Ogden's Appeal*, 70 Phila. 501; *Wells v. McCall*, 64 Pa. St. 207; *Springer v. Arundel*, Pa. St. 218; *Hamersley v. Smith*, 4 Whart. 126; *Snyder's Appeal*, 92 Pa. St. 504; *In re Stirling*, 11 Phila. 150; *Pickering v. Coates*, 10 Phila. 65; *Lindsay v. Harrison*, 3 Eng. (Ark.) 302, 311; *Apple v. Allen*, 3 Jones' Eq. 120; but see *Bridges v. Wilkins*, Jones' Eq. 342; *Tullett v. Armstrong*, 4 My. & Cr. 377; *Massey v. Parker*, 2 My. & K. 174; *Wright v. Wright*,

2 J. & H. 647, 655; *Barton v. Briscoe*, Jacob, 603; *In re Gaffee*, 1 Macn. & G. 541, 547; *Tullett v. Armstrong*, 1 Beav. 1, 22; 4 My. & Cr. 377, 392; *Buttanshaw v. Martin*, Johns. 89; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Foote*, 2 Tenn. Ch. 255; *Hepburn's Appeal*, 65 Pa. St. 468.

³ *Hawkes v. Hubback*, L. R. 11 Eq. 5; *Moore v. Morris*, 5 Drew. 33; *In re Gaffee*, 1 Macn. & G. 541, 545.

⁴ *Anderson v. Anderson*, 2 My. & K. 427; *Hawkes v. Hubback*, L. R. 11 Eq. 5; *Newlands v. Paynter*, 4 My. & Cr. 408; *Staggers v. Matthews*, 13 Rich. Eq. 142, 154; *Nix v. Bradley*, 6 Rich. Eq. 43; *Fellows v. Tann*, 9 Ala. 999; *Beaufort v. Collier*, Humph. 487; *Brown v. Foote*, 2 Tenn. Ch. 255; *Tullett v. Armstrong*, 4 My. & Cr. 377; 1 Beav. 1; *In re Gaffee*, 1 Macn. & G. 541; *Scarborough v. Borman*, 4 My. & Cr. 378; *Shirley v. Shirley*, 9 Paige, 363; *Waters v. Tazewell*, 9 Md. 291; *Fears v. Brooks*, 12 Ga. 195, 197; *Robert v. West*, 15 Ga. 122.

states, it has been held, that the restraint upon alienation will only operate during the single marriage, in which the separate use was originally created.¹

§ 336. **Disposition of separate estate on death of wife.**—After the termination of the coverture, the married woman has been shown to have full power to dispose of, alien or charge her separate property, notwithstanding the restrictions which may be imposed upon her control of her separate estate.² Therefore, when she dies, her property devolves upon her heirs or her husband, under the general laws concerning the descent and distribution of property; that is, in the absence of statutory changes, her lands which were held in fee will go to the heirs, subject to the husband's curtesy, unless the husband's curtesy is excluded,³ and the personal property would go to the administrator, whether he be the husband or someone else.⁴ Of course, where she has the power to dispose of such separate property by will, as she has by statute in most of the states, such disposition would change the devolution of the property.⁵

§ 337. **The condition of the law in the American states.**—It would be very difficult to give, in any general statement, detailed explanations of the law in the different states, in respect to the powers of married women over their separate estates, and their power to make contracts, which would be binding upon such separate estates or upon them absolutely. In a few of the states, like New York, statutes have been passed which give to the married woman the same absolutely independent position, not only in respect to her property rights, but also in respect to the power of making binding contracts, which is enjoyed by the single woman. In these states, the entire law in respect to the legal disabilities of married women has been abolished; and, therefore, the married woman stands free from all such disabilities, and on the same plane of equality with single women. In these states, therefore, there is never any question as to any separate estate or the limitations of a married woman in respect to her power of making contracts. She can make contracts which will be binding upon her, and which will support a personal judgment against her. Such is found to be the law in California, Colorado, Iowa, New Jersey, Nevada, New York and South Carolina. In New York, also, it is expressly provided that, where an express trust is granted, if it is valid at all, the beneficiary does not obtain any fixed title or interest which he can

¹ *Miller v. Bingham*, 1 Ired. Eq. 423; *Apple v. Allen*, 3 Jones' Eq. 120; and see cases *ante* in note (1), p. 30, under § 1105; *Hepburn's Appeal*, 65 Pa. St. 468; *Bush's Appeal*, 33 Pa. St. 85; *McKee v. McKinley*, Pa. St. 92; *Lindsay v. Harrison*, 3 Eng. (Ark.) 302, 311; *Hamersley v. Smith*, 4 Whart. 126; *Kuhn v. Newman*, 26 Pa. St. 227; *Dubs v. Dubs*, 31 Pa. St. 149; *Freyvogel v. Hughes*, 56 Pa. St. 228.

² See *ante*, § 335.

³ See *post*, § 342.

⁴ *Musters v. Wright*, 2 De G. & Sm. 777; *Stewart v. Stewart*, 7 Johns. Ch. 229; *Donnington v. Mitchell*, 1 Green's Ch. 243; *Cooney v. Woodburn*, 33 Md. 320; *Appleton v. Bowley*, L. R. 8 Eq. 139; *Molony v. Kennedy*, 10 Sim. 254; *Johnstone v. Lumb*, 15 Sim. 308; *Proudley v. Fielder*, 2 My. & K. 57; *Roberts v. Dixwell*, 1 Atk. 607; *Pitt v. Jackson*, 2 Bro. Ch. 51; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Harris v. Mott*, 14 Beav. 169.

⁵ See *Tiedeman Real Prop.*, § 881.

dispose of or charge; and such is also found to be the law in perhaps a few of the other states.¹

In a great many of the states, which are not to be included within the states following the example of New York, the legislation concerning the rights of married women is more limited in extent, although everywhere the legal rights of the married woman have been greatly enlarged. In other words, in these states she is not given the absolute power of acting in respect to her proprietary interests as a single woman is; so, that the power to contract a personal obligation is not granted to her; but, at the same time, the statutes have included, under the description of her separate property, which she can hold free from the claims of her husband, not only the equitable estates which could be settled to her separate use prior to the statutory reform, but all of her legal estates, which otherwise would have been subjected to the marital claims of the husband. There is, however, a possibility of division of these states into two classes: In one class, all the property of the married woman is declared to be her separate estate, free from any interest or control of her husband, and from liability for his debts, but there is no express provision concerning its liability for her own debts. In the second class, the same provision is found in respect to making all of her property her separate estate; but an express provision is added, which makes certain debts, or her debts in general, binding upon her separate estate, while these contracts are not declared to be personally binding on her. Such statutes are to be found in Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, West Virginia and Wisconsin.

It is a general rule that, where statutes have been passed giving to the married woman's property in general the characteristic of a separate estate, she will not have the power to convey such property where it constitutes lands, unless such power is expressly given by the statute; this, in the absence of such statutory authority to convey such property in any other way than what is generally provided for, this legal separate property of the married woman can only be transferred or conveyed by her when her husband joins in the conveyance with her, and all the formalities are observed, which were required in the conveyance of her legal estates prior to the statute.² Where the statute gives her the power to dispose of such property but prescribes a form for the execution of the conveyance, the form must be strictly followed.³ But where the power of disposition is given without any

¹ See *ante*, §§ 289, 294, 301; *Noyes v. Blake-man*, 6 N. Y. 567; 3 Sandf. 531; *Bramhall v. Ferris*, 14 N. Y. 41.

² *Parent v. Callerland*, 64 Ill. 97, 99; *Swift v.*

Luce, 27 Me. 285; *Lucas v. Cobbs*, 1 Dev. & B. (N. Car.) L. 228, 232; *Bressler v. Kent*, 61 Ill. 426; *Rogers v. Higgins*, 48 Ill. 211, 216.

³ *Silliman v. Cummins*, 13 Ohio, 116, 118.

specification of the form of the deed, she may transfer it by whatever deed would be valid, if she were single.¹

§ 338. **Contracts of married women.—General doctrine.**—As has already been stated, the common law did not recognize in the married woman the power to make a valid contract in her own name. She could, of course, make contracts as the agent of the husband, whenever she was authorized to do so by him; and, also, in many cases the law implied the power to make such contracts in his name, where he failed to perform his duty to her, in providing a reasonable support. But contracts, which were made by the married woman in her individual capacity, were absolutely void at common law. When, however, the court of equity provided for the recognition of a married woman's separate estate, and declared that she would hold that separate estate free from the control of the husband, it became an important question, how far the married woman could make this separate estate liable for her debts, and the property be sold at the instance of such creditors for the satisfaction of such claims? It must be borne in mind, that with the creation of the separate estate, the married woman was not treated in every particular as a single woman, but only given such power of control and disposition in respect to such separate estate, which was deemed advantageous to her. It did not give her any greater liberty, in respect to the making of contracts, which would bind her personally; but it was conceded that a limited power of making contracts would be necessary to the full enjoyment of her separate estate; particularly, where the contracts were necessary, in order to maintain the separate property in a proper condition. Without doubt, the first step to the recognition of a married woman's ability to contract debts as a charge to her separate property, was taken in respect to the benefit or maintenance of her separate estate; but gradually the power to charge the separate estate was enlarged, so that it may be stated as the generally accepted doctrine—at least in those states where the English doctrine in respect to the married woman's power of disposition over her separate property is recognized—that, whenever she indicates an intention to make the payment of a debt contracted by her in her individual capacity a charge upon her separate estate; it matters not what was the nature of such debt, or the purpose for which it was contracted; if the debt was contracted on the credit of this separate estate, and was intended by her to be charged upon such separate estate, the contract will be valid, not as a personal obligation of the married woman, but as a charge or lien upon her separate estate. Under the English rule, as it has been finally formulated, the debt will constitute a charge upon the separate estate whenever the character of the obligation involves some individual benefit to herself, and is in form, as well as in fact, an obligation assumed by

¹Silliman v. Cummins, 13 Ohio, 116, 191; Edwards v. Schoeneman, 104 Ill. 278, 284; Scranton v. Stewart, 52 Ind. 68, 89.

herself in her individual capacity. It has thus been settled, that the wife's separate estate is liable for all her contracts under seal,¹ bills of exchange and promissory notes,² as well as all other written agreements, from which she derives the benefit herself.³ So, also, as it has been finally stated by the English cases, her verbal contracts and debts will constitute charges upon her separate estate, where it can be shown that they were made on the credit of such separate estate.⁴ Of course, the power to charge her separate property with her debts is taken away from her, whenever a restraint is imposed upon her right of anticipating the income, or otherwise disposing of her separate property.⁵

Inasmuch as the charge of these debts upon the separate property is the result of an actual or implied intention of the wife to so charge her separate property; it could not be considered to operate as a charge upon any separate property, which she does not own at the time of entering into the contract, and which does not still remain her property when the judgment is rendered against her.⁶

§ 339. **Married women's power to contract in the United States.**—Bearing in mind the statutory changes, which have been made, and which have already been explained in respect to the married women's separate estates; it must first be stated that, in those states in which the entire system of the common law and equity, in respect to the property rights of married women, has been abolished, and the same independence given in law to the married woman as a single woman has, the statute gives her the power to make contracts, which will be binding upon her individually, as well as upon her estate.⁷

¹ *Pike v. Fitzgibbons*, L. R. 14 Ch. D. 837; 17 *Id.* 454; *Hulme v. Tenant*, 1 Bro. Ch. 16; *Heatley v. Thomas*, 15 Ves. 596.

² *Vandergucht v. De Blaquiére*, 5 My. & Cr. 229; *Owen v. Homan*, 4 H. L. Cas. 997; *McHenry v. Baviés*, L. R. 10 Eq. 88; *Davies v. Jenkins*, L. R. 6 Ch. D. 728; *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Lord Kirkwall*, 3 Madd. 387; *Field v. Sowle*, 4 Russ. 112.

³ *Owen v. Homan*, 4 H. L. Cas. 997; *Picard v. Hine*, L. R. 5 Ch. 274; *Morrell v. Cowan*, L. R. 6 Ch. D. 166; *Master v. Fuller*, 4 Bro. Ch. 19; 1 Ves. 513; *Owens v. Dickenson*, Cr. & Ph. 48; *Murray v. Barlee*, 3 My. & K. 209.

⁴ *Shattock v. Shattock*, L. R. 2 Eq. 182; *Butler v. Heyl*, L. R. 20 Eq. 321, 324; *Picard v. Hine*, L. R. 5 Ch. 274, 277; *Johnson v. Gallagher*, 3 De G. F. & J. 494; *Mrs. Matthewman's Case*, L. R. 3 Eq. 781; *Hodgson v. Williamson*, L. R. 15 Ch. D. 87; *Mayd v. Field*, L. R. 3 Ch. D. 587.

⁵ *Re Syke's Trusts*, 2 J. & H. 415; *Roberts v. Watkins*, 46 L. J. (Q. B.) 552; *Pike v. Fitzgibbons*, L. R. 17 Ch. D. 454, 459, 462, 463, overruling *s. c.*, L. R. 14 Ch. D. 837.

⁶ *Roberts v. Watkins*, 46 L. J. (Q. B.) 552; *Pike v. Fitzgibbons*, L. R. 17 Ch. D. 454, 460, 462, 465; *Re Syke's Trusts*, 2 J. & H. 415. It may be added that this doctrine is not recognized by some of the American courts, at least in res-

pect to the legal estates which have by statute been made her separate property.

⁷ *New York*: *Ackley v. Westervelt*, 86 N. Y. 448; *McKeon v. Hagan*, 18 Hun, 65; *Williamson v. Duffy*, 19 N. Y. 312; *Embree v. Franklin*, 23 N. Y. 203; *People v. Williams*, 8 Daly, 264; *Blanke v. Bryant*, 55 N. Y. 649; *Loomis v. Ruck*, 56 N. Y. 462; *Manhattan, &c. Co. v. Thompson*, 58 N. Y. 80; *Cashman v. Henry*, 75 N. Y. 103; *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613; *Maxon v. Scott*, 55 N. Y. 247; *Hier v. Staples*, 51 N. Y. 136; *Hinckley v. Smith*, 51 N. Y. 21; *Frecking v. Rolland*, 53 N. Y. 422, 426. *New Jersey*: *Hinkson v. Williams*, 41 N. J. L. (12 Vroom) 35; *Wilson v. Herbert*, N. J. L. 454. *Nevada*: *Barrenberger v. Haupt*, 10 Nev. 43; *Beckman v. Stanley*, 8 Nev. 257. *South Carolina*: *Clinkscales v. Hall*, 15 S. C. 602; *Ross v. Linder*, 12 S. C. 592; *Pelzer v. Campbell*, 15 S. C. 581. *Colorado*: *Wells v. Caywood*, 3 Col. 487; *Coon v. Rigden*, 4 Col. 275. *California*: *Parry v. Kelley*, Cal. 334; *Marlow v. Barlew*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 15; *Wood v. Orford*, 52 Cal. 412. *Iowa*: *Miller v. Hollingsworth*, Iowa, 163; *Spafford v. Warren*, 47 Iowa, 47; *Sweazy v. Kammer*, 51 Iowa, 642; *Mitchell v. Smith*, 32 Iowa, 484, 487; *First Nat. Bk. v. Haire*, 36 Iowa, 443.

It may be added that, where cases are cited from these states in support of the limited power of a married woman to charge her separate estate with her debts, that these cases so cited were rendered prior to the adoption of the statute in question.

It must also be observed that, in those states already referred to, where the statutes modifying the married woman's property rights did not go to the length of completely emancipating her from the common law disabilities, but simply extended her separate estate to all of her property, the principles of law in respect to her contractual capacity, as they were evolved by the adjudication of the courts of equity in respect to the married woman's equitable separate estate, were applied without qualification to her legal separate estates which had by statute been given all the characteristics of a separate estate. These American courts may be divided into three classes, according to the power which is conceded to the married woman to charge her separate estate with her debts. In the first class, the English courts have been closely followed and the doctrine laid down in such states, that the married woman's separate estate is liable for all her contracts, entered into for the benefit of such estate or for her own benefit, it matters not what may be the form of such contracts; and although the intention to charge such separate estate is not expressly declared in the instrument. When a wife's contract is one of surety or guaranty, it will be a good charge upon the separate estate only where she expressly declares her intention to so charge her separate estate. Such is found to be the law in Alabama, Missouri, Ohio, Virginia, and West Virginia.¹ In the second class of states, in order that her debts might constitute a charge upon the separate property, the intent to so charge her separate estate, it must appear affirmatively and expressly, and cannot be

¹ *Fry v. Hammer*, 50 Ala. 52; *Riley v. Pierce*, Ala. 93; *Booker v. Booker's Adm'r*, 32 Ala. 473; *Sprague v. Tysdon*, 44 Ala. 338; *Brame v. McGee*, 46 *Id.* 170; *Jones v. Reese*, 65 *Id.* 134; *Drake v. Glover*, 30 *Id.* 382; *Gunter v. Williams*, 40 *Id.* 561, 572; *Smyth v. Oliver*, 31 *Id.* 39; *Canty v. Sanderford*, 37 *Id.* 91; *Miller v. Voss*, 62 *Id.* 122; *Sprague v. Shields*, 61 *Id.* 428; *Lee v. Tanzenbaum*, 62 *Id.* 501; *Rogers v. Boyd*, 33 *Id.* 175; *Pickens v. Oliver*, 29 *Id.* 528; *Ozley v. Ikellheimer*, 26 *Id.* 332; *Bradford v. Greenway*, 17 *Id.* 797; *Shulman v. Fitzpatrick*, *Id.* 571; *Short v. Battle*, 52 *Id.* 456; *Williams v. Baldridge*, 66 *Id.* 338; *Paulk v. Wolfe*, 34 *Id.* 541; *Staley v. Howard*, 7 Mo. App. 377; *Boatmen's Sav. Bk. v. Collins*, Mo. 280; *Klenke v. Koeltze*, Mo. 239; *Davis v. Smith*, 75 Mo. 219; *Gage v. Gates*, 62 Mo. 412; *Eystra v. Capelle*, 61 Mo. 578; *Burnley v. Thomas*, 63 Mo. 390; *Clark v. National Bk.*, 47 Mo. 17; *Metrop. Bk. v. Taylor*, 53 Mo. 444; 62 *Id.* 338; *Boeckler v. McGowan*, 9 Mo. App. 373; *Miller v. Brown*, 47 Mo. 504; *Pemberton v. Johnson*, 46 Mo. 342; *Schafroth v. Ambs*, 46 Mo. 114; *Kimm v. Weippert*, 46 Mo. 532; *Lincoln v. Rowe*, 51 Mo. 571; *Meyers v. Van*

Wagoner, 56 Mo. 115; *Maguire v. Maguire*, 3 Mo. App. 458; *Pratt v. Eaton*, 65 Mo. 157; *Dameron v. Jamison*, 4 Mo. 299; *Nash v. Norment*, 5 Mo. App. 545; *Morrison v. Thistle*, 67 Mo. 596; *Hooton v. Ransom*, 6 Mo. App. 19; *Gay v. Ihm*, 69 Mo. 584; *De Baun v. Van Wagoner*, 56 Mo. 347, 349; *Westerman v. Westerman*, 25 Ohio, 500; *Logan v. Thrift*, 20 Ohio, 62; *Clark v. Clark*, Ohio, 128; *Allison v. Porter*, 29 Ohio, 136; *Machir v. Burroughs*, 14 Ohio, 519; *Avery v. Vansickle*, 35 Ohio St. 270; *Williams v. Urmston*, 35 Ohio St. 296; *Rice v. Railroad Co.*, 32 *Id.* 380; *Levi v. Earl*, 30 *Id.* 147; *Phillips v. Graves*, 20 *Id.* 371; *Patrick v. Littell*, 36 *Id.* 79; *Fallis v. Keys*, 35 *Id.* 265; *Swasey v. Antram*, 24 *Id.* 87; *Jenz v. Gugel*, 26 *Id.* 527; *Meiley v. Butler*, *Id.* 535; *Muller v. Bayly*, 21 Gratt. 521; *Frank v. Lillienfeld*, 33 *Id.* 377; *Triplett v. Romine's Adm'r*, *Id.* 651; *Penn v. Whitehead*, 17 *Id.* 503; *Harshberger's Adm'r v. Alger*, 31 Gratt. 52; *Garland v. Pamplin*, 32 *Id.* 305; *Burnett v. Hawpe's Ex'r*, 25 *Id.* 481; *Radford v. Carwile*, 13 W. Va. 572; *Weinberg v. Rempe*, 15 W. Va. 829.

implied or presumed from any form of the engagement; except in the one case, where the debt is contracted for the benefit of the separate estate. In all other cases it will only constitute a charge upon the separate estate when this intention is expressly declared. Such is found to be the law in Indiana, Kentucky, Maryland, Rhode Island, Vermont, New Jersey, and New York.¹ In the third class of cases, are those states in which it is held that she has no power to contract debts as a charge upon her separate estate, unless the power to so charge the property is expressly given in the instrument creating it. Where such power is given in the instrument, the debt will only constitute a charge upon the separate estate, where it is made for the benefit of such estate, or when it is expressly declared to be made on the credit of such estate and intended to be a charge upon it. Such is found to be the law in Massachusetts, Mississippi, Tennessee, and formerly South Carolina.² Other cases are cited from other states, which do not fall specifically within the classification here given, but which support generally the right of the married woman to contract debts, which will be binding upon her separate estate.³

¹ *Miller v. Albertson*, 73 Ind. 343; *Vail v. Meyer*, 71 Ind. 159; *Smith v. Smith*, 80 *Id.* 267; *Wooden v. Wampler*, 69 *Id.* 88; *Jackman v. Nowling*, *Id.* 188; *Patton v. Rankin*, 68 *Id.* 245; *Williams v. Wilbur*, 67 *Id.* 42; *Smith v. Howe*, 31 *Id.* 233; *Kantrowitz v. Prather*, 31 Ind. 92; *Lindley v. Cross*, *Id.* 106; *O'Daily v. Morris*, *Id.* 111; *Montgomery v. Sprinkle*, *Id.* 113; *Bellows v. Rosenthal*, *Id.* 116; *Putnam v. Tennyson*, 50 *Id.* 456; *Penn v. Young*, 10 Bush, 626; *Hannon v. Madden*, *Id.* 664; *Moreland v. Myall*, 14 *Id.* 474; *Uhrig v. Horstman*, 8 *Id.* 172; *Lillard v. Turner*, 16 B. Mon. 374; *Burch v. Breckinridge*, *Id.* 482; *Young v. Smith*, 9 Bush, 421; *Smith v. McAtee*, 27 Md. 420; *Niller v. Johnson*, *Id.* 6; *Six v. Shaner*, 26 *Id.* 415; *Buchanan v. Turner*, *Id.* 1; *Cooke v. Husbands*, 11 *Id.* 492; *Rice v. Hoffman*, 35 *Id.* 344; *Warner v. Dove*, 33 *Id.* 579; *Barton v. Barton*, 32 *Id.* 214; *Kuhn v. Stansfield*, 28 *Id.* 210; *Wilson v. Jones*, 46 Md. 349; *Kerchner v. Kempton*, 47 Md. 568; *Trader v. Lowe*, 45 *Id.* 1; *Plumer v. Jarman*, 44 *Id.* 632; *Oswald v. Hoover*, 43 *Id.* 360; *Hoffman v. Rice*, 38 *Id.* 264; *Petition of O'Brien*, 11 R. I. 419; *Berry v. Teel*, 12 *Id.* 267, 268; *Warner v. Peck*, 11 *Id.* 431; *Elliott v. Gower*, 12 R. I. 79; *Angell v. McCullough*, 12 R. I. 47; *Webster v. Hildreth*, 33 Vt. 457; *White v. Hildreth*, 32 Vt. 265; *Peck v. Walton*, 26 *Id.* 82; *Dale v. Robinson*, 51 Vt. 20; *Hinkson v. Williams*, 41 N. J. L. (12 Vroom) 35; *Wilson v. Herbert*, *Id.* 454; *Blake v. Bryant*, 55 N. Y. 649; *Loomis v. Ruck*, 56 N. Y. 462; *Manhattan, &c. Co. v. Thompson*, 58 N. Y. 80; *Cashman v. Henry*, 75 N. Y. 103; *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Corn Exch. Ins. Co. v. Babcock*, 43 N. Y. 613; *Maxon v. Scott*, 55 N. Y. 247; *Hier v. Staples*, 51 N. Y. 136; *Hinckley v. Smith*, 51 N. Y. 21; *Frecking v. Rolland*, 53 N. Y. 422, 426; *Ackley v. Westervelt*, 86 N. Y. 448; *McKeon v. Hagan*,

18 Hun, 65; *Williamson v. Duffy*, 19 N. Y. 312; *Embree v. Ward*, 8 Allen, 387; *Magwood v. Johnston*, 1 Hill's Ch. 223; *Cater v. Eveleigh*, 4 Desau. 19; *James v. Mayrant*, 4 Desau. 591; *Adams v. Mackey*, 6 Rich. Eq. 75; *Heburn v. Warner*, 112 Mass. 271; *Tracy v. Keith*, 11 Allen, 214; *Common'th v. Williams*, 7 Gray, 337; *Conant v. Warren*, 6 *Id.* 562; *Beal v. Warren*, 2 *Id.* 447; *Eastabrook v. Earle*, 97 Mass. 302; *Faucett v. Currier*, 109 Mass. 79; *McCluskey v. Provident Inst.*, 103 *Id.* 300; *Larabee v. Colby*, 99 *Id.* 559; *Towle v. Towle*, 114 *Id.* 167; *Stevens v. Reed*, 112 Mass. 515; *Nourse v. Henshaw*, 123 Mass. 96; *Merriam v. Boston, &c. R. R.* 117 Mass. 241; *Pierce v. Kittredge*, 115 Mass. 374; *Morrison v. Kinstra*, 55 Miss. 71; *Musson v. Trigg*, 51 Miss. 172; *Ogden v. Guice*, 56 Miss. 330; *Davis v. Jennings*, 3 Tenn. Ch. 241; *Arington v. Roper*, *Id.* 572; *Sherman v. Turpin*, *Coldw.* 382; *Young v. Young*, 7 *Id.* 461; *Hughes v. Peters*, 1 *Id.* 67; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Moseby v. Partee*, 5 Helsk. 26; *Shacklett v. Polk*, 4 *Id.* 104; *Head v. Temple*, *Id.* 34.

² *Willard v. Eastham*, 15 Gray, 328; see, also, *Rogers v. Ward*, 8 Allen, 387; *Magwood v. Johnston*, 1 Hill's Ch. 223; *Cater v. Eveleigh*, 4 Desau. 19; *James v. Mayrant*, 4 Desau. 591; *Adams v. Mackey*, 6 Rich. Eq. 75; *Heburn v. Warner*, 112 Mass. 271; *Tracy v. Keith*, 11 Allen, 214; *Common'th v. Williams*, 7 Gray, 337; *Conant v. Warren*, 6 *Id.* 562; *Beal v. Warren*, 2 *Id.* 447; *Eastabrook v. Earle*, 97 Mass. 302; *Faucett v. Currier*, 109 Mass. 79; *McCluskey v. Provident Inst.*, 103 *Id.* 300; *Larabee v. Colby*, 99 *Id.* 559; *Towle v. Towle*, 114 *Id.* 167; *Stevens v. Reed*, 112 Mass. 515; *Nourse v. Henshaw*, 123 Mass. 96; *Merriam v. Boston, &c. R. R.* 117 Mass. 241; *Pierce v. Kittredge*, 115 Mass. 374; *Morrison v. Kinstra*, 55 Miss. 71; *Musson v. Trigg*, 51 Miss. 172; *Ogden v. Guice*, 56 Miss. 330; *Davis v. Jennings*, 3 Tenn. Ch. 241; *Arington v. Roper*, *Id.* 572; *Sherman v. Turpin*, *Coldw.* 382; *Young v. Young*, 7 *Id.* 461; *Hughes v. Peters*, 1 *Id.* 67; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Moseby v. Partee*, 5 Helsk. 26; *Shacklett v. Polk*, 4 *Id.* 104; *Head v. Temple*, *Id.* 34.

³ *Arkansas: Scott v. Ward*, 35 Ark. 480; *Dyer v. Arnold*, 37 *Id.* 17; *Henry v. Blackburn*, 32

§ 340. **Settlement by wife in fraud of the marriage.**—Inasmuch as, under the common law, the husband became entitled at the marriage to marital interests in the wife's property, except when such property had been settled to her sole and separate use, it was considered to be a species of fraud upon the husband, if there was any secret

Ark. 445; Stillwell v. Adams, 29 Ark. 346; Collins v. Wassell, 34 *Id.* 17; Roberts v. Wilcoxon, 36 *Id.* 355; Ward v. Estate of Ward, *Id.* 586; Collins v. Underwood, 33 *Id.* 265. *California*: Miller v. Newton, 23 Cal. 554; Maclay v. Love, 25 *Id.* 387; Drais v. Hogan, 50 Cal. 121, 128; Friedberg v. Parker, *Id.* 103; Terry v. Hammonds, 47 *Id.* 32. *Connecticut*: Jennings v. Davis, Conn. 134; Jackson v. Hubbard, 36 *Id.* 10; Imlay v. Huntington, 20 *Id.* 146, 175; Donovan's Appeal, 41 *Id.* 551; Hitchcock v. Kiely, 41 *Id.* 611; Gore v. Carl, 47 *Id.* 291; Whiting v. Beckwith, 31 *Id.* 596. *Delaware*: State v. Gorman, 4 Houst. 624; Ross v. Singleton, 1 Del. Ch. 149. *Florida*: Adm'r of Smith v. Poythress, 2 Fla. 92; Lewis v. Yale, 4 *Id.* 418; Maiben v. Bohe, *Id.* 381; Sanderson v. Jones, 6 *Id.* 430; Lignoski v. Bruce, *Id.* 269; Tison v. Mattair, 8 Fla. 107; Alston v. Rowles, 13 *Id.* 117. *Georgia*: Kent v. Plumb, 57 Ga. 207; Humphrey v. Copeland, 54 *Id.* 543; Clark v. Valentino, 41 *Id.* 143; Huff v. Wright, 39 *Id.* 41; Dallas v. Heard, 32 Ga. 604; Robert v. West, 15 *Id.* 123; Cherokee Lodge v. White, 63 *Id.* 742. *Illinois*: McDavid v. Adams, 77 Ill. 155; Doyle v. Kelley, 75 *Id.* 574; Harrer v. Wallner, 80 *Id.* 197; Husband v. Eping, *Id.* 172; Yazel v. Palmer, 81 *Id.* 82; Whitford v. Daggett, 84 *Id.* 14; Elder v. Jones, 85 *Id.* 384; Emmert v. Hays, 89 *Id.* 11; Robinson v. Brems, 90 *Id.* 351; McCullough v. Ford, 96 *Id.* 439; Patterson v. Lawrence, 90 Ill. 174; Thompson v. Scott, 1 Ill. App. 641; Kase v. Painter, Ill. 543; Indianapolis, &c. Ry. v. McLaughlin, *Id.* 275; Bauman v. Street, 76 *Id.* 526; Patten v. Patten, 75 *Id.* 446; Williams v. Hugunin, 69 *Id.* 214; Haight v. McVegh, *Id.* 624; Halley v. Ball, 66 *Id.* 250; Cookson v. Toole, 59 *Id.* 515. *Kansas*: Deering v. Boyle, 8 Kans. 525; Going v. Orns, *Id.* 85; Knaggs v. Mastin, 9 *Id.* 532; Monroe v. May, *Id.* 466; Miner v. Pearson, 16 *Id.* 27; Tallman v. Jones, 13 *Id.* 438; Faddis v. Woollomes, 10 *Id.* 56; Larimer v. Kelley, *Id.* 298; Wicks v. Mitchell, 9 *Id.* 80. *Maine*: Hancock Bk. v. Joy, 41 Me. 568; Merrill v. Smith, 37 Me. 394; Southard v. Piper, 36 Me. 84; Southard v. Plummer, Me. 64; Sampson v. Alexander, 66 Me. 182; Mayo v. Hutchinson, 57 Me. 546; Bean v. Boothby, Me. 295; Hanson v. Millett, 55 Me. 184; Johnson v. Stillings, 35 Me. 427; How v. Wildes, 34 Me. 566; Motley v. Sawyer, Me. 340; Duren v. Getchell, Me. 241; Beales v. Cobb, 51 Me. 348; Winslow v. Gilbreth, 50 Me. 90; Eldridge v. Preble, Me. 148; Clark v. Viles, 32 Me. 32; McLellan v. Nelson, 27 Me. 129; Brookings v. White, 49 Me. 479; Springe v. Berry, 47 Me. 330; Eaton v. Nason, Me. 132; Beale v. Knowles, 45 Me. 479. *Michigan*: Watson v. Thurber, Mich. 457; Farr v. Sherman, Mich. 33; Starkweather v. Smith, 6 Mich. 377; Durfee v. McClurg, Mich. 223; Burdeno v.

Amperse, 14 Mich. 91; Glover v. Alcott, 11 Mich. 470. *Minnesota*: Williams v. McGrade, 13 Minn. 46; Rich v. Rich, 12 Minn. 468; Wilder v. Brooks, 10 Minn. 50; Carpenter v. Wilverschied, 5 Minn. 170; Carpenter v. Leonard, 5 *Id.* 155; Northwestern, &c. Co. v. Allis, 23 Minn. 337; Wampach v. St. Paul, &c. R. R., 22 *Id.* 34; Spencer v. St. Paul, &c. R. R., Minn. 29; Leighton v. Sheldon, 16 Minn. 243. *Nebraska*: Barnum v. Young, Neb. 309; Savings Bank v. Scott, 10 Neb. 83; Hall v. Christy, 8 Neb. 264; Aultman v. Obermeyer, 6 Neb. 260; Davis v. First Nat. Bk. 5 Neb. 242; Webb v. Hoselton, 4 Neb. 308; McCormick v. Lawton, 3 Neb. 449. *New Hampshire*: Bailey v. Pearson, 29 N. H. 77; Blake v. Hall, 57 N. H. 373; Muzzy v. Reardon, N. H. 378; Whipple v. Giles, 55 N. H. 139; Hammond v. Corbett, 51 N. H. 311; Patterson v. Patterson, N. H. 164; Shannon v. Canney, 44 N. H. 592; Ames v. Foster, 42 N. H. 381; Woodward v. Seaver, 38 N. H. 29; Albin v. Lord, 39 N. H. 196; Cooper v. Alger, 51 N. H. 172; Bachelder v. Sargent, 47 N. H. 262; George v. Cutting, 46 N. H. 130; Hill v. Pine River Bk., 45 N. H. 300. *North Carolina*: Kirkman v. Bk. of Greensboro, 77 N. C. 394; Knox v. Jordan, 5 Jones' Eq. 175; Harris v. Harris, 7 Ired. Eq. 111; Frazier v. Brownlow, 3 Ired. Eq. 237; Hall v. Short, 81 N. C. 273; Phippen v. Westson, 74 N. C. 437; Webb v. Gay, N. C. 447; Manning v. Manning, 79 N. C. 300. *Oregon*: Kennard v. Sax, 3 Or. 263, 267; Brummet v. Weaver, 2 Or. 168; Starr v. Hamilton, 1 Deady, 268; Dick v. Hamilton, Or. 322. *Pennsylvania*: Berger v. Clark, 79 Pa. St. 340; Silveus' Ex'rs v. Porter, 74 Pa. St. 448; Speakman's Appeal, 71 Pa. St. 25; Bower's Appeal, 68 Pa. St. 126; Walker v. Reamy, 36 Pa. St. 410; Bear's Adm'r v. Bear, 33 Pa. St. 525; Wright v. Brown, 44 Pa. St. 224; Lippincott v. Leeds, 77 Pa. St. 420; Appeal of Germania Sav. Bk., 95 *Id.* 329; Innis v. Templeton, *Id.* 262; Sawtelle's Appeal, 84 *Id.* 306; Trimble v. Reis, 37 *Id.* 448; Thorndell v. Morrison, 25 *Id.* 326; Peck v. Ward, 18 *Id.* 506; Snyder v. Nodde, 94 *Id.* 286. *Texas*: Hall v. Dotson, 55 Tex. 520; Bradford v. Johnson, 44 Tex. 381; Wallace v. Finberg, 46 *Id.* 35; Rhodes v. Gibbs, 39 Tex. 432; Ferguson v. Reed, 45 *Id.* 574; Gregory v. Van Vleck, 21 *Id.* 40; Cartwright v. Hollis, 5 *Id.* 152; Hollis v. Francois, 5 *Id.* 195; Hutchinson v. Underwood, 27 Tex. 255; Hamilton v. Brooks, 51 *Id.* 142. *Wisconsin*: Conway v. Smith, 13 Wis. 125; Meyers v. Rahte, 46 Wis. 655; McKesson v. Stanton, 50 *Id.* 297; Krouskop v. Shontz, 51 *Id.* 204; Todd v. Lee, 15 *Id.* 265; 16 *Id.* 480; Beard v. Dedolph, 29 Wis. 136. *United States*: Bk. of America v. Banks, 101 U. S. 240; Cheever v. Wilson, 9 Wall. 108, 119.

settlement of her property immediately prior to the marriage, so that his marital rights could not attach thereto. Where, therefore, a settlement is made by the prospective wife of her property to her sole and separate use, immediately before the marriage, and without the knowledge of her intended husband, such a settlement was declared to be a fraud upon him, and he could avoid it.¹

§ 341. **Wife's equity to a settlement.**—As has already been explained, the married woman's property, both real and personal, became subject to the husband's marital rights whenever such property was not settled to her sole and separate use. The interest, acquired by the husband in his wife's property, was not a trust fund held by him for the benefit of the family, but became his own absolute interest; and, therefore, was subjected to the claims of his creditors. His creditors could levy upon his interest in his wife's property and sell the same. Wherever the enforcement of the claims of the creditors against the husband's interest in the wife's property did not require a resort to the courts of equity, no limitation or restraint was imposed upon the enforcement of such claims; even though it would result in reducing the wife and children to absolute want.² But wherever a party, claiming a right to the property of the wife through the husband, is compelled, in order to acquire control of the property, to resort to the court of equity for the requisite remedy, the court would refuse to grant this extraordinary aid, in the enforcement of the legal claims of the husband's creditors against the property of the wife, unless a provision is made out of such property for the support of the wife and children. The court enforces in this case a special application of the equitable maxim, "He who seeks equity must do equity."³ The wife's

¹ *Taylor v. Pugh*, 1 Hare, 608, 614; *Downes v. Jennings*, 32 Beav. 290; *Chambers v. Crabbe*, 34 Beav. 457; but see *St. George v. Wake*, 1 My. & K. 610, 623; *De Manneville v. Compton*, 1 V. & B. 354; *Goddard v. Snow*, 1 Russ. 485; *Lance v. Norman*, 2 Ch. Rep. 79; *Blanchet v. Foster*, 2 Ves. Sen. 264; *Lewellin v. Cobbold*, 1 Sm. & Gif. 376; *Hunt v. Matthews*, 1 Vern. 408; *Slocombe v. Glubb*, 3 Bro. Ch. 545; *Cotton v. King*, 2 P. Wms. 358, 674; *Ball v. Montgomery*, 2 Ves. 191, 193; *England v. Downes*, 2 Beav. 522; *Countess of Strathmore v. Bowes*, 2 Bro. Ch. 345; 1 Ves. 22; 1 Eq. Lead. Cas. 605, 611-617, 618-623; *Ashton v. McDougall*, 5 Beav. 56; *Wrigley v. Swainson*, 3 De G. & Sm. 453; *Griggs v. Staplee*, 2 Id. 672; *Prideaux v. Lonsdale*, 1 De G. J. & S. 433; *Loader v. Clarke*, 2 Macn. & G. 382; *Linker v. Smith*, 4 Wash. 224; *Logan v. Simmons*, 3 Ired. Eq. 487, 494; *Terry v. Hopkins*, 1 Hill's Ch. 1; *Tucker v. Andrews*, 13 Me. 124; *Williams v. Carle*, 2 Stockt. Ch. 543; *Robinson v. Buck*, 71 Pa. St. 386; *Ramsay v. Jayce*, 1 McMullin's Eq. 236, 249; *McClure v. Miller*, *Bailey's Eq.* 108; *Belt v. Ferguson*, 3 Grant's Cas. 289; *Duncan's Appeal*, 43 Pa. St. 67; *Waller v. Armistead's Adm'rs*, 2 Leigh, 11; *Fletcher v. Ashley*, 6 Gratt. 332, 339; *Manes v. Durant*, 2 Rich. Eq. 404; *Free-*

man v. Hartman, 45 Ill. 57; *McAfee v. Ferguson*, 9 B. Mon. 475; *Cheshire v. Payne*, 16 Id. 618, overruling *Hobbs v. Blandford*, 7 Mon. 469.

² *Ward v. Ward*, L. R. 14 Ch. D. 506; *In re Bryan*, L. R. 14 Ch. D. 516; *Canby v. McLearn*, 13 Bankr. Reg. 22; *Warden v. Jones*, 2 De G. & J. 76, 87; *Durham v. Crackles*, 32 L. J. Ch. 111.

³ *Macaulay v. Phillips*, 4 Ves. 15, 19; *Scott v. Spashett*, 3 Macn. & G. 599; *Haviland v. Bloom*, 6 Johns. Ch. 178, 180; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Van Epps v. Van Deusen*, 4 Paige, 64, 74; *Van Duzer v. Van Duzer*, 6 Paige, 366, 368; *Martin v. Martin*, 1 Hoff. Ch. 462, 467; *Haviland v. Meyers*, 6 Johns. Ch. 25, 178; *Helms v. Franciscus*, 2 Bland, 544; *Sturgis v. Champnays*, 5 My. & Cr. 97; *Giacometti v. Producers*, L. R. 14 Eq. 253; 8 Ch. 338; *Kenny v. Udall*, 5 Johns. Ch. 464; 3 Cow. 590; *Poindexter v. Jeffries*, 15 Gratt. 363; but see *Jackson v. Hill*, 25 Ark. 223; *In re Robinson's Estate*, L. R. 12 Ch. D. 188; *Lady Elibank v. Montolieu*, 1 Eq. Lead. Cas. 623, 639-669, 670-679; *Life Association v. Siddal*, 3 De G. F. & J. 271; *Pond v. Skeen*, 2 Lea. 126; *Allday v. Fletcher*, 1 De G. & J. 82; *White v. Gouldin's Ex'rs*, 27 Gratt. 491; *Canby v. McLearn*, 13 Bankr. Reg. 22, *Beal's Ex'r v. Storm*, 26 N. J. Eq. 372; *Atchison v. Dixon*, L. R. 10 Eq.

claim to this equitable settlement, in her behalf, out of her own property is not limited to any particular amount. The court determines, in every particular case, how much of said property should be settled upon her free from the husband's creditors; her condition and the needs of the family being taken into consideration in the ascertainment of the amount. One-half of the fund was the ordinary provision, unless peculiar circumstances required a larger amount to be set aside for her.¹ To one who is under the influence of the notions of right and justice, as they obtain in the nineteenth century, it seems absurd that a court should in such cases feel compelled to limit its interference in behalf of a wife to the protection of only a part of her own property from the claims of her husband's creditors. But when one views these provisions in the light of the domestic conditions of the seventeenth and eighteenth centuries, one will consider such a provision as a very great advance upon, and a great relief from the hardships of, the common law.

She could claim this equity in respect to any kind of property that she might hold, and in respect to her interests in lands, whether they were freeholds or chattels.² So, also, could she claim this equity in respect to her personal property, as long as such property has not been reduced to actual possession by the husband.³ It may be stated as a

589; *In re Carr's Trusts*, L. R. 12 Eq. 609; *McCaleb v. Crichfield*, 5 Heisk. 288; *Jackson v. Hill*, 25 Ark. 223; *Atkinson v. Beall*, 33 Ga. 153; *Sabel v. Slingluff*, 52 Md. 132; *Moore v. Moore*, 14 B. Mon. 208; *Bennett v. Dillingham*, 2 Dana, 436; *Coppedge v. Threadgill*, 3 Sneed, 577; *Phillips v. Hassell*, 10 Humph. 197; *In re Lush's Trusts*, L. R. 4 Ch. 591; *Wiles v. Wiles*, 3 Md. 1; *Lay's Ex'r's v. Brown*, 13 B. Mon. 295; *Ward v. Amory*, 1 Curtis, 419, 432; *Andrews v. Jones*, 10 Ala. 401.

¹ *Barrow v. Barrow*, 5 De G. M. & G. 782, 794; *Gent v. Harris*, 10 Hare, 383; *Taunton v. Morrison*, L. R. 8 Ch. D. 453; 11 *Id.* 779; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Scott v. Spaschett*, 3 Macn. & G. 599; *Brown v. Clark*, 5 Ves. 166; *Ex parte Pugh*, 1 Drew. 202, 203; *Carter v. Taggart*, 1 De G. M. & G. 286, 289; *Layton v. Layton*, 1 Sm. & Giff. 179; *Spirett v. Willows*, L. R. 1 Ch. 520; *In re Suggitt's Trusts*, L. R. 3 Ch. 215; *Giacometti v. Prodders*, L. R. 14 Eq. 253; 8 Ch. 338; *Smith v. Smith*, 3 Giff. 121; *In re Kincaid's Trusts*, 1 Drew. 326; *In re Cutler*, 14 Beav. 220; *Marshall v. Fowler*, 16 Beav. 249; *Green v. Otte*, 1 S. & S. 250; *In re Erskine's Trust*, 1 K. & J. 302; *Coster v. Coster*, 9 Sim. 597; *Watson v. Marshall*, 17 Beav. 363; *Francis v. Brooking*, 19 *Id.* 347; *Duncombe v. Greenacre*, 29 *Id.* 568; *Napier v. Napier*, 1 Dr. & War. 407; *Ex parte Pugh*, 1 Drew. 202; *Re Grove's Trusts*, 3 Giff. 575; *White v. Gouldin's Ex'r's*, 27 Gratt. 491; *Re Ford*, 32 Beav. 621; *In re Lewin's Trusts*, 20 *Id.* 373; *Johnson v. Lander*, L. R. 7 Eq. 228; *In re Cordwell's Estate*, L. R. 20 Eq. 644.

² *Duncombe v. Greenacre*, 2 De G. F. & J.

509; *Sturgis v. Champneys*, 5 My. & Cr. 97; see *Atkinson v. Beall*, 33 Ga. 153; *Sabel v. Slingluff*, 52 Md. 132; *Smith v. Matthews*, 3 De G. F. & J. 139; *Life Association v. Siddal*, *Id.* 271; *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Hanson v. Keating*, 4 Hare, 1; *Clark v. Cook*, 3 De G. & Sm. 333; *Hill v. Edmonds*, 5 *Id.* 603.

³ *Beresford v. Hobson*, 1 Madd. 362; *Ruffles v. Alston*, L. R. 19 Eq. 539; *In re Mellor's Trusts*, L. R. 6 Ch. D. 127; *Elliott v. Cordell*, 5 Madd. 149, 156; *Carter v. Taggart*, 1 De G. M. & G. 286; 5 De G. & Sm. 49; *Tidd v. Lister*, 3 De G. M. & G. 857; *Scott v. Spaschett*, 3 Macn. & G. 599, 603; *Barrow v. Barrow*, 5 De G. M. & G. 782; *Burdon v. Dean*, 2 Ves. 607; *Earl of Salisbury v. Newton*, 1 Eden, 370; *Macaulay v. Phillips*, 4 Ves. 15, 19; *Wright v. Morley*, 11 *Id.* 12, 16; *Atchison v. Dixon*, L. R. 10 Eq. 589, 597, 598; *Ex parte Norton*, 8 De G. M. & G. 258; *Purdev v. Jackson*, 1 Russ. 1; *Stanton v. Hall*, 2 Russ. & M. 175, 182; *Re Duffy's Trusts*, 28 Beav. 386; *Allday v. Fletcher*, 1 De G. & J. 82; *Widgery v. Tepper*, L. R. 7 Ch. D. 423; *In re Barber*, L. R. 11 Ch. D. 442; *Heirs of Holmes*, 28 Vt. 765; *Horsby v. Lee*, 2 Madd. 16; *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrattton*, 14 *Id.* 116; *Michelmores v. Mudge*, 2 Giff. 183; *Dunn v. Sargent*, 101 Mass. 336; *Howard v. Bryant*, 9 Gray. 239; *Bartlett v. Van Zandt*, 4 Sandf. Ch. 396; *Burr v. Sherwood*, Bradf. 85; *Lockhart v. Cameron*, 29 Ala. 355; *McNeill v. Arnold*, 17 Ark. 154; *Canby v. McLearn*, 13 Bankr. Reg. 222; *Needles' Ex'r v. Needles*, 7 Ohio St. 432; *Corley v. Corley*, 22 Ga. 178; *Machem v. Machem*, 28 Ala. 374.

general proposition that the claim to this equity could not be granted, after the husband has made a disposition of his interest in the wife's property, whether by outright sale, or by transfer to the assignee for a valuable consideration.¹ So, also, she cannot claim the equity out of her reversionary personal estate;² or to the arrears of income, accruing before the claim to the equity is made.³ A claim to the equity will also be barred, whenever the wife has made illegal dispositions of her property, even though such dispositions be made for the benefit of the husband.⁴ Any misconduct on the part of the wife,⁵ or waiver on her part to the right to the equity,⁶ will have the effect of operating as a bar to her claim, except so far as such a claim might still be asserted in behalf of the children.⁷ No settlement will be made in favor of the wife which would affect in any way the husband's estate by the curtesy.⁸ No particular form is required in the making of the settlement, nor is there any absolute rule for the guidance of the court in this particular. Ordinarily, provision is made for the wife during her life and after her death to the children; and in default of children, it is usually provided for the property to go to the survivor of the husband and wife.⁹

§ 342. **Husband's estate by the curtesy in the wife's equitable estates.**—It was once held that the husband was not entitled to curtesy out of the equitable estates of the wife. But it is now very generally conceded that he has curtesy in all equitable as well as legal estates, and the same rules are applied to the former, which obtain in the latter. For the foundation of the claim of curtesy, the receipt by the wife of the rents and profits is a sufficient seisin.¹⁰ The husband has also

¹ *Elliott v. Cordell*, 5 Madd. 149; *Pryor v. Hill*, 4 Bro. Ch. 139; *Ex parte Coysegame*, 1 Atk. 192; *Jacobs v. Amyatt*, 1 Madd. 376 n; *Squires v. Ashford*, 23 Beav. 132; see *Taunton v. Morris* L. R. 8 Ch. D. 453; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Koeber v. Sturgis*, 22 Beav. 588; *Re Ford*, 32 *Id.* 621; per *contra*, *Vaughan v. Buck*, 13 Sim. 404; see *Tidd v. Lister*, 3 De G. M. & G. 857, 869, 870; 10 Hare, 140; *Wright v. Morley*, 11 Ves. 12, 22; *Stanton v. Hall*, 2 Russ. & M. 175; *Re Duffy's Trust*, 28 Beav. 386.

² *Osborn v. Morgan*, 9 Hare, 432; but see *In re Robinson's Estate*, L. R. 12 Ch. D. 188; *McCaleb v. Crichfield*, 5 Heisk. 288.

³ *In re Carr's Trusts*, L. R. 12 Eq. 609.

⁴ *Williams v. Cooke*, 9 Jur., n. s., 658; *Tuer v. Turner*, 20 Beav. 560.

⁵ See *In re Lewin's Trust*, 20 Beav. 378; *Greedy v. Lavender*, 13 Beav. 62; *Ball v. Montgomery*, 2 Ves. 191; see *Eedes v. Eedes*, 11 Sim. 569; *Carr v. Eastabrooke*, 4 Ves. 146; *In re Lush's Trusts*, L. R. 4 Ch. 591; *Barnard v. Ford*, L. R. 4 Ch. 247; *Bonner v. Bonner*, 17 Beav. 86; and see *Knight v. Knight*, L. R. 18 Eq. 487.

⁶ *Bibbles v. Jackson*, 3 De G. & J. 544; *Martin v. Foster*, 7 De G. M. & G. 98; *Penfold v. Mould*, L. R. 4 Eq. 562; see *Watson v. Marshall*, 17 Beav. 363; *Abraham v. Newcombe*, 12 Sim. 566; *Stubbs v. Sargon*, 2 Beav. 496; *Shipway v.*

Ball, L. R. 16 Ch. D. 376; *Beaumont v. Carter*, 32 Beav. 586; *Dimmoch v. Atkinson*, 3 Bro. Ch. 195.

⁷ *Fenner v. Taylor*, 2 Russ. & M. 190; *Ex parte Gardner*, 2 Ves. Sen. 671.

⁸ *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Life Association v. Siddal*, 3 De G. F. & J. 271; *Smith v. Matthews*, 3 *Id.* 139; *Duncombe v. Greenacre*, 2 De G. F. & J. 509.

⁹ *Murray v. Lord Elibank*, 13 Ves. 1; 14 *Id.* 496; *Johnson v. Johnson*, 1 J. & W. 472, 475; *Carter v. Taggart*, 1 De G. M. & G. 286; *Croxton v. May*, L. R. 9 Eq. 404; *Spirett v. Willows*, L. R. 1 Ch. 520; 4 *Id.* 407; *In re Suggett's Trusts*, L. R. 3 Ch. 215; *Walsh v. Wason*, L. R. 8 Ch. 482; *Lloyd v. Williams*, 1 Madd. 450; *De La Grade v. Lempriere*, 6 Beav. 344; *Hodgens v. Hodgins*, 4 Cl. & Fin. 323, 373; *Wallace v. Auldjo*, 1 De G. J. & S. 643; *McCaleb v. Crichfield*, 5 Heisk. 288.

¹⁰ 4 Kent's Com. 31; 1 Washb. on Real Prop. 165, 166; *Watts v. Ball*, 1 P. Wms. 109; *Morgan v. Morgan*, 5 Madd. 408; *Sweetapple v. Bindon*, 2 Vern. 537, note 3; *Davis v. Mason*, 1 Pet. 508; *Houghton v. Hapgood*, 13 Pick. 154; *Robinson v. Codman*, 1 Sumn. 128; *Dunsecomb v. Dunsecomb*, 1 Johns. 508; *Clepper v. Livergood*, 5 Watts, 113; *Dubs v. Dubs*, 31 Pa. St. 154; *Rawlings v. Adams*, 7 Md. 54; *Forbes v. Smith*, 5

curtesy in the equity of redemption, where he and his wife joined in the execution of the mortgage.¹ And this is true, also, even of those equitable estates, which are granted to her sole and separate use.² But equitable estates will not be subject to the right of curtesy, if the intention of the grantor, to exclude the husband from such equitable estate, is clearly manifested in the deed.³

§ 343. **Maintenance.**—The power of the court of equity, to provide for the maintenance of a married woman by her husband out of her own property, is somewhat analogous in character to the provision for the wife's equity, but somewhat different. The provision for the maintenance out of her own estate is only made in the case of actual need, and without any regard to any equity to the settlement out of her property; the maintenance is confined to her own property and would not be provided for out of the husband's estate.

The common cases of the provision for the maintenance of the wife out of her own estate, are those where the husband has deserted the wife, without making provision for her support. In such cases, the court of equity will order a maintenance to be made for her out of her own estate, even though such estate had not been settled but was agreed to be settled, to her own separate use; and even though the express provision of the marriage settlement be that the income of such property should be payable to the husband for his life.⁴

§ 344. **Pin-money and paraphernalia.**—Pin-money is the annual allowance which a husband is required by the marriage settlement to make to the wife for the purchase of her clothes and ornaments, and in satisfaction of her other personal needs. Of the same general character will be found to be all gifts by the husband during the marriage, and whatever is provided for under the marriage settlement. Pin-money is a settlement, like the wife's separate estate, independent of her husband's control of such fund, so far as the disposition and expenditure of it is concerned; but it differs from the separate estate, in that it was not her absolute property and remained subject to her husband's right of reducing it to his own possession, in case she did not spend it.⁵ Pin-money does not include the money given for the

Ired. Eq. 369; Withers v. Jenkins, 14 S. C. 597; Alexander v. Warrance, 17 Mo. 228. In several of the states, notably, Alabama, Kentucky, Maryland, Mississippi, and Virginia, curtesy is by statute made to attach to equitable estates. 1 Greenl. Cruise, 157.

¹ Robinson v. Lakeman, 28 Mo. App. 135; Mettler v. Miller, 129 Ill. 630.

² Tillinghast v. Coggeshall, 7 R. I. 383; Nightingale v. Hidden, *Id.* 115; Sartill v. Robeson, 2 Jones Eq. 510; Carter v. Dale, 3 Lea. 710; 31 Am. Rep. 660; but see Moore v. Webster, L. R. 23 Eq. 267; Appleton v. Rowley, L. R. 8 Eq. 139; and see cases cited in note 2; Carson v. Fuhs, 131 Pa. St. 256.

³ Carter v. Dale, 3 Lea. 710; 31 Am. Law Rep. 660; Stokes v. McKibbin, 13 Pa. St. 207; Coch-

ran v. O'Hern, 4 Watts & S. 95; Rigler v. Cloud, 14 Pa. St. 361; Clark v. Clark, 24 Barb. 582; Pool v. Blaikie, 53 Ill. 495; Hearle v. Greenbank, 3 Atk. 716; Bennett v. Davis, 2 P. Wms. 316; 1 Washb. on Real Prop. 165-169.

⁴ Newsome v. Bowyer, 3 P. Wins. 37; Nichols v. Danvers, 2 Vern. 671; Dumond v. Magee, 4 Johns. Ch. 318, 322; Bullock v. Menzies, 4 Ves. 798; Watkyns v. Watkyns, 2 Atk. 96, 98; Cecil v. Juxon, 1 Atk. 278; Guy v. Pearkes, 18 Ves. 196; Coster v. Coster, 1 Keen, 199; *Ibid.*; Oxenden v. Oxenden, 2 Vern. 493; Williams v. Callow, Vern. 752; Eedes v. Eedes, 11 Sim. 569; Peters v. Grote, 7 Sim. 238.

⁵ Howard v. Digby, 8 Bligh. n. s., 224, 245, 265-269; 2 Cl. & Fin. 634; and see Eq. Lead. Cas. 739 (4th Am. ed.).

purchase of household effects and the maintenance of the household, but was intended to provide for the strictly personal expenses of the wife.¹ Where the provision for pin-money is made in the marriage settlement, and the husband fails to perform that obligation, she may make the claim for such pin-money against his estate.² But if the husband has actually provided for all her personal expenses, without the payment to her of the pin-money, she could not thereafter make any claim for the arrears, since her personal wants have been fully satisfied.³

The wife's paraphernalia includes all her apparel and ornaments, which are given to her by her husband for her personal use; thus differing from the pin-money, in that the apparel and ornaments are secured and provided for by the husband instead of giving her the money wherewith to buy them.⁴ The paraphernalia differs from the wife's separate estate, in that, while she has the right to make use of them, she is not the absolute owner and cannot dispose of them without the consent of the husband; on the other hand, her husband may dispose of them and they are liable for his debts.⁵ But the husband cannot bequeath the paraphernalia to others.⁶ The jewelry and ornaments, which are held as heir-looms in the husband's family, cannot be claimed by the wife as her paraphernalia.⁷ And what would be paraphernalia, if given by the husband, would not be so considered but would be her absolute separate property, if it were given to her by anyone else.⁸ So, also, while the gift by the husband of jewels and other ornaments would ordinarily be considered to be a part of her paraphernalia, yet he may make an absolute gift to her of such property so as to become a part of her separate estate.⁹

The claims to satisfaction of legatees, whether general or special, cannot be enforced against the wife's paraphernalia; and if the wife's paraphernalia has, during the life of the husband, been subjected to the claims of creditors, she will have her claim for reimbursement against the husband's personal estate.¹⁰

Provisions for pin-money and personality are incidents of English marriage settlement and are not found in practice in the United States. In the absence of adjudication, it is believed to be safe to

¹ *Jodrell v. Jodrell*, 9 Beav. 45; *Howard v. Digby*, 8 Bligh, n. s., 224.

² *Lord Townshend v. Windham*, 2 Ves. Sen. 1, 7; *Peacock v. Monk*, 2 *Id.* 190; *Aston v. Aston*, 1 *Id.* 264, 267; *Howard v. Digby*, 8 Bligh, n. s., 224, 245, 265-269; *Ridout v. Lewis*, 1 Atk. 269; *Foss v. Foss*, 15 Ir. Ch. Rep. 215; *Edgeworth v. Edgeworth*, 16 *Id.* 348.

³ *Fowler v. Fowler*, 3 P. Wms. 353, 355; *Thomas v. Bennet*, 2 *Id.* 347; *Howard v. Digby*, 8 Bligh, n. s., 224, 245, 265-269.

⁴ *Graham v. Londonderry*, 3 Atk. 393, 394; *Jervoise v. Jervoise*, 17 Beav. 566, 571; see *Whiton v. Snyder*, 88 N. Y. 299.

⁵ *Seymore v. Tresillian*, 3 Atk. 358; *Campion v. Cotton*, 17 Ves. 264, 273; *Snelson v. Corbet*, 3

Atk. 369; *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Boyntun v. Boyntun*, 1 Cox, 106.

⁶ *Tipping v. Tipping*, 1 P. Wms. 729; *Seymore v. Tresillian*, 3 Atk. 358.

⁷ *Jervoise v. Jervoise*, 17 Beav. 566, 570; *Calmady v. Calmady*, 11 Vin. Abr. 181.

⁸ *Graham v. Londonderry*, 3 Atk. 393; *Lucas v. Lucas*, 1 Atk. 270.

⁹ *Graham v. Londonderry*, 3 Atk. 393.

¹⁰ *Boyntun v. Boyntun*, 1 Cox, 106; *Incleidon v. Northcote*, 3 Atk. 430, 436; *Tynt v. Tynt*, 2 P. Wms. 542, 543; but see *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Probert v. Clifford*, Ambl. 6; *Snelson v. Corbet*, 3 Atk. 369; *Tipping v. Tipping*, 1 P. Wms. 729; *Aldrich v. Cooper*, 8 Ves. 382, 397.

state that gifts of the kind that would in England be considered to have the peculiar character of paraphernalia, would be considered in this country as an absolute gift to the wife and free from the claim of creditors as well as the husband's subsequent power of control, except where such gifts are considered a fraud upon existing creditors, in consequence of the loss by such creditors of the means of satisfying their claims.¹

§ 345. **Alimony.**—Alimony is an altogether different right of the wife. It is not a separate estate; nor is it any provision for her out of her own estate, but a provision which is made for her maintenance, and which the court requires the husband to make for her maintenance, out of his own resources during the pendency of the action for divorce. It is, therefore, simply a temporary provision for the support of the wife. The court of equity in England did not assume jurisdiction to provide for alimony. This jurisdiction was exercised in England by the ecclesiastical court, and it is probably free from doubt, that the original jurisdiction of the court of equity did not include the control of the wife's claim for alimony. Such certainly was the rule in the English courts.² Such is also the position of a great many of the American courts.³ But in several of the states, the courts of equity assumed and exercised jurisdiction over the right of the wife to alimony, probably because of the inefficiency of the remedies, whereby the wife could otherwise secure alimony, during the pendency of the action for divorce.⁴

¹ See *Whiton v. Snyder*, 88 N. Y. 299.

² *Vandergucht v. De Blaquiére*, 8 Sim. 315; 5 My. & Cr. 229; *Bail v. Montgomery*, 2 Ves. 191, 195.

³ *McGee v. McGee*, 10 Ga. 477, 482; *Fischli v. Fischli*, 1 Blackf. 360; *Doyle v. Doyle*, 26 Mo. 545, 549; *Trotter v. Trotter*, 77 Ill. 510; *Parsons v. Parsons*, 9 N. H. 309; *Pomeroy v. Wells*, 8 Paige, 406; *Rees v. Waters*, 9 Watts, 90; *Shannon v. Shannon*, 2 Gray, 285; *Sheafe v. Sheafe*, 4 Fost. 564, 567; *Chapman v. Chapman*, 13 Ind. 396, 397; *Lawson v. Shotwell*, 27 Miss. 630, 633; *Yule v. Yule*, 2 Stockt. Ch. 133, 143; but see

Paterson v. Paterson, 1 Halst. Ch. 389; *Peltier v. Peltier*, Harring. Ch. 19, 29; *Cory v. Cory*, 3 Stockt. Ch. 400; *Helms v. Franciscus*, 2 Bland, 544, 568; *Wallingsford v. Wallingsford*, 6 Har. & J. 485.

⁴ *Butler v. Butler*, 4 Litt. 201; *Logan v. Logan*, 2 B. Mon. 142; *Graves v. Graves*, 36 Iowa, 310; *Galland v. Galland*, 38 Cal. 265; *Prather v. Prather*, 4 Desau. 33; *Rhame v. Rhame*, 1 McCord's Ch. 197; *Glover v. Glover*, 16 Ala. 440, 446; *Garland v. Garland*, 50 Miss. 694; *Almond v. Almond*, 4 Rand. 662; *Purcell v. Purcell*, 4 Hen. & Munf. 507.

CHAPTER XX.

ADMINISTRATION OF DECEDENTS' ESTATES, AND HEREIN OF GIFTS CAUSA MORTIS.

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§ 347. **Foundation for jurisdiction of equity.**—Where a court of equity assumes jurisdiction over matters pertaining to the administration of the estate of a deceased person, the court applies to the particular case only the general doctrines which underlie and are enforced in the equitable control of trusts in general; in other words, whether a court assumes charge of or interferes with the administration of the intestate's estate, or whether it is called upon to construe the provisions of the will; in either case the foundation for the assumption of jurisdiction is held to be the theory, that the property of the deceased passes to the executor or administrator, to be held by him in trust for the party to whom the property shall go, under the terms of the will, or under the Statute of Distribution, according to whether the deceased died testate or intestate.¹ Inasmuch as the legal title to lands does not vest in the administrator or executor on the death of the owner, but passes directly to the heir or devisee, as the case may be, a court of equity will assume control of the case for the purpose of enforcing the administration of the estate in respect to lands, only where there is a will by which the lands have been devised to one to be held in trust for another. But inasmuch as the title to personal property vests in the personal representatives of the deceased owner, whether he died testate or intestate, the representative must receive it, and does receive it in the capacity of a trustee for those who can thereafter claim the property as next of kin, or legatee. The court of equity can assume jurisdiction over the administration of personal estates in every case, on the general ground that it is a case of trust and falls, therefore, under the general jurisdiction of a court

¹ *Hurst v. Beach*, 5 Madd. 351, 360; *Farrington v. Knightly*, 1 P. Wms. 544, 549, 554; *Atkins v. Hill*, Cowper, 284, 287; see *Adair v. Shaw*, 1 Sch. & Lef. 243, 262, *per* Lord Redesdale; *Anony-*

mous, 1 Atk. 491, *per* Lord Hardwicke; *Franco v. Alvares*, 3 Atk. 342, 346; *Pratt v. Northam*, 5 Mason, 95, 105; *Prescott v. Morse*, 63 Me. 447.

of equity over the administration of trusts; and there are some courts which maintain that this is the only foundation for the assumption of jurisdiction by a court of equity over the administration of decedents' estates.¹ "The rule is, that to put a court of equity in motion, there must be an actual limitation in respect to matters which are the proper subjects of the jurisdiction of that court, as distinguished from a court of law. It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers, as an incident of that jurisdiction, take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy. It is when the court is moved on behalf of an executor, trustee or *cestui que trust*, and to insure a correct administration of the power conferred by a will, that jurisdiction is had, to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts."² There are, however, some cases which maintain that a court of equity has other grounds upon which to rest its claim to jurisdiction over the administration of decedents' estates, viz.: that a court can assume jurisdiction to construe and enforce a will whenever its terms are real, difficult or doubtful, or the validity of the will is contested, irrespective of the existence therein of any fiduciary relation.³ Under the English practice, it was at one time necessary, in many cases, to resort to the court of equity for the purpose of establishing a will; that is, for the purpose of placing upon record the fact that a certain will had been executed and had gone into effect as the decedent's last will and testament, inasmuch as under the old English practice there was no provision made for the probate and filing of the will. In such a case, in order to avoid the effect of the loss of the will and the inability to prove its condition, a court of equity would be appealed to to issue a decree to the effect that a certain will had been proven to be executed and to

¹ *Bowers v. Smith*, 10 Paige, 193; *Onderdonk v. Mott*, 34 Barb. 106; *Bliven v. Seymour*, 88 N. Y. 439; *Walrath v. Handy*, 24 How. Pr. 353; *Wager v. Wager*, 21 Hun, 93; *Wolf v. Schaeffner*, 51 Wis. 53; *Rexroad v. Wells*, 13 W. Va. 812; *Magers v. Edwards' Adm'r*, *Id.* 822; *Bussy v. McKie*, 2 McCord's Ch. 23; *Gibbes v. Elliott*, 5 Rich. Eq. 327; *Appeal of Schaffner*, 41 Wis. 260; *Devereux v. Devereux*, 81 N. C. 12; *Houston v. Howie*, 84 N. C. 349; *Rothgeb v. Mauck*, 35 Ohio St. 503; *Goddard v. Brown*, 12 R. I. 31; *Ferrand v. Howard*, 3 Ired. Eq. 381; *Simmons v. Hendricks*, 8 Ired. Eq. 84, 85, 86; *Tayloe v. Bond*, Bush Eq. 5; *Marrow v. Marrow*, Bush Eq. 148; *Walrath v. Hardy*, 24 How. Pr. 353; *Stinde v. Ridgway*, 55 How. Pr. 301; *Duncan v. Duncan*, 4 Abb. N. C. 275; *Marlett v. Marlett*, 14 Hun, 313; *Powell v. Denning*, 22 Hun, 235; *Bullock v. Bullock*, 2 Dev. Eq. 307; *Woodruff v. Cook*, 47 Barb. 304; *Bailey v. Southwick*, 6 Lans. 356; *Bailey v. Briggs*, 56 N. Y. 407; *Chipman v. Montgomery*,

63 N. Y. 221, 230; *Dill v. Wisner*, 88 N. Y. 153, 160; *Delaney v. McCormack*, N. Y. 174; *Post v. Hover*, 33 N. Y. 593, 602; 30 Barb. 312, 324; *Sellers v. Sellers*, 35 Ala. 235; *Cowles v. Pollard*, 51 Ala. 445; *Clay v. Gurley*, 62 Ala. 14; *Clark v. Clark*, 17 Ga. 485; *Strubher v. Belsey*, 79 Ill. 307; *Bowers v. Smith*, 10 Paige, 193; *Emmons v. Cairns*, 2 Sandf. Ch. 369; *Whitman v. Fisher*, 74 Ill. 147; *Mallory's Adm'r v. Craigie*, 2 McCart. 73; *Youmans v. Youmans*, 26 N. J. Eq. 149; *Benham v. Hendrickson*, 32 N. J. Eq. 441.

² *Allen, J.*, in *Chipman v. Montgomery*, 63 N. Y. 221, 230.

³ *Little v. Birdwell*, 21 Tex. 597; *Gibbs v. Elliott*, 5 Rich. Eq. 327; *Rosenberg v. Frank*, 58 Cal. 387; *First Bap. Ch. v. Robberson*, 71 Mo. 326; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Pervis v. Sherrod*, 12 Tex. 140; *Howze v. Howze*, 14 Tex. 232; *Sellers v. Sellers*, 35 Ala. 235; *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Baldwin v. Bean*, 59 Me. 481.

have gone into effect as the will and testament of the decedent, instead of waiting until some other party contested the existence or condition of the alleged will. In these cases the suit is in the nature of an action to quiet title.¹ In England, as well as in this country, the necessity for such a suit has been done away with by statutory provision for the probate and filing of the will. The ordinary cases, therefore, in which it would be at all necessary to resort to the court of equity, are for the enforcement of legacies and the due performance of the duties of an administrator.

§ 348. **Effect of establishment of probate courts upon the equitable jurisdiction.**—At a very early day in this country, separate courts, called probate or surrogate courts, have been established, to which an ordinary jurisdiction over the administration of decedents' estates has been assigned. It is true that, under the old English practice, the ecclesiastical court had jurisdiction over administration; but at best it was a very inefficient court, and in respect to the larger and more important classes of cases pertaining to administration, the ecclesiastical court did not have any jurisdiction at all. Such were legacies given in trust or charged upon lands.² And so, also, was the court incompetent in many cases to enforce the due administration of the estate, in consequence of the inadequacy of the remedies which it could employ.³ The modern probate or surrogate court, however, has a larger jurisdiction and is more efficient also in respect to the remedies which it might employ; so that, while the exact limitations of the jurisdiction of the probate court in this country are determined by the provisions of the statutes of the different states, yet it is probable that in the great majority of them the probate court has sufficient power to deal with almost every case, which comes up for adjudication in the ordinary administration of decedents' estates. The question would naturally arise, how far the probate court had superseded the court of equity in its jurisdiction over administration? Of course, in the modern practice, in the great majority of the states, there is no separate court of equity, but the one ordinary *nisi prius* court, having equitable as well as legal jurisdiction; and the contest for jurisdiction in the case under inquiry would arise between the probate court on the one hand, and the ordinary circuit court having equitable jurisdiction. In determining, in gen-

¹ Lovett v. Lovett, 3 K. & J. 1; and see *In re Tayleur*, L. R. 6 Ch. 416; *Boyse v. Rossborough*, Kay, 71; 3 De G. M. & G. 817; *affd.* sub. nom. *Colclough v. Boyse*, 6 H. L. Cas. 1, 20 & 21 Vict. Ch. 77.

² *Farrington v. Knightly*, 1 P. Wms. 544, 549; *Prescott v. Morse*, 62 Me. 447; *Anonymous*, 1 Atk. 491; *Hill v. Turner*, Atk. 515; *Reynish v. Martin*, 3 Atk. 330, 333; *Sherman v. Sherman*, 4 Allen, 392.

³ *Anon.*, 1 Atk. 491; *Hill v. Turner*, 1 Atk. 515; *Meals v. Meals*, 1 Dick. 373; *Pratt v. Northam*, 5

Mason, 95, 105; *Horrell v. Waldron*, 1 Vern. 26; see *Slanning v. Style*, 3 P. Wms. 334; *Blake v. Blake*, 2 Sch. & Lef. 26; *Johnson v. Mills*, 1 Ves. Sen. 282; *Phipps v. Annesley*, 2 Atk. 57, 58; *Webber v. Webber*, 1 S. & S. 311; and see *Randall v. Russell*, 3 Meriv. 190, 193; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Mills v. Mills*, 7 Sim. 501; *Fryer v. Buttar*, 8 Sim. 442; *Foley v. Burnell*, 1 Bro. Ch. 274, 279; *Leeke v. Bennett*, 1 Atk. 470; *Benn v. Dixon*, 10 Sim. 636; *Cafe v. Bent*, 5 Hare, 24, 38; *Hunt v. Scott*, 1 De G. & Sm. 219; *Covenhoven v. Shuler*, 2 Paige, 123, 132.

eral, how far the court of equity has been superseded by the probate court, in its jurisdiction over the administration of decedents' estates; the fundamental principle must be kept in mind, that equity jurisdiction does not necessarily involve the idea of exclusion of all other courts. Two courts may have concurrent jurisdiction over the same character of cases, and exclusive jurisdiction is not acquired by either court, except that the bringing of the action in the one court excludes the jurisdiction of the other court over the same cause of action; but where there are two or more courts of concurrent jurisdiction over the same cause of action, the plaintiff can bring his suit in either of the two courts. This is the general principle.¹ "There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect the power of the old courts to administer justice when it is demanded at their hands."² The variety of provisions in the different states, in respect to the composition of the probate court and the scope of its jurisdiction, makes the effect of applying this general principle to the different states quite variable; and in order to determine when, and under what circumstances, and how far the court of equity still retains jurisdiction over the administration of decedents' estates in any particular state, a special investigation of the decisions of the courts of that state, and the terms of the statutes which establish the courts of probate and define their jurisdiction, will be necessary. Within the limitations of an elementary treatise, it would be impossible to give detailed statements of the condition of the law in all the states in respect to the jurisdiction of the courts of equity over the administration of decedents' estates. An excellent compendium of this branch of the law is to be found in Mr. Pomeroy's work on Equity Jurisprudence.³ The most that is possi-

¹ *Rosenberg v. Frank*, 58 Cal. 387; *People v. Davidson*, 30 Cal. 379; *Willis v. Farley*, 24 Cal. 500; see, also, *Clarke v. Perry*, 5 Cal. 60; *Sanford v. Head*, 5 Cal. 298; *Deck v. Gerke*, 12 Cal. 436; *Blanton v. King*, 2 How. (Miss.) 856; *Carmichael v. Browder*, 3 How. 252; *Farve's Heirs v. Graves*, 4 Sm. & Mar. 707; *Payne v. Payne*, 18 Cal. 291; *Storv's Eq.*, §§ 542, 543, 1065; *Gould v. Hayes*, 19 Ala. 449; *Courtwright v. Bear River*, &c.

Co., 30 Cal. 573; *San Francisco v. Lawton*, 18 Cal. 465; *Bronson, J.*, in *Delafield v. State of Illinois*, 2 Hill, 159, 164; *Yolo County v. City of Sacramento*, 36 Cal. 195; *Caulfield v. Stevens*, 28 Cal. 118; *Stoppelkamp v. Mangeot*, 42 Cal. 325.

² *Delafield v. State of Illinois*, 2 Hill, 159, 164, *per* *Delafield, J.*

³ See Pomeroy's *Eq. Jur.*, Vol. 3, page 96, note 2.

ble in this connection, is to state in general terms the general effect of the establishment of the probate courts, and to give liberal citations of authorities to which reference can be made by the reader for a fuller statement of the law as it obtains in any particular state.

By comparison of these decisions, it will be seen that the states in respect to this question of jurisdiction of equity courts over administration of the decedent's estates, may be divided into three classes. In the first class, it will be generally found that the equitable jurisdiction over administration remains to this day unaffected by the statute, which gave concurrent jurisdiction over such cases to the probate court. The only effect in most of them is, that the will has to be probated and filed in the probate court; but after such probate of the will, either court can entertain jurisdiction over any action which is brought to compel the performance of the duty of administration, or to compel the enforcement of some provision of the will. In this first class are to be included the states of Alabama,¹ Illinois,² Iowa,³ Kentucky,⁴ Maryland,⁵ Mississippi,⁶ New Jersey,⁷ North Caro-

¹ *Teague v. Corbitt*, 57 Ala. 529; *Moore v. Lesueur*, 33 Ala. 237; *James v. Faulk*, 54 Ala. 184; *Hill v. Armistead*, 56 Ala. 118; *Hause v. Hause*, 57 Ala. 262; *Hooper v. Smith*, Ala. 557; *Whorton v. Moragne*, 59 Ala. 641; *Gould v. Hayes*, 19 Ala. 438; *Horton v. Moseley*, 17 Ala. 794; *Weakley v. Gurley's Adm'r*, 60 Ala. 399; *Glenn's Adm'r v. Billingslea*, 64 Ala. 345; *Randle v. Carter*, 62 Ala. 95; *McNeill's Adm'r v. McNeill's Crs.*, 36 Ala. 109; *Park's Dist'ees v. Park's Adm'rs*, Ala. 132; *Hemphill v. Moody*, 64 Ala. 468; *Reaves v. Garrett's Adm'r*, 34 Ala. 558; *Pharis v. Leachman*, 20 Ala. 662; *Wilson v. Cook*, 17 Ala. 59; *Hunley v. Hunley*, 15 Ala. 91; *Dobbs v. Distributees of Cockerham*, 2 Port. 328; *Blakey v. Blakey's Heirs*, 9 Ala. 391; *Apperson v. Cottrell*, 3 Port. 51; *Draper's Adm'r v. Draper*, 64 Ala. 545; *Scott v. Abercrombie*, 14 Ala. 270; and see *Harrison v. Harrison*, 9 Ala. 470; *Stallworth's Adm'r v. Farnham*, 64 Ala. 259; see, also, *Chaquette v. Ortet*, 9 Pac. C. L. J. 602; *Hays v. Cockrell*, 41 Ala. 75; *Randle v. Carter*, 62 Ala. 95.

² *Freeland v. Dazey*, 25 Ill. 294; *Townsend v. Radcliffe*, 44 Ill. 446; *Garvin v. Stewart's Heirs*, 59 Ill. 229; *Harris v. Douglas*, 64 Ill. 466; *Blanchard v. Williamson*, 70 Ill. 647; *Heustis v. Johnson*, 84 Ill. 61; *Crain v. Kennedy*, 85 Ill. 340; *Grattan v. Grattan*, 18 Ill. 167; *Mahar v. O'Hara*, 4 Gilm. 424; *Jennings v. McConnell*, 17 Ill. 148; *Heward v. Slagle*, 52 Ill. 336; *Clark v. Hogle*, 53 Ill. 427; *Pool v. Docker*, 92 Ill. 501; *Hales v. Holland*, 92 Ill. 494; *Armstrong v. Cooper*, 11 Ill. 560; *McGreedy v. Mier*, 64 Ill. 495.

³ *Waples v. Marsh*, 19 Iowa, 381; *Havelick v. Havelick*, 18 Iowa, 414; *Cowin v. Toole*, 31 Iowa, 513; *Hutton v. Laws*, 55 Iowa, 710.

⁴ *Moore v. Waller's Heirs*, 1 A. K. Marsh. 488; *Saunders's Heirs v. Saunders's Ex'rs*, 2 Litt. 314; *Blackerby v. Holton*, 5 Dana, 520; *Cartmel v. Rench*, 2 J. J. Marsh. 118; *Stroud's Heirs v. Barnett*, 3 Dana, 391; *Pilkington's*

Ex'rx v. Gaunt's Adm'x, 5 Dana, 410; *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Mon. 499, 507; *Bellomy's Adm'r v. Bellomy*, 3 Bush, 109; *Hunt v. Hamilton*, 9 Dana, 90.

⁵ *Davis v. Clabaugh*, 30 Md. 508; *Barnes v. Compton's Adm'rs*, 8 Gill, 391; *Lee v. Price*, 12 Md. 253; *Eichelberger v. Hawthorne*, 33 Md. 588.

⁶ *Walker v. State*, 53 Miss. 532; *Bank of Miss. v. Duncan*, 52 Miss. 740; *Brunini v. Pera*, 54 Miss. 649; *Evans v. Robertson*, Miss. 683; *Buie v. Pollock*, 55 Miss. 309; *Clopton v. Haughton*, 57 Miss. 787; *Hunt v. Potter*, 58 Miss. 96; *Wells v. Smith*, 44 Miss. 296; *Bernheimer v. Calhoun*, Miss. 426; *Saxon v. Ames*, 47 Miss. 565; *Troup v. Rice*, 49 Miss. 248; *Smith v. Everett*, 50 Miss. 575; *Gildart's Heirs v. Starke*, 1 How. 450; *Blanton v. King*, 2 Miss. 856; *Edmundson v. Roberts*, Miss. 822; *Carmichael v. Browder*, 3 Miss. 252; *McRea v. Walker*, 4 Miss. 455; *Hamberlin v. Terry*, 7 Miss. 143; *Farve's Heirs v. Graves*, 4 Sm. & Mar. 707; *Gaines v. Smiley*, 7 Miss. 53; *Ragland v. Green*, 14 Miss. 194; *Neylans v. Burge*, Miss. 201; *Hill v. McLaurin*, 28 Miss. 288; *Ratliff v. Davis*, 38 Miss. 107; *Hart v. Hart*, 39 Miss. 221; *Capers v. McCaa*, 41 Miss. 479; *Neylans v. Burge*, 14 Sm. & Mar. 201; *Green v. Creighton*, 10 Sm. & Mar. 159; *Searles v. Scott*, 14 Id. 94; *Hart v. Hart*, 39 Miss. 221; *Moody v. Harper*, 38 Miss. 569; *Gilliam v. Chancellor*, 43 Miss. 437; *Rabb v. Griffin*, 26 Miss. 579; *Archer v. Jones*, Miss. 583; *Wood v. Ford*, 29 Miss. 57; *Manly v. Kidd*, 33 Miss. 141; *Hill v. Boyland*, 40 Miss. 618; *Scott v. Searles*, 5 Sm. & M. 25; 7 Id. 498; *American, &c. Soc. v. Wade*, 8 Id. 610.

⁷ *King v. Ex'rs of Berry*, 2 Green's Ch. 44, 261; *Frey v. Demarest*, 16 N. J. Eq. 236; *Mallory's Adm'r v. Craige*, 2 McCart. 73; *Salter v. Williamson*, 1 Green's Ch. 480; *Smith v. Ex'r of Moore*, 3 Id. 485; *Meeker v. Marsh*, Saxt. 198; *Van Mater v. Sickler*, 1 Stockt. 483; *Clarke v.*

lina,¹ Rhode Island,² Tennessee,³ Virginia,⁴ District of Columbia,⁵ and the United States courts.⁶ In the second class, the equitable jurisdiction has been materially modified by the statute, so far as to deprive the equitable jurisdiction of the character of a concurrent jurisdiction; in other words, it has ceased to be concurrent and is simply auxiliary or ancillary to the main jurisdiction of the probate court; that is, in these states a court of equity will never have the enforcement of an administration except in extraordinary cases, where the probate jurisdiction has been limited, or where the character of the remedy which the court of probate may employ is imperfect and inadequate to secure the end designed. In such cases, the court of equity assumes jurisdiction; but wherever the court of probate is fully competent to perform the duty in the case, it has exclusive jurisdiction and the court of equity cannot take charge of it. In this class are found the states of Arkansas,⁷ California,⁸ Georgia,⁹ Kansas,¹⁰ Missouri,¹¹ New York,¹² Ohio,¹³

Johnston, 2 Stockt. 287; Search's Adm'r v. Search's Adm'r, 27 N. J. Eq. 137; Decker v. Decker's Adm'r, 27 Id. 239; Van Dyke v. Van Dyke, 31 N. J. Eq. 176.

¹Hunt v. Sneed, 64 N. C. 176; Brotten v. Bateman, 2 Dev. Eq. 115; Thompson v. McDonald, 2 Dev. & Bat. Eq. 463; Devereux v. Devereux, 81 N. C. 12; Greer v. Cagle, 84 N. C. 385; Pegram v. Armstrong, 82 N. C. 326; Haywood v. Haywood, 79 N. C. 42; Finger v. Finger, 64 N. C. 183; Ferrand v. Howard, 3 Ired. Eq. 381; Wilkins v. Finch, Phil. Eq. 355; Wadsworth v. Davis, 63 N. C. 251.

²Blake v. Butler, 10 R. I. 133; see, also, the following cases in the U. S. Circuit Court, which arose in this state: Mallett v. Dexter, 1 Curtis' C. C. 178; Pratt v. Northam, 5 Mason, 95.

³Evans v. Evans, 2 Coldw. 143; Bruce v. Bruce, 11 Heisk. 760; Rankin v. Anderson, 8 Baxt. 240; Townsend v. Townsend, 4 Coldw. 70.

⁴Simmons v. Simmons' Adm'r, 33 Gratt. 451; Portsmouth Ins. Co. v. Reynolds' Adm'r, 32 Gratt. 613; Kent's Adm'r v. Cloyd's Adm'r, 30 Gratt. 555; Nelson's Adm'r v. Cornwell, 11 Gratt. 724.

⁵Creswell v. Kennedy, 3 McArthur, 78; Keefe v. Malone, 3 McArthur, 236.

⁶Pratt v. Northam, 5 Mason, 95; Mallett v. Dexter, 1 Curtis C. C. 178; Case of Broderick's Will, 21 Wall. 504.

⁷Martin v. Campbell, 35 Ark. 137; State v. Rottaken, 34 Ark. 144; Freeman v. Reagan, 28 Ark. 373; Reinhardt v. Gartrell, 33 Ark. 727; Shegogg v. Perkins, 34 Ark. 117; Moren v. McCown, 23 Ark. 93; Mock v. Pleasants, 34 Ark. 63; Flash v. Gresham, 36 Ark. 529; Haag v. Sparks, 27 Ark. 594.

⁸Anguisola v. Arnaz, 51 Cal. 435; Gurnee v. Maloney, 38 Cal. 85; Hope v. Jones, 24 Cal. 89; Allen v. Tiffany, 53 Cal. 16; Matter of the Will of Bowen, 34 Cal. 683; Pond v. Pond, 10 Cal. 495; Rosenberg v. Frank, *supra*; Chaquette v. Ortet, 9 Pac. Law J. 602; 60 Cal.;

Bush v. Lindsey, 44 Cal. 121; Clarke v. Perry, 5 Cal. 58; Deck v. Gerke, 12 Cal. 433; Deck v. Gerke, *supra*; Haverstick v. Trudel, 51 Cal. 431; Meyers v. Farquharson, 46 Cal. 190; Willis v. Farley, 24 Cal. 490, 500; Sanford v. Head, 5 Cal. 297; but see Griggs v. Clark, 23 Cal. 427; Wilson v. Roach, 4 Cal. 362; Allen v. Tiffany, 53 Cal. 16; Castro v. Richardson, 18 Cal. 478.

⁹Slade v. Street, 27 Ga. 17; Perkins v. Perkins, 21 Ga. 13; Bryan v. Hickson, 40 Ga. 405; Irvin v. Crs. of Bond, 41 Ga. 630; Jeter v. Barnard, 42 Ga. 43; Mayo v. Keaton, 54 Ga. 496; and see Collins v. Stephens, 58 Ga. 284; Ewing v. Moses, 50 Ga. 264; Slade v. Street, 27 Ga. 17; Perkins v. Perkins, 21 Ga. 13; Moody v. Ellerbie, 36 Ga. 666; Walker v. Morris, 14 Ga. 323; Mills v. Lumpkin, 1 Kelly, 511.

¹⁰Shoemaker v. Brown, 10 Kans. 383; Johnson v. Cain, 15 Kans. 532.

¹¹Butler v. Lawson, 73 Mo. 227; Jones v. Brinker, 20 Mo. 87; Clark v. Henry's Adm'r, 9 Mo. 336; Berry v. Robinson, 9 Mo. 273; Miller v. Woodward, 8 Mo. 169; Erwin v. Henry, 5 Mo. 469; Graham v. O'Fallon, 3 Mo. 507; Jackson v. Jackson, 4 Mo. 210; Overton v. McFarland, 15 Mo. 312; Chandler v. Dodson, 52 Mo. 128; Pearce v. Calhoun, 59 Mo. 271; Titterington v. Hooker, 58 Mo. 593.

¹²Seymour v. Seymour, 4 Johns. Ch. 409; Thompson v. Brown, Johns. Ch. 619; Whitney v. Monroe, 4 Edw. Ch. 5; Rogers v. King, 8 Paige, 210; Christy v. Libby, 35 How. Pr. 119; Chipman v. Montgomery, 63 N. Y. 221, 235, 236; see, also, Peyser v. Wendt, 87 N. Y. 322; Haddow v. Lundy, 59 N. Y. 320; Browers v. Smith, 10 Paige, 193; Du Bussierre v. Holladay, 55 How. Pr. 210; Wright v. Fleming, 76 N. Y. 517.

¹³Taylor v. Huber's Ex'rs, 13 Ohio St. 288; McDonald v. Aten, 1 Ohio St. 293; Piatt v. Longworth's Devisees, 27 Ohio St. 159, 186; Cram v. Green, 6 Ohio, 429; Stiver v. Heirs of Stiver, 8 Ohio, 217.

South Carolina,¹ Tennessee,² Texas,³ Vermont,⁴ Wisconsin.⁵ In the third class of cases, the jurisdiction of the probate court is almost exclusive; and the only cases, in which the court of equity could assume jurisdiction, in respect to the administration of decedents' estates, are those which relate to matters lying under or outside of the regular course of administration and settlement of such estates, and therefore beyond the scope of the probate jurisdiction. Of this class are to be found the states of Connecticut,⁶ Indiana,⁷ Maine,⁸ Massachusetts,⁹ Michigan,¹⁰ Nebraska,¹¹ Nevada,¹² New Hampshire,¹³ Oregon,¹⁴ Pennsylvania.¹⁵

This variance in the jurisdiction of a court of equity over the administration of decedents' estates, in consequence of the establishment of probate courts, does not, however, affect the principles which are applied in the enforcement of such administration; it only relates to the jurisdiction of the courts over such cases. The fact that a court of equity did once have an almost unlimited jurisdiction over the administration of decedents' estates, makes the principles, which guide the court of probate at the present time in the enforcement of the administration, equitable in character and origin. And hence, what is to be said in this connection is not devoid of value or changed by the fact, that the probate court, instead of the court of equity, has jurisdiction. In one sense of the term, the probate court might be called a court of equity of limited jurisdiction.

¹ *Ragsdale v. Holmes*, 1 S. C. 91; *Eno v. Calder*, 14 Rich. Eq. 154; *Campbell v. Bank of Charleston*, 3 S. C. 384.

² *Evans v. Evans*, 2 Coldw. 143; *Bruce v. Bruce*, 11 Heisk. 760; *Rankin v. Anderson*, 8 Baxt. 240; *Townsend v. Townsend*, 4 Coldw. 70.

³ *Long v. Wortham*, 4 Tex. 381; *Dobbins v. Bryan*, 5 Tex. 276; *Newson v. Chrisman*, 9 Tex. 113; *Smith v. Smith*, 11 Tex. 102; *Crain v. Crain*, 17 Tex. 80; *Little v. Bidwell*, 21 Tex. 597; *Atchison v. Smith*, 25 Tex. 228; *Cannon v. McDaniel*, 46 Tex. 303; *Rogers v. Kennard*, 54 Tex. 30; *Patterson v. Allen*, 50 Tex. 23.

⁴ *Merriam v. Hemmenway*, 26 Vt. 565; *Heirs of Adams v. Adams*, 22 Vt. 50; *Morse v. Slason*, 13 Vt. 296.

⁵ *Appeal of Schaeffner*, 41 Wis. 260; *Wolf v. Schaeffner*, 51 Wis. 53; *Batchelder v. Batchelder*, 20 Wis. 452; *Tryon v. Farnsworth*, 30 Wis. 577; *Brook v. Chappell*, 34 Wis. 405.

⁶ *Beach v. Norton*, 9 Conn. 182; *Pitkin v. Pitkin*, 7 Conn. 315; *Bailey v. Strong*, 8 Conn. 278; *Sheldon v. Sheldon*, 2 Root, 512; *Gates v. Treat*, 17 Conn. 388; *Mix's Appeal*, 35 Conn. 121; *Cowles v. Whitman*, 10 Conn. 121; *Parsons v. Lyman*, 32 Conn. 566; *Prindle v. Holcomb*, 45 Conn. 111.

⁷ *Allen v. Clark*, 2 Blackf. 343; *Brackenridge v. Holland*, Blackf. 377; *Murdock v. Holland's Heirs*, 3 *Id.* 114; *Peck v. Brame*, 2 *Id.* 141; *Ex parte Shockley*, 14 Ind. 413; *Williams v. Perrin*, 73 Ind. 57; *Ramsey v. Fouts*, 87 *Id.* 78; *Heaton v. Knowlton*, 65 *Id.* 255; *Noble v. McGinnis*,

55 *Id.* 528; *Alexander v. Alexander*, 48 *Id.* 559.

⁸ *Richardson v. Knight*, 69 Me. 285, 289; *Nason v. First, &c. Church*, 66 Me. 100; *Elder v. Elder*, 50 Me. 535; *Morton v. Southgate*, 28 Me. 41; *Boynton v. Ingalls*, 70 Me. 461; *Caswell v. Caswell*, 28 Me. 232; *Fletcher v. Holmes*, 40 Me. 364.

⁹ *Fairfield v. Fairfield*, 15 Gray, 596; *Ross v. Ross*, 123 Mass. 212; *Jennison v. Hapgood*, 7 Pick. 1; *Grinnell v. Baxter*, 17 Pick. 383; *Sever v. Russell*, 4 (ush. 513; *Wilson v. Leishman*, 12 Met. 316; *Hathaway v. Thayer*, 8 Allen, 421; *Southwick v. Morrell*, 121 Mass. 520; *Sykes v. Meacham*, 103 Mass. 285.

¹⁰ *Winegar v. Newland*, Mich. 367; *Kellogg v. Aldrich*, 39 Mich. 576; *Shelden v. Walbridge*, 44 Mich. 251; *Holbrook v. Campau*, 22 Mich. 288; *Dickinson v. Seaver*, 44 Mich. 624.

¹¹ *Loosemore v. Smith*, 12 Neb. 343.

¹² *Corbett v. Rice*, 2 Nev. 330; *Lucich v. Medin*, 3 Nev. 93.

¹³ *Walker v. Cheever*, 35 N. H. 339, 349; *Hayes v. Hayes*, 48 N. H. 219; *Wells v. Pierce*, 27 N. H. 503; *Wheeler v. Perry*, 18 N. H. 307; *Petition of Baptist Church*, 51 N. H. 424; *Meth. Epis. Soc. v. Heirs of Harriman*, 54 N. H. 444.

¹⁴ *Winkle v. Winkle*, 8 Oreg. 193; *Grange Union v. Burkhart*, 8 Oreg. 51.

¹⁵ *Norris v. Farrell*, 33 Leg. Int. 129; 2 W. N. C. 423; *Wiley's Executors' Appeal*, 84 Pa. St. 270; *Campbell's Appeal*, 80 Pa. St. 298; *Dundas' Appeal*, 73 Pa. St. 474, 479; *Linsenberg v. Gourley*, 56 Pa. St. 166, 172; *Whiteside v. Whiteside*, 8 Harris, 473, *per* Black, C. J.

§ 349. **Kinds of legacies.**—Legacies are divided, in respect to their nature and qualities, into four kinds: specific, general, demonstrative and residuary legacies. In respect to the last legacy, very little by way of explanation need be said; its very name implies what its qualities are. Under a residuary legacy everything of a personal character passes to the legatee which has not been previously disposed of in the will; in other words, only those things pass to the residuary legatee which have not been made the subject of the specific, general, or demonstrative legacies. A specific legacy is the bequest or gift by will of a specific or particular thing belonging to the testator; and therefore can only be satisfied by the transfer of the one particular thing which was intended by the testator to be given to the legatee, and cannot be satisfied by any other thing of the same kind. The testator gives to the legatee, not a horse or statue or some other chattel of a general description, but he gives a particular horse or piece of plate or other chattel, which is specifically described in some way or other in the will so as to distinguish it from other things of the same kind. Whether the legacy is specific or not depends upon the language of the will. If the language employed in the will, in making the bequest, does not distinctly distinguish the thing bequeathed from the other things of the same kind; the legacy is not specific, although the testator may have had at the time when he made the will only one thing of the kind described. Ordinarily, the personal pronoun *my* is sufficient to make the bequest specific, as where the bequest is “of my horse” or “my household goods” and the like, where the testator has only one thing of the kind described in the bequest. Where the testator has other things of the same character which would fall within the description of the bequest or legacy, then there has not been a sufficient differentiation of the thing bequeathed, in order to make the legacy specific. The most common illustrations of specific legacies are to be found in the bequests of personal property of a changeable character; such as the furniture of a particular house, a particular horse, and the like; which are so described that they may be differentiated from other property of the same kind.¹ It is also quite common to have specific legacies in the bequests of the whole or part of the shares of stock or bonds or other securities, so bequeathed that specific bonds or shares of stock are transferred by such bequests and are differentiated from other stocks and bonds of the same kind; as where the testator bequeaths “my” stocks or bonds of a certain corporation. In all such cases, the bequest is specific.² The fact that the bequest is only of a

¹ *Golder v. Littlejohn*, 30 Wis. 344; *Stall v. Wilbur*, 77 N. Y. 158; *Gayre v. Gayre*, 2 Vern. 538; *Clark v. Buttler*, 1 Meriv. 304; *Robinson v. Webb*, 17 Beav. 260; *Powell v. Riley*, L. R. 2 Eq. 175; *Spencer v. Higgins*, 22 Conn. 521; *Lilly v. Curry's Ex'r*, 6 Bush, 590; *McGuire v. Evans*, 5 Ired. Eq. 269.

² *Gordon v. Duff*, 3 De G. F. & J. 662; *Hayes*

v. Hayes, 1 Keen, 97; *Vincent v. Newcombe*, 1 Younge, 599; *In re Jeffery's Trusts*, L. R. 2 Eq. 68 (“the pink coupons in the pigeon-hole for £3,666”); *Sidley v. Perry*, 7 Ves. 522, 529; *Barton v. Cooke*, 5 Ves. 461; *Miller v. Little*, 2 Beav. 259; *Kermode v. Macdonald*, L. R. 3 Ch. 584; 1 Eq. 457; *Humphreys v. Humphreys*, 3 Cox, 184; *Kirby v. Potter*, 4 Ves. 748, 750; *Measure v.*

part of the stock which is specifically described, does not make the bequest any the less specific. In such a case, the bequest makes the legatee tenant in common, as to the whole block of stock, with the other person who becomes entitled thereto under the terms of the will or the Statute of Distribution.¹ But where the bequest constitutes only gifts of money out of stock described, or simply a gift of a certain number of shares of stock or bonds, without words of description indicating the contemplation by the testator of a particular lot of stocks or bonds; as where he bequeathes a certain number of shares of stock, without indicating that he has in mind some stock which he owns at the time; that is, he does not use the words "my stock" or "the stock which I now possess" and the like; then the bequest is not specific, but may be satisfied by the transfer to the legatee of any stock of the kind called for, whether it be owned when the will was made or subsequently. In such cases, the bequest is equivalent to the gift of a sum of money, the amount of which is ascertained by the consideration of the face value of the stock bequeathed.² So, also, may there be specific bequests of debts due to the testator, where the description of the subject-matter of the bequest is sufficiently specific to distinguish the debts bequeathed from those which are not bequeathed.³ A bequest of money is generally not specific; but where the money bequeathed is described as being in a certain bag or box; or deposited in a certain bank, then it becomes a specific legacy instead of a general legacy.⁴

The devise of land is always specific; and hence a bequest of a lease or term of years would necessarily be specific.⁵

§ 350. **Ademption of specific legacies.**—The peculiarity of a specific legacy is, that the particular thing described as the subject-matter of the legacy can alone be claimed by the legatee. He has a

Carleton, 30 Beav. 538; Shuttleworth v. Greaves, 4 My. & Cr. 35; Manning v. Craig, 3 Green's Ch. 436; McGuire v. Evans, 5 Ired. Eq. 269; *In re* Gibson, L. R. 2 Eq. 669; Oliver v. Oliver, L. R. 11 Eq. 506; Bothamley v. Sherson, L. R. 20 Eq. 304; Loring v. Woodward, 41 N. H. 391; Wallace v. Wallace, 23 N. H. 149; Ford v. Ford, N. H. 212; Davies v. Fowler, L. R. 16 Eq. 308; Pollock v. Pollock, L. R. 18 Eq. 329; Page v. Young, L. R. 19 Eq. 501; Ludlam's Estate, 3 Pa. Law J. Rep. 332; Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9; Brainerd v. Cowdrey, 16 Conn. 1; Blackstone v. Blackstone, 3 Watts, 335; Alsop's Appeal, 9 Barr. 374.

¹ Kirby v. Potter, 4 Ves. 748; Hill v. Hill, 11 Jur., n. s., 806; Morley v. Bird, 3 Ves. 628; Hosking v. Nicholls, 1 Y. & C. Ch. 478.

² Boys v. Williams, 2 Russ. & M. 689; Mullin v. Smith, 1 Dr. & Sm. 204; Robinson v. Addison, 2 Beav. 515; Partridge v. Partridge, Cas. temp. Talbot, 226; Wilson v. Brownsmith, 9 Ves. 180; Lambert v. Lambert, 11 Id. 607; Johnson v. Johnson, 14 Sim. 313; Bp. of Peterborough v. Mortlock, 1 Bro. Ch. 565; Webster v. Hale, 8

Ves. 410; Fielding v. Preston, 1 De G. & J. 438; Tift v. Porter, 8 N. Y. 516.

³ Farnum v. Bascom, 122 Mass. 283; Titus v. McLanahan, 2 Del. Ch. 200; Gardner v. Printup, 2 Barb. 83; Stout v. Hart, 2 Halst. 414; Duncan v. Duncan, 27 Beav. 386; Sidbotham v. Watson, 11 Hare, 170; Walpole v. Apthorp, L. R. 4 Eq. 37; Chaworth v. Beech, 4 Ves. 555; Fryer v. Morris, 9 Ves. 360; Innes v. Johnson, 4 Ves. 568; Davies v. Morgan, 1 Beav. 405; Nelson v. Carter, 5 Sim. 530; Mellon's Appeal, 46 Pa. St. 165; Sparks v. Weedon, 21 Md. 156; Howell v. Hooks, 4 Ired. Eq. 188; Le Grice v. Finch, 3 Meriv. 50.

⁴ Lawson v. Stitch, 1 Atk. 507; Towle v. Swasey, 106 Mass. 100; Smith v. McKitterick, 51 Iowa, 548; Beck v. McGillis, 9 Barb. 35; Cagney v. O'Brien, 83 Ill. 72.

⁵ Forrester v. Lord Leigh, Ambl. 171; Mirehouse v. Scaife, 2 My. & Cr. 695; Hensman v. Pryer, L. R. 3 Ch. 420; Long v. Short, 1 P. Wms. 403; Fielding v. Preston, 1 De G. & J. 438; Sampson v. Sampson, L. R. 8 Eq. 479; Farquhar v. Hadden, L. R. 7 Ch. 1.

claim not to something that would generally fall within the description of the thing bequeathed, but he can only claim the particular thing that the testator intended him to have; so that if the bequest was of "my white horse," he could not claim any other white horse than that which the testator had at the time when he made the will; for it is that horse alone which the testator intended to give him, and not any white horse which the executor might be able to procure for the legatee. Hence, in the case of specific legacies, if the subject-matter of the legacy has been disposed of by the testator during his life, so that it is not his property when he dies; there is a complete failure of the legacy, and the executor is under no obligation to replace the particular thing with others of the same kind. In such cases the legacy is completely gone. This is not only true where the thing bequeathed is entirely consumed or sold, but there will be a partial ademption or failure of the legacy, where only a part of the subject-matter of the legacy still remains when the testator dies. To the extent to which the subject-matter of the legacy has been consumed or disposed of, there is a failure of the legacy.¹ There will be an ademption and a consequent failure of the specific legacy, whenever the thing is sold or otherwise disposed of during the life of the testator, and the proceeds of sale placed in the general funds of the estate or invested in property of a different kind.² But so, also, where the proceeds of sale have been invested in other property of the same kind which has been bequeathed by a specific legacy; in such cases, the property of the same kind, which has been subsequently acquired by or with the proceeds of sale with the subject-matter of this specific legacy, cannot be claimed by the legatee in the place of such specific legacy.³ So, also, if the specific articles bequeathed have been destroyed by fire, and the insurance money has been procured for such loss and reinvested, the legatee is not entitled to the insurance money or the property in which it is invested.⁴ There is also an ademption where the property is described as being in a particular place, and the property has been removed from that place by the act or consent

¹ *Newcomb v. Tr's of St. Peter's Ch.*, 2 Sandf. Ch. 636; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 37; *Douglas v. Douglas, Kay*, 400, 404; *Drinkwater v. Falconer*, 2 Ves. Sen. 623, 625; *Partridge v. Partridge*, Cas. temp. Talbot, 226; *Philson v. Moore*, 23 Hun, 152; *Blackstone v. Blackstone*, 3 Watts, 335; *Alsop's Appeal*, 9 Barr. 374; *Whitlock v. Vaun*, 38 Ga. 562; *Macdonald v. Irvine*, L. R. 8 Ch. D. 101; *Castle v. Fox*, L. R. 11 Eq. 542, 551; *Miles v. Miles*, L. R. 1 Eq. 462; *Douglas v. Douglas, Kay*, 400, 404; *Drinkwater v. Falconer*, 2 Ves. Sen. 623, 625; *Partridge v. Partridge*, Cas. temp. Talbot, 226; *Philson v. Moore*, 23 Hun, 152.

² *Newcomb v. Tr's of St. Peter's Ch.*, 2 Sandf. Ch. 636; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 37; *In re Gibson*, L. R. 2 Eq. 669; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Watts v. Watts*, L. R. 17 Eq. 217; *Blackstone v. Blackstone*, 3 Watts,

335; *Alsop's Appeal*, 9 Barr. 374; *Whitlock v. Vaun*, 38 Ga. 562; *Macdonald v. Irvine*, L. R. 8 Ch. D. 101; *Castle v. Fox*, L. R. 11 Eq. 542, 551; *Miles v. Miles*, L. R. 1 Eq. 462; *Douglas v. Douglas, Kay*, 400, 404; *Drinkwater v. Falconer*, 2 Ves. Sen. 623, 625; *Partridge v. Partridge*, Cas. temp. Talbot, 226; *Philson v. Moore*, 23 Hun, 152.

³ *Ludlam's Estate*, 3 Pa. Law J. Rep. 332; 1 Pars. Eq. 116; 1 Harris, 188; *Cuthbert v. Cuthbert*, 3 Yeates, 486; *Walton v. Walton*, 7 Johns. Ch. 258; *Beck v. McGillis*, 9 Barb. 35; *Innes v. Johnson*, 4 Ves. 568, 574; *Gardner v. Hatton*, 6 Sim. 93; *Sidney v. Sidney*, L. R. 17 Eq. 65; *Harrison v. Jackson*, L. R. Ch. D. 339; *In re Lane*, L. R. 14 Ch. D. 856.

⁴ *Durrant v. Friend*, 5 De G. & Sm. 343.

of the testator.¹ But where the removal is only of a temporary character, either for the purpose of being used by the testator or preserved from fire, with the expectation of its being returned to the same place, in such a case the removal does not operate as an ademption.² So, also, will there be no ademption where there has been a removal or change in the character of the subject-matter of the bequest, without the procurement or consent of the testator or without his knowledge.³ Inasmuch as this question of ademption appears to rest upon the determination or the intention of the testator to effect thereby an implied revocation of the will, it is held that if, at the time that the testator removes or otherwise does acts which operate as an ademption, he is insane, the rights of the specific legatee under the will will not be thereby affected, provided the same things which were bequeathed could be identified and recovered.⁴

On the other hand, a mere change in the form of ownership of the thing bequeathed, as where stock which is standing in the name of trustees for the testator, is subsequently transferred to the testator and placed in his name on the books of the company; in such cases, there has been no substantial disposition of the interests of the testator in the thing bequeathed, and hence there is no ademption, notwithstanding the change in the title, which would affect the rights of the legatee to claim such property under the specific legacy.⁵ For the same reason, a change in the form of an indebtedness, which has been made the subject-matter of a specific legacy, will not operate as an ademption; the original debt still remains, only in a changed form. It is only when the transaction amounts to an actual payment or discharge of the debt that the subject-matter of the legacy will be considered as having been adeemed; in the other case, the legatee may claim the debt in its changed form.⁶ The effect of an ademption in consequence of the sale or disposition of the subject-matter of the legacy, may be avoided by a written provision in connection with such specific legacy, that in case of the sale or other disposition of the subject-matter of the legacy the legatee shall have in the place of such legacy the money obtained by such sale of the thing bequeathed. This substitutionary provision would constitute in fact a contingent legacy of a fund to be acquired in the future.⁷ It will be seen in this connection that the term "ademption" is employed in the sense of failure of the legacy, in consequence

Colleton v. Garth, 6 Sim. 19; *Spencer v. Spencer*, 21 Beav. 548; *Blagrove v. Coore*, 27 Beav. 138; *Green v. Symonds*, 1 Bro. Ch. 129 n; *Heseltine v. Heseltine*, 3 Madd. 276.

Domville v. Taylor, 32 Beav. 604; *Chapman v. Hart*, 1 Ves. Sen. 271, 273; *Land v. Devaynes*, 4 Bro. Ch. 537; *Brooke v. Earl of Warwick*, 2 De G. & Sm. 425.

² *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Domville v. Taylor*, 32 Beav. 604.

³ *Taylor v. Taylor*, 10 Hare, 475; *Jenkins v. Jones*, L. R. 2 Eq. 323.

⁴ *Aslbourne v. Macguire*, 2 Bro. Ch. 108, 113;

Knight v. Davis, 3 My. & K. 358; *Dingwell v. Askew*, 1 Cox, 427; *Lee v. Lee*, 27 L. J. Ch. 824; *Moore v. Moore*, 29 Beav. 496; *Bothamley v. Sherson*, L. R. 20 Eq. 304; *Oakes v. Oakes*, 9 Hare, 666; *Basan v. Brandon*, 8 Sim. 171.

⁵ *Ford v. Ford*, 23 N. H. 212; *Havens v. Havens*, 1 Sandf. Ch. 324; *Gardner v. Printup*, 2 Barb. 83, 88, 93; *Morgan v. Thomas*, L. R. 6 Ch. D. 176; *In re Johnstone's Settlement*, L. R. 14 Ch. D. 162; *Doughty v. Stillwell*, 1 Bradf. 300, 309; *Stout v. Hart*, 2 Halst. 414, 418.

⁷ *Spencer v. Higgins*, 22 Conn. 521; *Langdon v. Astor's Ex'rs*, 3 Duer, 477; *Gardner v. Print-*

of the disposition of the subject-matter of such legacy during the life of the testator, and is not to be confounded with the case of ademption of one or another legacy in the same or different wills, which has already been described in the chapter on Satisfaction.¹

§ 351. **General legacies.**—A general legacy is one which is not specific; it is a bequest, not of some specific article or property of the testator, but of things in general of the kind described in the legacy. It would be a general legacy, where the testator bequeaths a white horse or a set of furniture, or a certain number of shares of stock, without specifying what horse, set of furniture or particular block of stock is bequeathed. Such legacies are in effect gifts of money equal in amount to the value of the thing bequeathed; and this legacy will constitute a general legacy, even though the testator may own articles of the kind described in the bequest at the time when he made his will, as long as the terms of the description of the legacy did not require that the particular thing of that kind, which he owned when the will was made, shall go to the legatee.² And it will be a general legacy, although the gift of a specified amount of money is declared to be for purpose of buying something; as, for example, a ring.³ If the testator leaves a general legacy, but imposes restrictions upon the amount or upon its use by the legatee, confining its use to certain objects; and there is a failure of such objects; and under the terms of the legacy it cannot be employed for the attainment of any other purpose; in such a case, there will be a failure of the legacy, because it is conditional and not absolute; but such a legacy is not any the less a general legacy.⁴ The effect of a general legacy is the creation of the obligation on the part of the estate of the testator to furnish to the legatee property of the kind described in the legacy, or to transfer to such legatee an equivalent in money of the value of such things. And the claim, therefore, can be enforced against the estate, whenever the estate is solvent and sufficiently large to satisfy such demand. On the other hand, the specific legacy can only be enforced, when the particular thing which has been bequeathed is found in the possession of the testator when he dies. For this reason it is an established rule of construction that, where it is doubtful whether the testator intended a specific or a general legacy, it will be presumed to be a

up, 2 Barb. 83, 88; *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 461; *Clark v. Browne*, 2 Sm. & Gif. 524; *Doughty v. Stillwell*, 1 Bradf. 300, 309; *Corbin v. Mills' Ex'rs*, 19 Gratt. 438.

¹ See *ante*, § 169.

² *Scotfield v. Adams*, 12 Hun. 366; *England v. Vestry of Prince George's Parish*, 53 Md. 466; *Osborn v. McAlpine*, 4 Redf. 1; *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Md. 9; *Randle v. Carter*, 62 Md. 95; *Brown v. Grimes*, 60 Md. 647; *Enders v. Enders*, 2 Barb. 362; *Corbin v. Mills' Ex'rs*, 19 Gratt. 438; *Davis v. Cain's Ex'r*, 1 Ired. Eq. 304; *Pearce v. Billings*, 10 R. I. 102; *Parker's Ex'rs v. Moore*, 25 N. J. Eq. 228; *Harper v.*

Bibb, 47 Ala. 547; *Hawthorn v. Shedden*, 2 Sm. & Gif. 293; *Fairer v. Park*, L. R. 3 Ch. D. 309; *Tift v. Porter*, 8 N. Y. 516; *Bliven v. Seymour*, 88 N. Y. 469; *Ashburner v. Macguire*, 2 Eq. Lead. Cas. 605-612, 646-652 (4th Am. ed.); *Fielding v. Preston*, 1 De G. & J. 438; *Macdonald v. Irvine*, L. R. 8 Ch. D. 101.

³ *Apreece v. Apreece*, 1 V. & B. 364; *Gibbons v. Hill*, 1 Dick. 324; *Hinton v. Pinke*, 1 P. Wms. 359; *Edwards v. Hall*, 11 Hare, 1, 23.

⁴ *Churchill v. Churchill*, L. R. 5 Eq. 44; *Palmer v. Flower*, L. R. 13 Eq. 250; *Lassence v. Tierney*, 1 Macn. & G. 551, 561, 562, *per Lord Cottenham*.

general legacy, since that construction is held to be more favorable to the legatee.¹

§ 352. **Demonstrative legacies.**—These are a peculiar kind of legacy, partaking somewhat of the character of a specific legacy, and yet not altogether so. They constitute bequests of sums of money or of quantities of certain property having a pecuniary value and measure, not in such a form as to make such a bequest a specific legacy; but this bequest is made, by the terms of the will, payable primarily out of a particular fund, or a certain designated piece of property, which is owned by the testator at the time when the will is made. Inasmuch as he has made the legacy primarily payable out of the particular fund or out of a certain piece of property, if this particular fund or piece of property is in existence and belongs to the testator when he dies, the legacy is a specific legacy to the extent that it must be satisfied out of the particular fund or property, and can, therefore, claim precedence in the matter of abatement over the general legacies. On the other hand, if the property out of which the legacy is primarily payable does not exist as a part of the testator's estate at his death, the legacy operates as a general legacy, and, like general legacies, becomes payable out of the general assets of the estate.²

§ 353. **Annuities.**—An annuity differs from an ordinary legacy, in that it is a bequest for the periodical payment of a certain sum of money for a certain length of time, which may be for a given number of years, for life, or indefinitely.³ But where no special time is stipulated during which the annuity is to be paid, it is presumed to be for the life of the legatee, and not perpetual.⁴ An annuity is a general legacy, where it is made payable out of the general assets of the estate, and specific, or rather a demonstrative legacy, where it is provided that it shall be paid out of a particular fund; it is probable

¹ *Tift v. Porter*, 8 N. Y. 516; *Morris v. Ex'rs of Thompson*, 16 N. Y. Eq. 222, 542.

² *Smith v. Fitzgerald*, 3 V. & B. 2; *Roberts v. Pocock*, 4 Ves. 150; *Savilo v. Blacket*, 1 P. Wms. 777; *Disney v. Crosse*, L. R. 2 Eq. 592; *Kirby v. Potter*, 4 Ves. 748; *Attwater v. Attwater*, 18 Beav. 330; *Sparrow v. Josselyn*, 16 Beav. 135; *Bevan v. Atty.-Gen.*, 4 Giff. 361; *Gillaume v. Adderley*, 15 Ves. 384; *Robinson v. Geldard*, 3 Macn. & G. 735, 744, 745; *Lord Truro*, quotation and definition of Mr. Justice Williams; see, also, *Tempest v. Tempest*, 7 De G. M. & G. 470, 473, *per Lord Cranworth*; *Giddings v. Seward*, 16 N. Y. 365; *Lagagher v. Gallagher*, 6 Watts, 473; *Corbin v. Mills' Ex'rs*, 19 Gratt. 438; *Smith v. Lampton*, 8 Dana, 69; *Snow v. Foley*, 119 Mass. 102; see, also, *Campbell v. Graham*, 1 Russ. & My. 453; *Manice v. Manice*, 1 Lans. 348; *Enders v. Enders*, 2 Barb. 362; *Armstrong's Appeal*, 63 Pa. St. 312; *Knecht's Appeal*, 71 Pa. St. 333; *Vickers v. Pound*, 6 H. L. Cas. 885; *Gordon v. Duff*, 3 De G. F. & J. 682; *Hodges v. Grant*, L. R. 4 Eq. 140; *Mytton v. Mytton*, L. R. 19 Eq. 30; *Pierrepont v. Sands*, 4 Redf. 206; *Ac-*

ton v. Acton, 1 Meriv. 178; *Paget v. Huish*, 1 Hem. & M. 663; *Armstrong's Appeal*, 63 Pa. St. 312; *Welch's Appeal*, 28 Pa. St. 363; *Mann v. Copland*, 2 Madd. 222; *Vickers v. Pound*, 6 H. L. Cas. 885; *Mullins v. Smith*, 1 Dr. & Sm. 204, 210; *Newton v. Stanley*, 28 N. Y. 61; *Walls v. Stewart*, 4 Harris, 275, 281; *Giddings v. Seward*, 16 N. Y. 365; *Pierrepont v. Edwards*, 25 N. Y. 128.

³ *Duke of Bolton v. Williams*, 4 Bro. Ch. 297; *Sibley v. Perry*, 7 Ves. 522, 534; *Swift v. Mash*, 2 Keen, 20; *Mullins v. Smith*, 1 Dr. & Sm. 204, 211.

⁴ *Acton v. Acton*, 1 Meriv. 178; *Paget v. Huish*, 1 Hem. & M. 663; *Armstrong's Appeal*, 63 Pa. St. 312; *Welch's Appeal*, 28 Pa. St. 363; *Newton v. Stanley*, 28 N. Y. 61; *Manice v. Manice*, 1 Lans. 348; *Mann v. Copland*, 2 Madd. 223; *Vickers v. Pound*, 6 H. L. Cas. 885; *Mullins v. Smith*, 1 Dr. & Sm. 204, 210; *Walls v. Stewart*, 4 Harris, 275, 281; *Giddings v. Seward*, 16 N. Y. 365; *Pierrepont v. Edwards*, 25 N. Y. 128.

that an annuity would never be treated as a specific legacy strictly so-called, instead of an demonstrative legacy, unless the intention of the testator to make it a strictly specific legacy is clearly manifested.

§ 354. **Abatement of legacies.**—All legacies are made subject to the claims of creditors; the creditor's claim to satisfaction out of the estate of the deceased debtor is paramount to the claims of every sort of devisee and legatee. But the relative claim of exemption of the devisee and legatee from liability to the debts of the deceased is dependent upon the special rules of law which obtain in the different states. It is not often that the English equitable rules of priority are interfered with by modern statutes; in fact, the general provision obtains that the English rule is enforced without material modification. In a few of the states, like California, all discrimination in respect to priority in the matter of liability for testator's debts has been done away with; but, as a general rule, it will be found that the order in which the property must be applied to the satisfaction of the debts of the deceased owner is the same as obtains in England, and is as follows: *First*, all personal property that was not disposed of by the will or only disposed as a part of the residuary legacy. *Secondly*, real estate which is expressly devised to be sold for the satisfaction of debts. *Thirdly*, real estate which descends to the heir not charged with the payment of debts. *Fourthly*, real estate and personal property which is especially charged with the payment of debts. *Fifthly*, general legacies. *Sixthly*, specific legacies and real estate devised. *Seventhly*, property which the testator appoints to a volunteer under a general power of appointment.² It will be seen, therefore, so far as the question applies to legacies, that a specific legacy is not called upon to be abated, until the general legacies have been exhausted.³ General annuities stand on the same level

¹ See 2 Eq. Lead. Cas. 613-619 (4th Am. ed.); *Pierrepont v. Edwards*, 25 N. Y. 128; *Alton v. Madlicot*, cited 2 Ves. Sen. 417; *Mann v. Copland*, 2 Madd. 223; *Paget v. Huish*, 1 Hem. & M. 663; *Attwater v. Attwater*, 18 Beav. 330.

² *Davies v. Topp*, 1 Bro. Ch. 524, 526; *Duke of Ancaster v. Mayer*, Bro. Ch. 454; see *Hoover v. Hoover*, 5 Barr. 351; *Armstrong's Appeal*, 63 Pa. St. 312; see *Lyne's Estate*, L. R. 8 Eq. 482; *Barnewell v. Lord Cawdor*, 3 Madd. 453; *Irvin v. Ironmonger*, 2 Russ. & M. 531; *Wood v. Ordish*, 3 Sm. & Gif. 125; *Harris v. Watkins, Kay*, 438; *Row v. Row*, L. R. 7 Eq. 414; *Lanoy v. Duke of Athol*, 2 Atk. 444; *Davies v. Topp*, 1 Bro. Ch. 524, 527; *Harmood v. Oglander*, 8 Ves. 106, 124, 125; *Manning v. Spooner*, 3 Ves. 114, 117; *Phillips v. Parry*, 22 Beav. 279; *Thompson v. Towne*, 2 Vern. 319; *Bainton v. Ward*, 2 Atk. 172; *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & Gif. 293, 305; *In re Davies' Trusts*, L. R. 13 Eq. 163; *Bateman v. Hotchkin*, 10 Beav. 426; *Hensman v. Fryer*, L. R. 3 Ch. 420; 2 Eq. 637; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Collins v. Lewis*, L. R. 8 Eq. 708;

Pearlins v. Lewis, L. R. 8 Eq. 708; *Pearmain v. Twiss*, 2 Giff. 130. As to legacies, see *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654; *Young v. Hassard*, 1 Jo. & Lat. 466, 472; *Fielding v. Preston*, 1 De G. & J. 438.

³ *Titus' Adm'r v. Titus*, 26 N. J. Eq. 111; *University of Pennsylvania*, 97 Pa. St. 187; *Osborne v. McAlpine*, 4 Redf. 1; *Alsop v. Bowers*, 76 N. C. 168; *Bliven v. Seymour*, 88 N. Y. 469; see, also, *Miller v. Huddleston*, 3 Macn. & G. 513; *Thwaites v. Foreman*, 1 Coll. 409; *Brown v. Brown*, 1 Keen, 275; *Coore v. Todd*, 7 De G. M. & G. 520; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; *Hensman v. Fryer*, L. R. 3 Ch. 420; *Bonham v. Bonham*, 23 N. J. Eq. 476; *Nash v. Smallwood*, 6 Md. 394; *Alexander v. Worthington*, 55 Md. 474; *Armstrong's Appeal*, 63 Pa. St. 312; *Long v. Short*, 1 P. Wms. 403; *Sleech v. Thorington*, 2 Ves. Sen. 560, 561, 564; *Page v. Leapingwell*, 18 Ves. 463; *Bonham v. Bonham*, 33 N. J. Eq. 476; *Towle v. Swasey*, 106 Mass. 100; *Brainerd v. Cowdrey*, 16 Conn. 1, 498; *Harley v. Moon*, 1 Dr. & Sm. 623; *Wright v. Weston*,

with general legacies, and are abated with them.¹ In the case of demonstrative legacies, if the particular fund, out of which the legacy is to be paid, is in existence and belongs to the testator when he dies, it is to be treated as a specific legacy, and does not have to abate with the general legacies.² In other words, whenever a legacy is specific, all the general legacies must have been exhausted in satisfying the claims of creditors before the specific legacy may be called upon to answer to the demands of the creditor; and if in the enforcement of his claims against the estate, the creditor should appropriate the property that was to have gone to the specific legatee, the legatee would have the claim of exoneration against the estate, to the amount of property held by the estate which would be appropriated to the satisfaction of the general legacies.

But the abatement of general legacies to their complete exhaustion, before specific legacies become liable, may be overcome by a declaration by the testator of a contrary intention; in other words, the testator may provide that certain specific legacies shall be postponed in matter of abatement to general legacies; and certain general legacies may be expressly exempted from the equality of the abatement with the other general legacies, so that the general legacies in general must first be exhausted, before the particular legacy exempt from this general rule can be called upon to contribute to the satisfaction of the debts.³ But this intention to control the question of priority must be clear and distinct; any doubt as to the intention of the testator to change the order of priority will make the supposed intention nugatory.⁴ A preference may be acquired by one general legacy over the others in the matter of abatement, where in the grant of the legacy the testator stipulates expressly that it "shall be paid in full," or "shall be paid at all events," or the like.⁵ So, also, may an intention to give preference to one legacy over another be inferred

26 Beav. 429; *Fielding v. Preston*, 1 De G. & J. 438; *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9; *Lightfoot v. Lightfoot's Ex'r*, 27 Ala. 351; *Bevan v. Cooper*, 7 Hun, 117; *Walpole v. Anthorp*, L. R. 4 Eq. 37; *Powell v. Riley*, L. R. 12 Eq. 175; *In re Jeffery's Trusts*, L. R. 2 Eq. 68.

¹ *University of Pennsylvania, Appeal of Trustees*, 97 Pa. St. 187; *Titus' Adm'r v. Titus*, 26 N. J. Eq. 111; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; *Hensman v. Fryer*, L. R. 3 Ch. 420; *Bonham v. Bonham*, 33 N. J. Eq. 476; see, also, *Miller v. Huddleston*, 3 Macn. & G. 513; *Thwaites v. Foreman*, 1 Coll. 409; *Brown v. Brown*, 1 Keen, 275; *Coore v. Todd*, 7 De G. M. & G. 520; *Osborne v. McAlpine*, 4 Redf. 1; *Alsop v. Bowers*, 76 N. C. 168; *Bliven v. Seymour*, 88 N. Y. 469.

² *Bliven v. Seymour*, 88 N. Y. 469; *Alsop v. Bowers*, 76 N. C. 168; *Osborne v. McAlpine*, 4 Redf. 1; *University of Pennsylvania*, 97 Pa. St. 187; *Titus' Adm'r v. Titus*, 26 N. J. Eq. 111; *Farrer v. St. Catharine's College*, L. R. 16 Eq.

19; *Hensman v. Fryer*, L. R. 3 Ch. 420; *Bonham v. Bonham*, 33 N. J. Eq. 476; see, also, *Miller v. Huddleston*, 3 Macn. & G. 513; *Thwaites v. Foreman*, 1 Coll. 409; *Brown v. Brown*, 1 Keen, 275; *Coore v. Todd*, 7 De G. M. & G. 520.

³ *McLean v. Robertson*, 126 Mass. 537; *Bancroft v. Bancroft*, 104 Mass. 236; *Appeal of Trustees of the University of Penn.*, 97 Pa. St. 187; *Lewin v. Lewin*, 2 Ves. Sen. 415; *Marsh v. Evans*, 1 P. Wms. 668; *Atty.-Gen. v. Robins*, 2 P. Wms. 23; *Brown v. Brown*, 1 Keen, 275; *Haynes v. Haynes*, 3 De G. M. & G. 590; *Beeston v. Booth*, 4 Madd. 161, 170; *Stammers v. Halliley*, 12 Sim. 42.

⁴ *Blower v. Morret*, 2 Ves. Sen. 420; *Beeston v. Booth*, 4 Madd. 161, 168; *Eavestaff v. Austin*, 19 Beav. 591; *Appeal of Trustees of the University of Penn.*, 97 Pa. St. 187.

⁵ *McLean v. Robertson*, 126 Mass. 537; *Johnson v. Johnson*, 14 Sim. 313; *Marsh v. Evans*, 1 P. Wms. 668.

from the fact that the testator after giving certain legacies, states that "as there will be a surplus" he will give further legacies; these subsequent legacies would not stand on an equality with the prior legacies of the same kind, in respect to abatement.¹ But an intention to exempt from liability to the abatement *pro rata* with others, will not be inferred from the fact that a particular legacy is directed to be paid at once, or that the testator declares that the legacies shall be paid in the order in which they are given in the will.² In all such cases, however, where the equality of liability for abatement has not been destroyed; or where in the change of liability two or more legacies participate in the change, whenever one or both of them become liable to be extinguished or abated in the satisfaction of the claims of creditors, they will abate *pro rata* among themselves, where the amount of the debt to be satisfied does not require the complete exhaustion of both.³ This is only a special application of the more general rule, that where the debts to be paid fall in amount below the value of the property covered by the devises or bequests of the same class, in the order of priority of liability for debts, that the debts will then be divided *pro rata* among these legacies and devises of the same class, so that such devises and legacies will be abated *pro rata* to the extent required for the satisfaction of the debts.

Independently of statute, there is no exception in respect to liability to abatement in favor of legacies, which are given to a wife, child or near relative.⁴ This rule has been changed by statute in several states; but even in the absence of statutory change, the disposition of the court is to give the preference to the widow, or child, or descendant, as far as it can; and an intention to give the preference to such favored legatee will be held by the court to have been established, whenever there is any circumstance in connection with the will, from which the intention may be implied.⁵ There is but one positive exception to the equality of liability to abatement in the satisfaction of the claims of creditors; and that is, in respect to legacies, which are given for and are based upon a valuable consideration, as where there is a bequest or devise to the widow in the satisfaction of her dower interest, or to a creditor in payment or discharge of his debt; such legacies will not abate with the other legacies, as would be the case if the favored legacy were not based upon a valuable consideration.⁶

§ 355. Effect of appropriation of funds by executor.—If in the

¹ *Stammers v. Halliley*, 12 Sim. 42; *Brown v. Brown*, 1 Keen, 275; *Atty.-Gen. v. Robins*, 2 P. Wms. 23.

² *Blower v. Morret*, 2 Ves. Sen. 420; *Beeston v. Booth*, 4 Madd. 161, 168; *Brown v. Brown*, 1 Keen, 275; *Thwaites v. Foreman*, 1 Coll. 409; *Titus' Adm'r v. Titus*, 26 N. J. Eq. 111.

³ *Bancroft v. Bancroft*, 104 Mass. 226; *Atty.-Gen. v. Robins*, 2 P. Wms. 23; *Brown v. Brown*, 1 Keen, 275; *Stammers v. Halliley*, 12 Sim. 42.

⁴ *Appeal of Trustees of the Univ. of Pa.*, 97

Pa. St. 187; see *Bliven v. Seymour*, 88 N. Y. 469; *Blower v. Morret*, 2 Ves. Sen. 420; *Titus' Adm'r v. Titus*, 26 N. J. Eq. 111.

⁵ *Lewin v. Lewin*, 2 Ves. Sen. 415.

⁶ *Matter of Dolan*, 4 Redf. 511; *McLean v. Robertson*, 126 Mass. 537; *Burridge v. Brady*, 1 P. Wms. 127; *Blower Morret*, 2 Ves. Sen. 420; *Heath v. Dendy*, 1 Russ. 543; *Davies v. Bosh*, 1 Younge, 341; *Potter v. Brown*, 11 R. I. 232; *Sanford v. Sanford*, 4 Hun, 753.

satisfaction or settlement of a legacy the executor has, with the consent of the legatee, set apart a particular fund for the satisfaction of the legacy, and afterwards through the wrongful act of the executor or in any other way, this fund has become insufficient; then the legatee, who gave his consent to the appropriation of the particular fund to the satisfaction of his legacy, will have to bear the loss of such deficit himself, and cannot call for contribution upon the other legatees of the same class. Where, however, the appropriation of the particular fund to the satisfaction of a particular legacy was made without the consent of the legatee, then any deficit in the fund occurring before its acceptance by the legatee, must fall ratably upon all the legatees of the same class, and not upon one legatee, for the payment of whose legacy the particular fund has been set apart.¹

§ 356. **Lapsed Legacies.**—In order that any disposition of property by will *in præcænti* may go into effect, there must be a donee in being, when the will goes into effect at the death of the testator, who can take such gift. Hence, if the legatee dies during the life of the testator, there is no legatee, when the will goes into effect and the legacy becomes nugatory; it is said to “lapse.”² But there is no lapse of the legacy, where the one legacy is given to a class of persons, as, for example, to children, and one or more of the children, or other members of the class of legatees, die during the life of the testator. The death of any member of the class has only the effect of enlarging the interests of the surviving members of the class, and there is no lapse of the legacy *pro tanto*.³ Where there is a lapsed legacy, the rule is that the property, which would have been acquired by such legatee, will pass into and become a part of the residuary fund, and would go to the residuary legatee. This is now the general rule throughout the American states, as well as in England, except that in most of our states the application of the rule has been limited by statute; which declares that whenever a legatee dies during the life of the testator, leaving issue or descendants, the legacy vests in the children of such legatee, instead of lapsing into the residuary estate.⁴

§ 357. **Gifts causa mortis; distinction from testamentary disposition.**—A gift *causa mortis* is not a testamentary disposition, for it does not appear in a will; and is, in fact, an act done by the donor during his life, although in apprehension of death. The donor, therefore, acquires the title to the gift directly from the donor, and does not receive it through the personal representative of the donor, hence

¹ Baker v. Farmer, L. R. 3 Ch. 537, reversing s. c., L. R. 4 Eq. 382; *Ex parte* Chadwin, 3 Swanst. 380; Willmott v. Jenkins, 1 Beav. 401; Page v. Leapingwell, 18 Ves. 463, 466; Humphreys v. Humphreys, 2 Cox, 184; Fonnereau v. Poyntz, 1 Bro. Ch. 472, 478.

² Appleton v. Rowley, L. R. 8 Eq. 139; Browne v. Hope, L. R. 14 Eq. 343; Maybank v. Brooks, 1 Bro. Ch. 84; Goodrich v. Wright, 1 P. Wms. 397;

Elliott v. Davenport, *Id.* 83; Aspinall v. Duckworth, 35 Beav. 307.

³ Sanders v. Ashford, 28 Beav. 609; Aspinall v. Duckworth, 35 Beav. 307; Fitz Roy v. Duke of Richmond, 27 Beav. 186; Philips v. Philips, 3 Hare, 281; Shuttleworth v. Greaves, 4 My. & Cr. 35; Lee v. Pain, 4 Hare, 201, 250; Leigh v. Leigh, 17 Beav. 605.

⁴ 3 Pom. Eq. Jur., § 1145; see Van Beuren v. Dash, 30 N. Y. 393.

the gift *causa mortis* takes effect independently of any testamentary provision or disposition. The gift stands or falls according to its own inherent validity as a gift, and cannot take place or be enforced as a testamentary provision, if it is not valid as a gift *causa mortis*. On the other hand, an ineffectual testamentary provision cannot be enforced as a gift *causa mortis*.¹ The gift *causa mortis* is, however, so far of the same general character as a testamentary provision as that it is liable for the debts of the testator, in case of a deficiency of assets,² and may be discussed with propriety in the same connection with legacies.

§ 358. **Equitable jurisdiction over gifts causa mortis.**—In consequence of the difficulty, in the way of exercising the jurisdiction at law over gifts *causa mortis*, the court of equity assumed concurrent jurisdiction over such gifts with the court of law.³ This concurrent jurisdiction, however, only obtains in the ordinary cases of enforcement of gifts *causa mortis*. Where the relation of trustee and *cestui que trust* obtains between the donor and the donee, as where bonds or negotiable instruments are transferred unindorsed, then the court of equity is alone competent to afford the appropriate remedy, to procure the due endorsement of such instrument to the donee.⁴ So, also, where the gift is made to one person in trust for another, the court of equity assumes exclusive jurisdiction for the purpose of enforcing the trust.⁵

§ 359. **The characteristics of donatio mortis causa.**—A gift made in contemplation of the death of the donor is called in the civil law, from which these principles are taken, *donatio mortis causa*.⁶

¹ Mitchell v. Smith, 4 De G. J. & S. 422; McGrath v. Reynolds, 116 Mass. 566; Ward v. Turner, 2 Ves. Sen. 431; Grattan v. Appleton, 3 Story, 755; Edwards v. Jones, 1 My. v. Cr. 226; Kilby v. Goodwin, 2 Del. Ch. 61.

² Tate v. Leithhead, Kay, 658; Smith v. Casen, cited 1 P. Wms. 406; Borneman v. Sidlinger, 15 Me. 429; House v. Grant, 4 Lans. 296.

³ Mitchell v. Smith, 4 De G. J. & S. 422; Hewitt v. Kaye, L. R. 6 Eq. 198; *In re Bleak's Estate*, L. R. 15 Eq. 489; Thompson v. Batty, 2 Str. 777; Staniland v. Willott, 3 Macn. & G. 664; Boutts v. Ellis, 4 De G. M. & G. 249; Duffield v. Elwes, 1 Bligh, n. s., 497; Ward v. Turner, 2 Ves. Sen. 431; Miller v. Miller, 3 P. Wms. 356; Moore v. Moore, L. R. 18 Eq. 474; Rolls v. Pearce, L. R. 5 Ch. D. 730; *In re Mead*, L. R. 15 Ch. D. 651; Ellis v. Secor, 31 Mich. 185; Fiero v. Fiero, 5 T. & C. 151; Case v. Dennison, 9 R. I. 88; House v. Grant, 4 Lans. 296; Rhodes v. Childs, 64 Pa. St. 18; Vandermark v. Vandermark, 55 How. Pr. 408; Coleman v. Parker, 114 Mass. 30; Clough v. Clough, 117 Mass. 83; Pierce v. Boston Sav. Bank, 129 Mass. 425.

⁴ Duffield v. Elwes, 1 Bligh, n. s., 497, 530, 534; Staniland v. Willott, 3 Macn. & G. 664, 675, 676.

⁵ See Trorlicht v. Weizenecker, 1 Mo. App. 482; Brooks v. Brooks, 12 S. C. 422; Darland v.

Taylor, 52 Iowa, 503; Conklin v. Conklin, 20 Hun, 278; Sheedy v. Roach, 124 Mass. 472; Vandermark v. Vandermark, 55 How. Pr. 408; Coleman v. Parker, 114 Mass. 30; Clough v. Clough, 117 Mass. 83; Pierce v. Boston Sav. Bank, 129 Mass. 425; Kilby v. Godwin, 2 Del. Ch. 61; McGrath v. Reynolds, 116 Mass. 566; Carr v. Silloway, 111 Mass. 24; Ellis v. Secor, 31 Mich. 185; Fiero v. Fiero, 5 T. & C. 151; Case v. Dennison, 9 R. I. 88; House v. Grant, 4 Lans. 296; Rhodes v. Childs, 64 Pa. St. 18; Smith v. Dorsey, 38 Ind. 451; Baker v. Williams, 34 Ind. 547; Tillinghast v. Wheaton, 3 R. I. 536; Prickett v. Prickett's Adm'rs, 20 N. J. Eq. 478; Turner v. Estabrook, 129 Mass. 425; Conser v. Snowden, 54 Md. 175; West v. Cavins, 74 Ind. 265; Robinson v. Ring, 72 Me. 140; Dean v. Dean's Estate, 43 Vt. 337; Hatch v. Atkinson, 56 Me. 324; Southerland v. Southerland's Adm'r, 5 Bush, 591.

⁶ Ward v. Turner, 2 Ves. Sen. 431; 1 Eq. Lead. Cas. 1205, 1219-1229, 1230-1251 (4th Am. ed.); Hedges v. Hedges, Prec. Chan. 269; Jones v. Selby, *Id.* 300; Miller v. Miller, 3 P. Wms. 356; Lawson v. Lawson, 1 *Id.* 441; McGrath v. Reynolds, 116 Mass. 566; Clough v. Clough, 117 Mass. 83; Carr v. Silloway, 111 Mass. 24; Ellis v. Secor, 31 Mich. 185; Stevens v. Stevens, 5

In order that it may take effect in passing the absolute title to the thing donated, the following requisites must concur: (1.) It must be made in immediate apprehension of death; a gift in expectation of the future possibility of death, as where a soldier, on going out to a war, or a sailor, on the eve of a long voyage, makes a gift to take effect if he does not return, is not a good *donatio mortis causa*.¹ And it must appear by satisfactory evidence that the gift was made in apprehension of death.² But the length of time before the death is not essential, provided at the time the gift was made there was an immediate apprehension of death.³ (2.) The donor should die of the same ailment which caused the apprehension of death. The recovery of the donor defeats the gift.⁴ And the donor may revoke the gift at any time before his death.⁵ (3.) There must be a delivery, actual or symbolical, and, (4) it must be accepted by the donee. The gift may be delivered to the donee, or to some third person for him.⁶ There may

Thomp. & C. 87; Blount v. Burrow, Ves. 546; Tate v. Hilbert, 2 Ves. 111, 120; Gardner v. Parker, 3 Madd. 184; Snellgrove v. Bailey, 3 Atk. 214; Duffield v. Elwes, 1 S. & S. 239; 1 Bligh, n. s., 497, 527; Fiero v. Fiero, Thomp. & C. 151; Case v. Dennison, 9 R. I. 88; Tillingham v. Wheaton, 8 Id. 536; Smith v. Dorsey, 38 Ind. 451; Baker v. Williams, 34 Ind. 547; Powell v. Hellicar, 26 Beav. 261; Cosnahan v. Grice, 15 Mo. P. C. 215; Boutts v. Ellis, 4 De G. M. & G. 249; Mitchell v. Smith, 4 De G. J. & S. 422; Rockwood v. Wiggan, 16 Gray, 402; Hatch v. Atkinson, 56 Me. 324; Southerland v. Southerland's Adm'r, 5 Bush, 591; Prickett v. Prickett's Adm'r, 20 N. J. Eq. 478; Hewitt v. Kaye, L. R. 6 Eq. 198; *In re* Beak's Estate, L. R. 13 Eq. 489; Moore v. Moore, L. R. 18 Eq. 474; Rolls v. Pearce, L. R. 5 Ch. D. 730; Dole v. Lincoln, 31 Me. 422; Boreman v. Sidlinger, 15 Me. 429; Weston v. Hight, 17 Me. 287, 290; Holley v. Adams, 16 Vt. 206, 210, 212; Smith v. Kitttridge, 21 Vt. 238, 245; Meach v. Meach, 24 Vt. 519; *In re* Mead, L. R. 15 Ch. D. 651; Robinson v. Ring, 72 Me. 140; Walter v. Ford, 74 Mo. 195; West v. Cavins, 74 Ind. 265; Pierce v. Boston Sav. Bk., 128 Mass. 425; Parish v. Stone, 14 Pick. 198, 203, 204; Grover v. Grover, 24 Pick. 261; Sessions v. Moseley, 4 Cush, 87; Bates v. Kempton, 7 Gray, 382; Turner v. Estabrook, Mass. 425; Conser v. Snowden, 54 Md. 175; Estate of Barclay, 11 Phila. 123; Brooks v. Brooks, 12 S. C. 422; Gratant v. Appleton, 3 Story, 755, 763; Raymond v. Sellick, 10 Conn. 480; Harris v. Clark, 2 Barb. 94, 96; 3 N. Y. 93; Delmotte v. Taylor, 1 Redf. 417; Ogilvie v. Ogilvie, 1 Bradf. 356; Darland v. Taylor, 52 Iowa, 503; Conklin v. Conklin, 20 Hun, 278; Sheedy v. Roach, 124 Mass. 472; McCarty v. Kearnan, 86 Ill. 291; Kilby v. Godwin, 2 Del. Ch. 61; Trorlicht v. Weizenecker, 1 Mo. App. 482; Westerlo v. De Witt, 35 Barb. 215; Wells v. Tucker, 3 Binn. 386; Nicholas v. Adams, 2 Whart. 17; Hebb v. Hebb, 5 Gill, 506; Bradley v. Hunt, 5 Gill & J. 54; Pennington v. Gittings, 2 Gill & J. 208; Miller v. Jeffress, 4 Gratt. 473; Chevallier v. Wilson, 1 Tex. 161.

¹ Gourley v. Linsinbigler, 51 Pa. St. 345; Brickhouse v. Brickhouse, 11 Ired. 404; Irish v. Nutting, 47 Barb. 370; Baker v. Williams, 34 Ind. 547; Gass v. Simpson, 4 Coldw. 288; and see Smith v. Dorsey, 38 Ind. 451; but see *contra*, Dexhelmer v. Gautier, 5 Robert. 216; Gourley v. Linsinbigler, 51 Pa. St. 345.

² Edwards v. Jones, 1 My. & Cr. 226; Gardner v. Parker, 3 Madd. 184, 185; Tate v. Leithhead, Kay, 658; Ogilvie v. Ogilvie, 1 Bradf. 356; Lawson v. Lawson, 1 P. Wms. 441 First Nat. Bank v. Balcom, 35 Conn. 351; Prickett v. Prickett's Adm'r, 20 N. J. Eq. 478; Sheedy v. Roach, 124 Mass. 472; Rockwood v. Wiggan, 16 Gray, 402; Rhodes v. Childs, 64 Pa. St. 18; Dean v. Dean's Estate, 43 Vt. 337; Hatch v. Atkinson, 56 Me. 324; Cosnahan v. Grice, 15 Mo. P. C. 215; Ellis v. Secor, 31 Mich. 185. Delmotte v. Taylor, 1 Redf. 417; Westerlo v. De Witt, 35 Barb. 215; Conklin v. Conklin, 20 Hun, 278.

³ Gardner v. Gardner, 22 Wend. 526; Darland v. Taylor, 52 Iowa, 503.

⁴ Staniland v. Willott, 3 Macn. & G. 664; Conser v. Snowden, 54 Md. 175; Ward v. Turner, 2 Ves. Sen. 431; 1 Eq. Lead. Cas. 1245; Tate v. Hilbert, 2 Ves. 111; 4 Bro. Ch. 286; Bunn v. Markham, 7 Taunt. 224.

⁵ Parker v. Marston, 27 Me. 196; Staniland v. Willott, 3 Macn. & G. 664; and see Fiero v. Fiero, 5 Thomp. & C. 151; Ellis v. Secor, 31 Mich. 185.

⁶ Ward v. Turner, 2 Ves. Sr. 431; McKenzie v. Doning, 25 Ga. 669; Jones v. Deyer, 16 Ala. 221; Darland v. Taylor, 52 Iowa, 503; Sheedy v. Roach, 124 Mass. 472; Pierce v. Boston Savings Bank, 129 Mass. 425; Kilby v. Godwin, 2 Del. Ch. 61; Vandermark v. Vandermark, 55 How. Pr. 408; Clough v. Clough, 117 Mass. 83; McGrath v. Reynolds, 116 Mass. 566; Stevens v. Stevens, 9 Thomp. & C. 87; Fiero v. Fiero, 5 Thomp. & C. 151; Hatch v. Atkinson, 56 Me. 324; and see, also, Carr v. Silloway, 111 Mass. 24; Case of Dennison, 9 R. I. 88; Prickett v. Prickett's Adm'r, 20 N. J. Eq. 478; Conser v. Snowden, 54 Md. 175; Robinson v. Ring, 72 Me.

be a delivery to one person for the benefit of two or more donees.¹ In any case, the intention to deliver must be made clear.² The third person, to whom it is delivered, must in turn deliver it to the intended donee, at or before the donor's death.³ And if the holder refuses to so deliver to the donee, the latter may recover it of him by an appropriate action.⁴ Or it may be returned to the donor to keep or to collect for the donee.⁵ The delivery need not be actual and manual. It may be constructive, and implied from acts which indicate clearly the intention to transfer title.⁶ The acceptance of the donee will ordinarily be implied from the gift being advantageous to him.⁷

At first, it was held that only things, which were susceptible of manual delivery, could pass by a *donatio mortis causa*; but the rule began immediately to be relaxed and extended in its application, so as to admit of the gift in this way of negotiable bills and notes, either payable to bearer, or indorsed by the donor in blank,⁸ as well as to chattels in general.⁹ It was once doubted whether there could

140; Ellis v. Secor, 31 Mich. 185; Turner v. Estabrook, 129 Mass. 425; Champney v. Blanchard, 39 N. Y. 111; Wing v. Merchant, 57 Me. 383; Southerland v. Southerland's Adm'r, 5 Bush, 591; Conklin v. Conklin, 20 Hun, 278; Coleman v. Parker, 114 Mass. 30; Thompson v. Heffernan, 4 Dr. & War. 285; Tate v. Hilbert, 2 Ves. 111, 120; Reddel v. Dobree, 10 Sim. 244; Noble v. Smith, 2 Johns. 52; Harris v. Clark, 3 N. Y. 93; Jackson v. Twenty-third St. Ry., 88 N. Y. 520; Ward v. Turner, 2 Ves. Sen. 431; 1 Eq. Lead. Cas. 1205; see, also, Dunn v. Markham, 7 Taunt. 224, 227; Irons v. Smallpiece, 2 B. & Ald. 551; Craig v. Craig, 3 Barb. Ch. 76, 117; Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400; French v. Reynolds, 39 Vt. 623; Dow v. Gould, & Co. Min. Co., 31 Cal. 629.

¹ Borneman v. Sidlinger, 15 Me. 429; Brunson v. Brunson, Meigs, 635.

² Dunne v. Boyd, I. R. 8 Eq. 609.

³ Sessions v. Moseley, 4 Cush. 87; Walter v. Ford, 74 Mo. 195; Drury v. Smith, 1 P. Wms. 404; Moore v. Darton, 4 De G. & Sm. 517; Kemper v. Kemper's Adm'r's, 1 Duv. 401; Baker v. Williams, 34 Ind. 547; Sheedy v. Roach, 124 Mass. 473; Kilby v. Godwin, 2 Del. Ch. 61; Trorlicht v. Weizenecker, 1 Mo. App. 482; Clough v. Clough, 147 Mass. 83; Turner v. Estabrook, 129 Mass. 425.

⁴ Coutant v. Schuyler, 1 Paige, 316; Wells v. Tucker, 3 Binn. 366.

⁵ Grover v. Grover, 24 Pick. 261.

⁶ A direction to a trustee to give a note, belonging to the donor, to the donee, is a good constructive delivery. Southerland v. Southerland, 4 Bush, 491; an attorney's receipt for a bond in his possession at the direction of the donor, Elam v. Keen, 4 Leigh, 333; a wife's direction to her husband to take the money, referring to a note in a bureau drawer, Stevens v. Stevens, 2 Hun, 470; the surrender or destruction of the donee's bill or note, Garland v. Garland, 22 Wend. 526; Lee v. Boak, 11

Gratt. 182; Hurst v. Beach, 5 Madd. 351; Darland v. Taylor, 52 Iowa, 503. But see Blanchard v. Sheldon, 43 Vt. 512; Smith v. Smith, 2 Str. 955; Jones v. Selby, Prec. Chan. 300; Penfield v. Thayer, 2 E. D. Smith, 305; and see Vandermark v. Vandermark, 55 How. Pr. 408; Cooper v. Burr, 45 Barb. 9; Miller v. Jeffress, 4 Gratt. 472, 479; Powell v. Hellicar, 26 Beav. 261; Reddel v. Dobree, 10 Sim. 244; Farquharson v. Cave, 2 Coll. 356; Trimmer v. Danby, 25 L. J. Ch. 424; Hawkins v. Blewitt, 2 Esp. 663; Maguire v. Dodd, 9 Ir. Ch. 452-459; Hatch v. Atkinson, 56 Me. 324.

⁷ De Levillian v. Evans, 39 Cal. 120; Darland v. Taylor, 52 Iowa, 503.

⁸ Rankin v. Wegnein, 27 Beav. 309; Veal v. Veal, 27 Beav. 303; Drury v. Smith, 1 P. Wms. 405; Lawson v. Lawson, 1 P. Wms. 411; Miller v. Miller, P. Wms. 356; Weston v. Hight, 17 Me. 287; House v. Grant, 4 Lans. 296; Burke v. Bishop, 27 La. Ann. 465 (27 Am. Rep. 567); Turpin v. Thompson, 2 Met. (Ky.) 420; Borneman v. Sidlinger, 15 Me. 429; Caldwell v. Renfrew, 33 Vt. 213; Grover v. Grover, 24 Pick. 261; Sessions v. Moseley, 4 Cush. 87; Stevens v. Stevens, 5 Thomp. & C. 87; Bedell v. Carll, 33 N. Y. 581; Coutant v. Schuyler, 1 Paige, 316; Craig v. Craig, 3 Barb. Ch. 76, 117; Chase v. Redding, 13 Gray, 418; Brown v. Brown, 18 Conn. 410; Gourley v. Linsenbiger, 51 Pa. St. 345; Jones v. Deyer, 16 Ala. 221; Southerland v. Southerland's Adm'r, 5 Bush, 591; Ashbrook v. Ryon's Adm'r, 2 Bush, 228; Turpin v. Thompson, 2 Metc. (Ky.) 420. Where the donor has indorsed the paper, the indorsement only operates as a transfer of the donor's legal title, and does not make his estate liable as an indorsement. Weston v. Hight, 17 Me. 287.

⁹ Drury v. Smith, 1 P. Wms. 404; Bunn v. Markham, 7 Taunt. 224; Kilby v. Godwin, 2 Del. Ch. 61; Baker v. Williams, 34 Ind. 547; Ward v. Turner, 2 Ves. Sen. 431; Shanley v. Harvey, 2 Eden, 126; Miller v. Miller, 3 P.

be a good *donatio mortis causa* of an undorsed negotiable paper, payable to order.¹ But it is now very generally held that for the purpose of a *donatio mortis causa*, the indorsement was a mere technicality, and that there may be a good gift of the negotiable instrument without indorsement by the donor.² The donee in such a case gets only the equitable title,³ and must bring suit in the name of the donor's personal representatives, unless the common law rule is regarded to assignment of choses in actions has been repealed, when the donee can sue in his own name;⁴ or he may compel the donor's representatives to indorse the paper to him.⁵ But a donor cannot make a *donatio mortis causa* of his own bill of exchange, or promissory note, for the reason that it constitutes a contract without a consideration, which cannot be enforced in the courts.⁶ As a general rule, the gift of the donor's check, which is not presented until after the death of the donor, is held to be an invalid *donatio mortis causa*.⁷ But if such a check is paid by the bank, before receiving notice of the drawer's death,⁸ or is certified to by the bank,⁹ or it passes into the hands of a *bona fide* holder before the donor's death,¹⁰ it passes a good title,¹¹ and

Wms. 356; *Dean v. Dean's Estate*, 43 Vt. 337; *Estate of Barclay*, 11 Phila. 123.

¹ *Miller v. Miller*, 3 P. Wms. 356; 1 *Daniel's Negot. Inst.*, § 24.

² *Veal v. Veal*, 27 Beav. 303; *Rankin v. Wagnelin*, 27 Beav. 308, 309; *Borneman v. Sedlinger*, 15 Me. 429; *Parker v. Marston*, 27 Me. 196; *Bates v. Kempton*, 7 Gray, 382; *Grover v. Grover*, 24 Pick. 261; *Chase v. Redding*, 13 Gray, 418; *Keniston v. Scena*, 54 N. H. 24; *Brown v. Brown*, 18 Conn. 409; *McConnell v. McConnell*, 11 Vt. 290; *Tillinghast v. Wheaton*, 8 R. I. 536; *Stevens v. Stevens*, 9 N. Y. S. C. (2 Hun) 472; *Coutant v. Schuyler*, 1 Paige, 315; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Jones v. Deyer*, 16 Ala. 221; *In re Mead*, L. R. 15 Ch. D. 651; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 Gray, 418, 420.

³ *Ashbrook v. Pyon*, 2 Bush, 228.

⁴ See *post*, § 371.

⁵ *Veal v. Veal*, 27 Beav. 303; *Rankin v. Wagnelin*, 27 Beav. 309; *Duffield v. Elwes*, 1 Bligh, N. S., 409.

⁶ *Fink v. Cox*, 18 Johns. 145; *Harris v. Clark*, 3 N. Y. 93, overruling *Wright v. Wright*, 1 Cow. 598; *Copp v. Sawyer*, 6 N. H. 386; *Phelps v. Pond*, 23 N. Y. 69; *Hamor v. Moore*, 8 Ohio St. 239; *Blanchard v. Williamson*, 70 Ill. 647; *De Pouilly's Succession*, 22 La. Ann. 97; *Parish v. Stone*, 74 Pick. 198; *Warren v. Durfee*, 126 Mass. 338; *Flint v. Paltee*, 33 N. H. 520; *Holly v. Adams*, 16 Vt. 206; *Smith v. Ketrledge*, 21 Vt. 237; *Raymond v. Sellick*, 10 Conn. 480; *Voorhees v. Woodhull*, 4 Vroom, 494; *Helfenstein's Estate*, 77 Pa. St. 328; *Hall v. Howard*, Rice, 310; *Smith v. Smith*, 3 Stew. Eq. 564; *Grymes v. Hone*, 40 N. Y. 17; *Whitaker v. Whitaker*, 52 N. Y. 368; *Johnson v. Spies*, 5 Hun, 468; *Kenistons v. Seeva*, 56 N. H. 24; *Brown v. Moore*, 3 Head, 671; *Harris v. Clark*, 3 N. Y. 93, 110; *Second*

Nat. Bk. v. Williams, 13 Mich. 282; *McKenzie v. Downing*, 25 Ga. 669; see *Walter v. Ford*, 74 Mo. 195; *West v. Cavins*, 74 Ind. 265; *Flint v. Pattee*, 33 N. H. 520; *Copp v. Sawyer*, 6 N. H. 386; *Holley v. Adams*, 16 Vt. 206; *In re Mead*, L. R. 15 Ch. D. 651; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R. 13 Eq. 489. But where there is a valuable consideration for the note, the transfer will be upheld by the courts. *Dean v. Carruth*, 108 Mass. 242; *Bowers v. Hurd*, 16 Mass. 127.

⁷ *Curry v. Powers*, 70 N. Y. 212; *Simmons v. Cincinnati Sav. Soc.*, 31 Ohio St. 457; *Second Nat. Bank v. Williams*, 13 Mich. 282; *Boutts v. Ellis*, 17 Beav. 121; 4 De G. M. & G. 249; *Beak v. Beak*, L. R. 13 Eq. 489; *De Pouilly's Succession*, 22 La. Ann. 97; *Harris v. Clark*, 3 N. Y. 93, 110; *McKenzie v. Downing*, 25 Ga. 669; see *Walter v. Ford*, 74 Mo. 195; *In re Mead*, L. R. 15 Ch. D. 651; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R. 13 Eq. 489.

⁸ *Tate v. Hilbert*, 2 Ves. Jr. 111; s. c., 4 Bro. C. C. 280.

⁹ *Rolls v. Pearce*, L. R. 5 Ch. D. 730; *Bromley v. Brunton*, L. R. 6 Eq. 275; *Bouts v. Ellis*, 4 De G. M. & G. 249; *Rhodes v. Childs*, 74 Pa. St. 18; *Trorlicht v. Weizenecker*, 1 Mo. App. 482.

¹⁰ *Rolls v. Pearce*, L. R. 5 Ch. D. 730; see *Lawson v. Lawson*, 1 P. Wms. 441.

¹¹ *Moore v. Moore*, L. R. 18 Eq. 474; *Brooks v. Brooks*, 12 S. C. 422; *Amis v. Witt*, 33 Beav. 619; *Westerlo v. De Witt*, 36 N. Y. 340; *Case v. Denison*, 9 R. I. 88; *Dean v. Dean's Estate*, 43 Vt. 337; *Camp's Appeal*, 36 Conn. 88; *Penfield v. Thayer*, 2 E. D. Smith, 305; *Sheedy v. Roach*, 124 Mass. 472; *Pierce v. Boston Sav. Bk.*, 129 Mass. 425; *Ashbrook v. Ryon's Adm'r*, 2 Bush, 228; *Boutts v. Ellis*, 4 De G. M. & G. 249; *Witt v. Amis*, 1 B. & S. 109; *Turner v. Estabrook*, Mass. 425; *Vandermark v. Vandermark*, 55 How. Pr. 408; *Tillinghast v. Wheaton*, 8 R. I. 536.

may be enforced against the donor's estate. There can also be a good *donatio mortis causa* of credits and certificates of deposit, and of bonds and other instruments of indebtedness.¹

¹ Witt v. Amis, 1 B. & S. 109; Moore v. Moore, L. R. 18 Eq. 474; Ward v. Turner, 2 Ves. Sen. 431; Waring v. Edmonds, 11 Md. 424; Phipps v. Hope, 16 Ohio St. 586; Connor v. Trawick's Adm'r, 37 Ala. 289, 295; Duffield v. Elwess, 1 Bligh, N. S., 497, 527, 542; Gardner v. Parker, 3 Madd. 184; Hurst v. Beach, 5 Madd. 351; Clavering v. Yorke, 2 Coll. 363 n; see, also, Ellis v.

Secor, 31 Mich. 185; Wing v. Merchant, 57 Me. 383; Reed v. Spaulding, 42 N. H. 114; Champney v. Blanchard, 39 N. Y. 111; Re Patterson, 10 Jur., N. S., 578; Snellgrove v. Baily, 3 Atk. 214; and see Conklin v. Conklin, 20 Hun, 278; Hatch v. Atkinson, 56 Me. 324; Lee's Ex'r v. Boak, 11 Gratt. 182; Bradley v. Hunt, 5 Gill & J. 54; Pennington v. Gittings, 2 Gill & J. 208.

CHAPTER XXI.

CONTRACTS IN. EQUITY.

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§ 361. **A general statement as to contracts in law and in equity.**
 —In respect to the general definition of a contract, there is no room for difference in law and in equity. Courts of equity substantially agree with the courts of law as to what are the essential elements of a contract, and when a valid contract has been made. There are, however, some cases in which the courts of law will pronounce a contract to be valid or invalid, and a court of equity will reach an altogether different conclusion. It would be difficult to lay down any general rule, for the purpose of determining just when there will be a departure of the courts of equity from the rulings of the courts of law as to the validity of a particular contract. The nearest approach to a general explanation which can be ventured upon, is that a court of equity will never permit the iron-cast rules of the law, as to what are the essential requisites of a valid contract, to produce a positively inequitable result; that a court of equity will discard these rules of law, whenever the ends of justice, as they are formulated by the principles of equity, cannot otherwise be attained. Perhaps the cases of variation from the courts of law, in respect to what contracts are valid and can be enforced, may be divided into two classes. The one class consists of those contracts in which the parties to them cannot perform the same in its entirety, and relief is asked for on the ground that the impossible condition is not essential to the contract.¹ The second class include a variety of cases in which a court of equity departs from the common law rules and holds the contracts to be valid and binding, although they are void or voidable at law. Some of these cases arise in connection with suits for specific performance. A few of the cases are here referred to with a number of citations in support of them. Thus, part performance of an oral contract is

¹ *Mortlock v. Buller*, 10 Ves. 292, 305, 306; *Stewart v. Allston*, 1 Meriv. 26, 32; *Davis v. Hone*, 2 Sch. & Lef. 341, 347; *Voorhees v. De*

Meyer, 2 Barb. 37; *Coale v. Barney*, 1 Gill & J. 324; *McCorkle v. Brown*, 9 Sm. & Mar. 167; *Shaw v. Livermore*, 2 Greene, (Iowa) 338.

held in equity to take such contract out of the Statute of Frauds.¹ Ante-nuptial contracts or agreements, between a man and woman who afterwards marry and whose contracts cannot afterwards be sued on in law, may be enforced in equity.² So, also, contracts to sell lands are enforced in equity after the death of the vendor;³ and, likewise, agreements for the assignment of things in action and possibilities, although such agreements may not be enforced in law.⁴

In other chapters, reference is made to liens, which cannot be enforced at law but which are valid in equity;⁵ mortgages which are valid in equity but not enforceable at law;⁶ so, also, the contracts of married women which are void at law but valid in equity;⁷ and so, likewise, assignments of choses in action which are only enforceable in equity.⁸ In the present chapter, reference will only be made to a few isolated cases of contracts in respect to which the courts of equity do not follow the law.

§ 362. **Whether a seal imports a consideration.**—It is the rule of the common law that a sealed contract is conclusively presumed to be based upon a valuable consideration, and the parties thereto are estopped from denying that the contract is so supported; so that a sealed instrument can be enforced at law, although there is no consideration mentioned in it, and none proven, in fact.⁹ But while a court of equity recognizes the doctrine generally, at least so far as presumption of a consideration from a seal;¹⁰ yet, on the other hand, it will grant no affirmative relief, such as to aid in any defective conveyance of land,¹¹ or grant a decree for specific performance of a contract,¹² if

¹ *Buckmaster v. Harrop*, 7 Ves. 341, 346; *Mundy v. Jolliffe*, 5 My. & Cr. 177; *London, &c. Ry. v. Winter*, Cr. & Ph. 57; *Earl of Lindsey v. Great Northern Ry.*, 10 Hare, 664, 700; *Kirk v. Bromley Union*, 2 Phil. 640; *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Lord v. Underdunck*, 1 Sandf. Ch. 46; *Jervis v. Smith*, Hoff. Ch. 470.

² *Cannel v. Buckle*, 2 P. Wms. 243; *Acton v. Acton*, Prec. Chan. 237; *Gould v. Womack*, 2 Ala. 83; *Croswaigh v. Hutchinson*, 2 Bibb. 407.

³ *Milnes v. Gery*, 14 Ves. 400, 403; *Newton v. Swazey*, 8 N. H. 9; *Saunders v. Simpson*, 2 Har. & J. 81; *Glaze v. Drayton*, 1 Desau. 109; *Wilkinson v. Wilkinson*, 1 Id. 201.

⁴ *Wiseman v. Roper*, 1 Ch. Rep. 158; *Beckley v. Newland*, 2 P. Wms. 182; *Hyde v. White*, 5 Sim. 524; *Lyde v. Mynn*, 1 My. & K. 683; *Price v. Winston*, 4 Munf. 68; *Clifford v. Turrell*, 1 Y. & C. Ch. 138; *Corbin v. Tracy*, 34 Conn. 325; *Cogent v. Gibson*, 33 Beav. 557; *Somerby v. Buntin*, 118 Mass. 279; *Binney v. Annan*, 107 Mass. 94; *Ely v. McKay*, 12 Allen, 323; *Adderley v. Dixon*, 1 S. & S. 607; *Wright v. Bell*, 5 Price, 325; *Cutting v. Dana*, 25 N. J. Eq. 265; *Tuttle v. Moore*, 16 Minn. 123; *Woodward v. Harris*, 3 Sandf. 272; *Hughes v. Piedmont, &c. Ins. Co.*, 55 Ga. 111; *Withy v. Cottle*, 1 S. & S. 174; *Kenny v. Wexham*, 6 Madd. 355.

⁵ See *post*, Chapt. XXII.

⁶ See *post*, §§ 416, 417.

⁷ See *ante*, §§ 338, 339.

⁸ See *post*, Chapt. XXI.

⁹ *Harris v. Harris*, 23 Gratt. 737; *Van Valkenburgh v. Smith*, 60 Maine, 97; *Sharrington v. Stratton*, 1 Plow. 298, 309; *Page v. Trufant*, 2 Mass. 159, 162; *Fallowes v. Taylor*, 7 T. R. 475; *Cooch v. Goodman*, 2 Q. B. 580; *Denman, C. J.*, p. 599; *Douglass v. Howland*, 24 Wend. 35; *Burkholder v. Plank*, 19 Smith, (Pa.) 225; *Mack's Appeal*, 18 Smith, (Pa.) 231; *Wing v. Peck*, 54 Vt. 245; *The State v. Gott*, 44 Md. 341.

¹⁰ *Northern Kansas Town Co. v. Oswald*, 18 Kans. 336.

¹¹ *Anonymous*, 12 Mod. 603.

¹² *Lister v. Hodgson*, Law Rep. 4 Eq. 30, 36; *Jefferys v. Jefferys*, Craig & P. 138; *Keffer v. Grayson*, 76 Va. 517; and see *James v. Bydder*, 4 Beav. 600, 5 Jur. 1076; *Holloway v. Headington*, 8 Sim. 324; *Downs v. Porter*, 54 Texas, 59; *Cochrane v. Willis*, 34 Beav. 359; *Houghton v. Lees*, 1 Jur., n. s., 862; *Ord v. Johnston*, 1 Id. 1063; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Hervey v. Audland*, 14 Sim. 531; *Meek v. Kettlewell*, 1 Ph. 342; 1 Hare, 464; *Stone v. Hackett*, 12 Gray, 227; *Wason v. Colburn*, 99 Mass. 342; *Estate of Webb*, 49 Cal. 541, 545; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Burling v. King*, 66 Barb. 633; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Vasser v. Vasser*, 23 Miss. 378.

the contract is not, in fact, based upon a consideration. In such cases, a court of equity will look behind the seal, and the presumption based thereon that there is a consideration, and will ascertain for itself what is the fact in respect thereto.¹

§ 363. **Equitable easements arising from covenants.**—Where, in the conveyance of several parcels of land to different grantees, the grantor imposes a restriction upon the use and mode of enjoyment of the land so granted, which creates a mutual benefit to the owners of the several parcels; even though the restriction be in the form of a covenant, equity will construe it to have the binding force of an easement, and will sustain an action for its enforcement in favor of any one of the owners. They are covenants running with the land, and can be enforced by anyone in whose possession any one of the parcels should fall.²

Such would be the case where, in granting several parcels of land, the conveyances contain covenants that any buildings thereafter erected upon any one of them shall be set back from the street a certain distance. An injunction would be granted at the suit of either of the owners of the several pieces of property restraining another from violating the covenant.³ In the same manner, a covenant to build and maintain a party wall will operate as an easement.⁴ But an executory agreement, or covenant to build a party wall, cannot operate as an easement, since such a covenant does not run with the land, and is binding only upon the covenantor.⁵ But if the covenant as to the use of the land is imposed upon only one of the lots, and omitted in the conveyance of the others, the covenant is held to be

¹ But see *ante*, §§ 258, 299, where it is held that the acknowledgment of a consideration under seal cannot be inquired into, for the purpose of invalidating the creation of a use or trust. See, also, *Tiedeman Real Prop.*, §§ 783, 801.

² *Martin v. Martin*, (Kans. '90) 24 Pac. 418; *Clement v. Burtis*, (N. Y. '90) 24 N. E. 1013; *Nye v. Hoyle*, 120 N. Y. 195 (24 N. E. 1); *Graves v. Deterling*, 120 N. Y. 447; *Pittsburg, &c. R. R. Co. v. Reno*, 22 Ill. App. 470; s. c., 123 Ill. 273 (14 N. E. 195); *Midland Ry. Co. v. Fisher*, (Ind. '90) 24 N. E. 756, 758.

³ *Whatman v. Gibson*, 9 Sim. 196; *Harrison v. Good*, L. R. 11 Eq. 338; *Parker v. Nightingale*, 6 Allen, 341; *Hubbell v. Warren*, 8 Allen, 173; *Greene v. Creighton*, 7 R. I. 1; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Tallmadge v. East River Bk.*, 26 N. Y. 105; *Brewer v. Marshall*, 19 N. J. Eq. 543; *Winfield v. Henning*, 21 N. J. Eq. 188; *Clark v. Martin*, 49 Pa. St. 290; *St. Andrew's Church Appeal*, 67 Pa. St. 518; *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; *Pingree v. McDuffie*, 56 N. H. 306; *McTavish v. Carroll*, 7 Md. 352; *Oliver v. Hook*, 47 Md. 301; *Burns v. Gallagher*, 62 Md. 462; *Viall v. Carpenter*, 14 Gray, (Mass.) 126; *Day v. Walden*, 46 Mich. 575; *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 Barb.

Ch. (N. Y.) 353; *Smyles v. Hastings*, 22 N. Y. 217; *Wheeler v. Gilsey*, 35 How. Pr. (N. Y.) 139; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Collins v. Prentice*, 15 Conn. 39; s. c., 38 Am. Dec. 61; *Brown v. Burkenmeyer*, 9 Dana, (Ky.) 159; *Lenning v. Ocean City Asso.*, 41 N. J. Eq. 606; s. c., 56 Am. Rep.; see, also, *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Foster v. City of Buffalo*, 64 How. Pr. (N. Y.) 127; *In the Matter of Opening Eleventh Ave.*, 81 N. Y. 436; *Baxter v. Arnold*, 114 Mass. 577; s. c., 11 Am. R. 335; *Bagnall v. Davies*, 140 Mass. 76; *Atty.-Gen. v. Williams*, 140 Mass. 329 (54 Am. Rep. 468); *Payson v. Burnham*, 141 Mass. 547; *Hamlen v. Werner*, 144 Mass. 396; *Winnepesaukee, &c. Ass'n v. Gordon*, 63 N. H. 505; *Wobb v. Robbins*, 77 Ala. 176; *Hull v. C. B. & Q. R. R. Co.*, 65 Iowa, 713; *Coudert v. Sayre*, (N. J. '90) 19 Atl. 190; *Chautauqua Assembly v. Alling*, 46 Hun, 582; *Rose v. Hawley*, 118 N. Y. 502 (23 N. E. 904); *Graves v. Deterling*, 120 N. Y. 447 (24 N. E. 655); *Page v. Murray*, (N. J. '90) 19 Atl. 11; *Mackenzie v. Childers*, 43 Ch. Div. 265; *Foster v. Foster*, 62 N. H. 46; *Avery v. N. Y. Cent., &c. R. R. Co.*, (N. Y. '90) 24 N. E. 20, 24.

⁴ *Richardson v. Tobey*, 121 Mass. 157; 23 Am. Rep. 283.

⁵ *Cole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611.

thereby abandoned, even as to the grantee in whose deed the covenant was inserted.¹

§ 364. **Equitable contracts by representation and acts.**—In order that a valid contract may be made, there must generally be an intentional offer on one side, and an intentional acceptance on the other. And while the acceptance is often implied at law, and likewise the obligation to pay for what one receives on the intentional offer of another; yet, the general rule still obtains that, in order to prove a contract which is valid at law, one must show a meeting of the minds of the parties upon the same terms and conditions. But in equity, this agreement of the minds may very often be implied by representations and by the acts of one party—which induce the other party to act in accordance with the wishes of the former—even when there is no manifest intention on the party making the representation to make such representations good. For, notwithstanding that fact, a court of equity will imply a contract from a representation, whenever such representation or act assumes in any way a promissory form. There is but one requirement to the implication of a contract from such representation, viz.: that the representation must be absolute and positive, and subject to no uncertainty as to the truth or verity of the representation. Where the expression of intention or representation as to what will follow the desired act of the other party, is uncertain and made expressly conditional or subject to the will of the party making them, no contract will be implied from such representation. These cases generally arise in connection with representations and acts relating to one's financial condition and the like, which are made prior to the marriage, for the purpose of inducing the other to accept the offer of marriage; and the cases under this heading are found to be largely, if not altogether, English.²

§ 365. **Contracts for necessities supplied to parties under legal disabilities**—It is a general rule of law, that the husband is liable to provide for the necessities of the wife, and if he fails to perform that duty, the wife has the power to provide herself with the necessities and to contract bills in his name; and he is responsible to the parties so furnishing her with the necessities; and an action at law will lie

¹ *Duncan v. Central Pass. R. R. Co.*, (Ky.) 4 S. W. Rep. 228; *Stuart v. Diplock*, 43 Ch. Div. 343.

² *Dashwood v. Jermyn*, L. R. 12 Ch. D. 776, 781; *Maunsell v. White*, 4 H. L. Cas. 1039, 1056; *De Bell v. Thomson*, 3 Beav. 469; 12 Cl. & Fin. 61 n; *Hammersley v. De Bell*, 12 Cl. & Fin. 45; *Saunders v. Cramer*, 3 Dr. & W. 87; *Moore v. Hart*, 1 Vern. 110, 201; 2 Ch. Rep. 284; *Cokes v. Mascal*, 2 Vern. 34, 200; *Lauders v. Anstey*, 4 Ves. 501; 5 *Id.* 213; *Crosbie v. McDoual*, 13 *Id.* 148; *Montgomery v. Beilly*, 1 Bligh, n. s., 364; 1 Dow. & Cl. 63; *Payne v. Mortimer*, 1 Giff. 118; 4 De G. & J. 447; *Alt v. Alt*, 4 Giff. 84; *Loffus v.*

Maw, 3 *Id.* 592; *Prole v. Soady*, 2 *Id.* 1; *Skidmore v. Bradford*, L. R. 8 Eq. 124; *Coverdale v. Eastwood*, 15 *Id.* 121; *Randall v. Morgan*, 12 Ves. 67; *Loxley v. Heath*, 27 Beav. 523; 1 De G. F. & J. 489; *Jameson v. Stein*, 21 Beav. 5; *Kay v. Crook*, 3 Sim. & Giff. 407; 4 H. L. Cas. 1039; *Money v. Jorden*, 15 Beav. 372; 2 De G. M. & G. 318; 5 H. L. Cas. 185; *Moorehouse v. Colvin*, 15 Beav. 341; *Lord v. Walpole v. Lord Orford*, 3 Ves. 402; *Norton v. Wood*, 1 Russ. & M. 178; *Cross v. Sprigg*, 6 Hare, 552; *Viscountess Montacute v. Maxwell*, 1 P. Wms. 618; *Coldicutt v. Townsend*, 28 Beav. 445; *Caton v. Caton*, L. R. 2 H. L. 127, 142.

against him for the debt so contracted.¹ This is likewise the rule in regard to the liability of parents for necessities supplied to their children, where they have failed to make the proper provision for the children, in accordance with the requirements of the law. So, also, can an infant, or minor, or insane person, or any other party who at the time is not supplied with necessities and who is incapable of taking care of himself, be held liable in their estates for the necessities which might be furnished to them. The legal liability, in respect to all of these cases, is so clear that citations of cases in support of these propositions of law are not necessary. But in all of these cases it is necessary, as a foundation to the claim for liability, to determine what is a necessary. The question in general can only be determined by a consideration of the pecuniary situation of the particular individual or individuals; but it is the uniform rule of law, that in none of these cases will money be treated as a necessary, so that the lending of money to an infant, or insane person, or wife, will not be treated as a necessary, although the money be loaned for the purpose of enabling such parties to supply themselves with the necessities of life. But the rule in equity is different; there it is held where a third party actually pays out money for necessities or for the necessary expenses of the party borrowing, it becomes a valid debt in equity, although invalid at law.² So, also, the debt is enforced in equity, where money is directly loaned to those parties under disability, where it is loaned for the purpose of enabling them to supply themselves with necessities, and when the money is actually spent for that purpose.³

§ 366. **Liability of the estate of a deceased joint debtor in equity.**—The common law rule provided that where a debt was joint instead of being joint and several, the liability of the deceased joint debtor terminated with his death; and any subsequent action for the enforcement of such joint debt could only be brought against the surviving joint debtor. But the courts of equity refuse to recognize and enforce this technical rule of the common law. In equity, the joint debts are treated as joint and several obligations; and in equity the personal representatives of the deceased joint debtor could be joined with the survivors in one action for the recovery of the debt, without first enforcing or exhausting the legal remedies against the survivors. This, at least, is the rule in England and in a few of the American states;⁴ but the prevailing American rule is somewhat different.

¹ *Gilman v. Andrus*, 28 Vt. 241; *Walker v. Loughton*, 31 N. H. 111; *Rumney v. Keyes*, 7 Id. 571; *Kimball v. Keyes*, 11 Wend. 33.

² *Randal v. Sweet*, 1 Den. (N. Y.) 460; and see *Walker v. Simpson*, 7 W. & S. (Pa.) 83; *Bradley v. Pratt*, 23 Vt. 386; *Smith v. Oliphant*, 2 Sandf. 306; *Clark v. Leslie*, 5 Esp. 28; *Swift v. Bennett*, 10 Cush. (Mass.) 436, citing *Ellis v. Ellis*, 5 Mod. 368; *Earl v. Peake*, 1 Salk. 387.

³ *Price v. Sanders*, 60 Ind. 310; *Smith v. Oli-*

phant, 2 Sandf. (Sup. Ct. N. Y.) 306; *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pitfield*, 1 P. Wms. 558; see *Watson v. Cross*, 2 Duv. (Ky.) 147; *Darby v. Boucher*, 1 Salk. 279.

⁴ *Wilkinson v. Henderson*, 1 My. & K. 582; *Braithwaite v. Britain*, 1 Keen, 206, 219; *Brown v. Weatherby*, 12 Sim. 6, 11; *Devaynes v. Noble*, 2 Russ. & My. 495; *Thorpe v. Jackson*, 2 Y. & C. Ex. Ch. 553, 561; *Freeman v. Stewart*, 41 Miss. 138.

While in equity the liability of the estate of the deceased joint debtor is universally recognized, yet the American courts, generally, will not permit of a resort to this equitable remedy against the personal representatives of the deceased joint debtor, until the legal remedies against the survivor or survivors have been exhausted, or proof is shown that through the insolvency of the survivors, prosecution of the action at law against them would be fruitless.¹ In several of the states, however, in which the Reformed Procedure has been adopted, it is held, that this equitable jurisdiction has been completely abrogated, and now a legal action can be brought against the surviving joint debtor and the personal representatives of the deceased debtor.² But in many of the states, in which the Reformed Procedure has been adopted, this distinction between the equitable and legal remedies is held still to obtain.³ But the equitable recognition of the liability of a deceased joint debtor did not apply where the deceased joint debtor was a surety. The liability of a surety, who was jointly bound by the contract with the principal debtor, is completely terminated by his death; and his estate, after his decease, could be made liable on such debt, neither at law nor in equity.⁴ But it must be observed, how-

¹ *Masten v. Blackwell*, 8 Hun, 313; *Maples v. Geller*, 1 Nev. 233, 237, 239; *Fowler v. Houston*, 1 *Id.* 469, 472; *Lanier v. Irvine*, 24 Minn. 116; *Cairns v. O'Brien*, 40 Wis. 469; *Jones v. Estate of Keep*, 23 *Id.* 45; *People v. Jenkins*, 17 Cal. 500; *Humphreys v. Crane*, 5 *Id.* 173; *May v. Hanson*, 6 *Id.* 642; *Voorhis v. Childs' Ex'r*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 *Id.* 373; *Pope v. Cole*, 55 *Id.* 124; *Scholey v. Halsey*, 72 *Id.* 578; *Lane v. Doty*, 4 Barb. 530, 534; *Morehouse v. Ballou*, 16 *Id.* 289; *Bentz v. Thurber*, 1 T. & C. 645; *Livermore v. Bushnell*, 5 Hun, 285; *Yates v. Hoffman*, 5 *Id.* 113; but see *Bank of Stockton v. Howland*, 42 Cal. 129; *Barlow v. Scott's Adm'rs*, 12 Iowa, 63; *Pecker v. Cannon*, 11 *Id.* 20; *Marsh v. Goodrell*, 11 *Id.* 474; *Williams v. Scott's Adm'rs*, 11 *Id.* 475; *County of Wapello v. Bigham*, 10 *Id.* 39; *Childs v. Hyde*, 10 *Id.* 294.

² *Burgoyne v. Ohio Life Ins. and Trust Co.*, 5 Ohio St. 586, 587; *Braxton v. The State*, 25 Ind. 82; *Eaton v. Burns*, 31 *Id.* 390; *Voris v. The State ex rel. Davis*, 47 *Id.* 345, 349; *Myers v. The State ex rel. McCray*, 47 *Id.* 293, 297; *Hays v. Crutcher*, 54 *Id.* 260; *Hudelson v. Armstrong*, 70 *Id.* 99; *Owen v. State*, 25 *Id.* 107; *Klussman v. Copeland*, 18 *Id.* 306.

³ *Masten v. Blackwell*, 8 Hun, 313; *Maples v. Geller*, 1 Nev. 233, 237, 239; *Fowler v. Houston*, 1 *Id.* 469, 472; *Lanier v. Irvine*, 24 Minn. 116; *Cairns v. O'Brien*, 40 Wis. 369; *Jones v. Estate of Keep*, 23 *Id.* 45; *People v. Jenkins*, 17 Cal. 500; *Humphreys v. Crane*, 5 *Id.* 173; *Voorhis v. Childs' Ex'r*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 *Id.* 373; *Pope v. Cole*, 55 *Id.* 124; *Scholey v. Halsey*, 72 *Id.* 578; *Lane v. Doty*, 4 Barb. 530, 534; *Morehouse v. Ballou*, 16 *Id.* 289; *Bentz v. Thurber*, 1 T. & C. 645; *Livermore v.*

Bushnell, 5 Hun, 285; *Yates v. Hoffman*, 5 *Id.* 113; *May v. Hanson*, 6 Cal. 642; but see *Bank of Stockton v. Howland*, 42 *Id.* 129; *Barlow v. Scott's Adm'rs*, 12 Iowa, 63; *Pecker v. Cannon*, 11 *Id.* 20; *Marsh v. Goodrell*, 11 *Id.* 474; *Williams v. Scott's Adm'rs*, 11 *Id.* 475; *County of Wapello v. Bigham*, 10 *Id.* 39; *Childs v. Hyde*, 10 *Id.* 294. But the decisions in New York, here given and the rule as set forth in them, have been abrogated by the new Code of Civil Procedure, § 753. And similar results have been attained by express provision of the codes in Iowa, Kentucky, Missouri, Kansas, and Georgia. Iowa, Code 1860, § 2764; Revision of 1873, § 2550; *Sellon v. Braden*, 13 Iowa, 365; Ky. Code, § 39; Mo. Code, Art. 1, § 7; Kans. Gen. Stat. (1868), Ch. 21, §§ 1-4; N. Y. Code of Civil Procedure (New Code), § 753; *Anderson v. Pollard*, 62 Ga. 46.

⁴ *Randall v. Sackett*, 77 N. Y. 480; *Hudelson v. Armstrong*, 70 Ind. 99; *Voris v. The State*, 47 *Id.* 345, 349, 350; see, also, *Royal Ins. Co. v. Davis*, 40 Iowa, 469; *Towers v. Moor*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Bradley v. Burwell*, 3 Denio, 61; U. S. v. Price, 9 How. (U. S.) 83, 92; *Harrison v. Field*, 2 Wash. (Va.) 136; *Pickersgill v. Lahens*, 15 Wall. 140; *Weaver v. Shryock*, 6 Serg. & R. 282, 284; *Waters' Rep's v. Riley's Adm'r*, 2 Har. & G. 305, 310; *Simpson v. Field*, 2 Ch. Cas. 22; *Sumner v. Powell*, 2 Meriv. 30 T. & R. 423; *Other v. Iveson*, 3 Drew. 177; *Richardson v. Horton*, 6 Beav. 185; *Jones v. Beach*, 2 De G. M. & G. 886; *Wilmer v. Currey*, 2 De G. & Sm. 247; *Getty v. Binsse*, 49 N. Y. 385; *Wood v. Fisk*, 63 *Id.* 245; *Risley v. Brown*, 67 *Id.* 160; *Hauck v. Craighead*, *Id.* 432; *Davis v. Van Buren*, 72 *Id.* 587, 588, 589; *Randall v. Sackett*, 77 *Id.* 480.

ever, that this question as to the liability of a deceased joint debtor, at law and in equity, can only arise when the obligation is strictly joint. Whenever the contract is joint and several, the principles here laid down as to the termination of the liability of the sureties at their death did not apply; the sureties in such cases are all liable, notwithstanding their death, and the obligation can be enforced against their estates.¹ So, also, where there are two or more co-sureties, the death of one of them would not relieve him or his estate from liability for contribution to the other co-sureties, who may be called upon to pay the debt, although a deceased co-surety could not be made directly liable for the debt.² In a very large number of the states, it is also now provided by statute, that all joint debts shall be treated as joint and several obligations. Of course, in such cases, the principles, as to joint obligations, would have no application whatever.

§ 367. **Equitable remedies for the enforcement of contracts.**—Another ground for distinction between law and equity, in respect to contracts, is the difference in the character of the remedies which the two courts respectively employ for the enforcement of contracts; but this will constitute the subjects of subsequent chapters.³ The matter is only incidentally referred to in this connection.

¹ U. S. v. Price, 9 How. (U. S.) 83, 92.

² Dussol v. Bruguere, 50 Cal. 456.

³ See *post*, Chapters XXVII, XXVIII, XXXI.

CHAPTER XXII.

EQUITABLE ASSIGNMENT.

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§ 371. **Assignment of choses in action at law and in equity.—Present state of the law in respect to the same.**—The common law expressly prohibited the assignment of all things in action, expectancies, and possibilities, and refused to recognize any rights in and to the same on the part of an assignee. Lord Coke considered this prohibition to be the embodiment of the highest wisdom: “The great wisdom and policy of the sages and founders of our law, have provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers; for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice!”¹ But the court of equity refused to be bound by this common law prohibition, in many cases of assignments of the kind described, and particularly in respect to the assignment of *choses in action*. While at common law the *choses in action* and expectancies or possibilities could not be assigned, the assignment of them in equity would, with a few exceptions, be sustained, and the assignee be treated as the true owner of the same, and his rights therein vigorously enforced. In the case of the assignment of *choses in action*, the court of equity would ordinarily by injunction compel the assignor to enforce the *chose in action* in the courts of law, and turn over to the assignee what he recovered in the action at law.² Under the influence of this equitable proceeding, the courts of law gradually took notice of the rights of the assignee, until they permitted the assignee to take active charge of the actions at law for the enforcement of the claims which had been assigned. Although they required that the actions should be brought in the name of the assignor, they treated the assignee as the real party in interest, and at the same time prevented the assignor from doing

¹ *Lampet's Case*, 10 Coke's Rep. 46 b, 48 a.

Cas. 1531 (4th Am. ed.); *Wright v. Wright*, 1 Ves.

² *Row v. Dawson*, 1 Ves. Sen. 331; 2 Eq. Lead.

Sen. 409, 411; *Squibb v. Wyn*, 1 P. Wms. 378, 381.

anything to frustrate the assignee's prosecution of the claim. The assignor would be held, as an implication from the assignment of the *chose in action*, to have authorized the assignee to use his name in the prosecution of the claim.¹ Under the later statutory modifications of the law of procedure, the necessity of suing in the name of the assignor no longer exists; particularly in the states in which the reformed procedure has been adopted. It is now provided that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this statute." But this statutory provision for actions at law by the assignee, did not in any way affect the question, as to what things in action are assignable and what are not; it simply provided for the removal of what had ultimately become a mere technical objection to suits at law by the assignee of a legal cause of action. Wherever the assignment of thing in action remains impossible at law; whether because the assignment itself is invalid, or because the thing in action is of an equitable nature, and cannot therefore be recognized in a legal action; in such cases a court of law cannot enforce the assignment, and as to such causes of action the equitable jurisdiction still prevails. But in respect to assignment of a legal thing in action, the legal remedy is ordinarily adequate and a court of equity will refuse to assume jurisdiction of such suits.²

§ 372. **What things in action are not assignable?**—There are two subdivisions of this question. Under one subdivision will be found distinctions in respect to the assignability and non-assignability of things in action, on account of the peculiar character of the rights of action, so far as the obligee is concerned. Thus, all actions, which are of so personal a nature as that they will not pass to the personal representatives of the party who could originally bring the action, cannot be assigned. These actions would embrace all actions for damages to the person or character of the individual, where the injury or damage affected only one's body or feelings; as well as to actions *ex contractu*, whether express or implied, the breach of which produces only direct injury or damage to the feelings or body of the person seeking a remedy, such as promises to marry, or injuries resulting from the want of skill of a physician, and the like. In all these classes of cases, the right of action will not survive the death of the party injured and cannot be assigned by him to another.³ It has been held, generally, that contracts which provide for the rendition of personal service,

¹ *Hammond v. Messenger*, 9 Sim. 327; *Keys v. Williams*, 3 Y. & C. Ex. 462, 466, 467.

² *Hammond v. Messenger*, 9 Sim. 327, 332; *Rose v. Clarke*, 1 Y. & C. Ch. 534; *Keys v. Williams*, 3 Y. & C. Ex. 462, 466, 467; *Ontario Bk. v. Mumford*, 2 Barb. Ch. 596, 615, *Walworth Chan.*; *Walker v. Brooks*, 125 Mass. 241; see, also, *Hager v. Buck*, 44 Vt. 285, 290; *Chicago, &c. Ry. v. Nichols*, 57 Ill. 464; *Carter v. United Ins. Co.*, 1 Johns. Ch. 463; *Field v. Maghee*, 5 Paige,

539; *Rogers v. Traders' Ins. Co.*, 6 Id. 583; *Adair v. Winchester*, 7 Gill & J. 114; *Moseley v. Boush*, 4 Rand. 392; *Lenox v. Roberts*, 2 Wheat. 373.

³ *Wade v. Kalbfleisch*, 58 N. Y. 282; *Smith v. Sherman*, 4 Cush. 408; *Rice v. Stone*, 1 Allen, 566; *Lattimore v. Simmons*, 13 Serg. & R. 183, 186; *Zabriskie v. Smith*, 13 N. Y. 322, 333, *per Denio*, J.; *Chamberlain v. Williamson*, 2 M. & S. 408; *Meech v. Stoner*, 19 N. Y. 26, 29, *per Comstock*, J.

involving or calling for the peculiar skill or knowledge of the contracting party, cannot be assigned as long as they remain executory.¹ But this prohibition of assignments only obtains where the service is necessarily personal, and involves the requirement of the special skill or knowledge of the particular contracting party. Where that is not the case, and the service can be performed by someone else, it has then been held that the party obliged to perform the service may assign his claim for compensation, even while his contract remains executory, subject of course to the implied provision that the contract is subsequently performed, either by the assignor or assignee.² But it would not be possible at law to assign a contract or assign one's claim for compensation in a service or contract which has not yet been made.³ And it must be fully borne in mind, in no action can a party assign his contract where his own special skill and knowledge is contracted for, where the purpose of the assignment is to substitute the assignee for himself in the performance of the service; this can only be done with the consent of the party who had contracted for the service.⁴ So, on the other hand, where the services were of a nature personal to the party who had contracted for them, it is impossible for such contracting party to assign to another the claim for the service without the consent of the party who had agreed to render them. His contract was to render these services to that particular individual, and he alone could enforce the performance or receive the benefit of them.⁵ But causes of action are assignable, where they are based upon rights of property, instead of relating to personal service or to tort against the person. Thus, causes of action, for fraudulent representation concerning the value of certain property, may be assigned.⁶ In the second subdivision of the subject are to be found classes of things in action, whose assignment is forbidden by the law, and which are non-assignable both at law and in equity on account of public policy. In England the prohibition is universal, so far as it relates to the assignment of official salaries for all kinds of public service.⁷ But, probably,

¹ *Devlin v. The Mayor*, 63 N. Y. 8; *Wheelock v. Lee*, 64 *Id.* 242; *Hoyt v. Thompson*, 5 *Id.* 320, 347; *Haight v. Hayt*, 19 *d.* 464, 467; *Byxhie v. Wood*, 24 *Id.* 607, 611; *Graves v. Spier*, 58 Barb. 349, 386; *Butler v. N. Y. & E. R. R.*, 22 *Id.* 110, 112; *Bk. of California v. Collins*, 5 Hun, 209; *Weire v. Davenport*, 11 Iowa, 49, 52; *Tyson v. McGuineas*, 25 Wis. 656.

² *Wetmore v. San Francisco*, 44 Cal. 294; *Philadelphias v. Lockhardt*, 73 Pa. St. 211; *Brackett v. Blake*, 7 Met. 335; *Hawley v. Bristol*, 39 Conn. 26; *Field v. The Mayor*, 6 N. Y. 179; *Devlin v. The Mayor*, 63 *Id.* 8; *Parsons v. Woodward*, 2 Zab. 196; *St. Louis v. Clemens*, 42 Mo. 69; *Cochran v. Collins*, 29 Cal. 129; *Augur v. N. Y. Belting & Co.*, 39 Conn. 536; *Taylor v. Lynch*, 5 Gray, 49; *Hartley v. Tapley*, 2 *Id.* 565; *Wallace v. Heywood & Co.*, 16 *Id.* 209; *Emery v. Lawrence*, 8 Cush. 151; *Tripp v. Brownell*, 12 *Id.* 376; *Boyle v. Leonard*, 2 Allen, 407; *Garland v. Harrington*, 51 N. H. 409.

³ *Mulhall v. Quinn*, 1 Gray, 106, 107, *per Shaw*, C. J.; *Farnsworth v. Jackson*, 32 Me. 419; *Jermyn v. Moffitt*, 65 Pa. St. 399; *Skipper v. Stokes*, 42 Ala. 255.

⁴ *Lansden v. McCarty*, 45 Mo. 106; *Stevens v. Benning*, 6 De G. M. & G. 223; *Flanders v. Lamphear*, 9 N. H. 201; *Bethlehem v. Annis*, 40 *Id.* 34, 40; *Burger v. Rice*, 3 Ind. 125.

⁵ *Bethlehem v. Annis*, 40 N. H. 34; *Davenport v. Gentry's Adm'r*, 9 B. Mon. 427, 429.

⁶ *Byxhie v. Wood*, 24 *Id.* 607, 611; *Bond v. Smith*, 4 Hun, 48; *Grant v. Ludlow's Adm'r*, 8 Ohio St. 1, 37; *Beckham v. Drake*, 8 M. & W. 846; 9 *Id.* 79; 11 *Id.* 315; *Garland v. Harrington*, 51 N. H. 409; *Conway v. Cutting*, 51 *Id.* 407; *Edwards v. Parkhurst*, 21 Vt. 572; *Rice v. Stone*, 1 Allen, 566; *Zabriskie v. Smith*, 13 N. Y. 322, 333.

⁷ *Arbuthnot v. Norton*, 5 Moo. P. C. 219; *Greenfield v. Dean of Windsor*, 2 Beav. 544, 549; *Tunstall v. Boothby*, 10 Sim. 542; *Copper v. Rielly*, 2

in America the prohibition is confined to those cases, where a statute expressly prohibits the assignment of the salaries of the officials named in the statute.¹ All assignments, which violate the law in respect to champerty and maintenance, are void and will not be enforced in equity, even though they may not constitute in a strict sense of the term the criminal offense of champerty or maintenance.²

§ 373. **Assignments of mere possibilities and expectancies.**—While the common law prohibition extends to all kinds of expectancies and possibilities, a court of equity has invariably recognized the validity of such assignments, whether they relate to real or personal property, provided they are based upon a valuable consideration.³ But in order to understand in this connection the line of distinction between those assignments which will be valid at law and those which will be valid only in equity, one must clearly distinguish between merely contingent interests in property, and what are properly called expectancies, or mere possibilities. Thus, for example, future estates or interests in lands more or less definitely described and limited, whether they be vested or contingent, would be sufficiently in existence as to be capable of assignment. Thus, contingent remainders, executory devises, and other future and contingent interests in lands and in personal property, are all capable of being assigned.⁴ Where the remainder-man is uncertain, no grant or devise can be made before the happening of the contingency which will have any effect, either in law or equity.⁵ This arose from the practical inability of a conveyance, when it is not ascertained who is the remainder-man. But if a certain individual made a conveyance of the land by a warranty deed, and he subsequently became the vested remainder-man, his deed would certainly operate by way of an estoppel to bar him of any claim to the remainder, as against his grantee.⁶ Mr. Washburne states that

Id. 560; *Collyer v. Fallon*, T. & R. 459; *Calisher v. Forbes*, L. R. *Id.* 7 Ch. 109; *Addison v. Cox*, L. R. 8 Ch. 76; *Davis v. Duke of Marlborough*, 1 Swanst. 79; *Priddy v. Rose*, 3 Meriv. 86, 102; *McCarthy v. Goold*, 1 Ball & B. 387; *Stone v. Lidderdale*, 2 Anstr. 533.

¹ *Wallless v. U. S.*, 6 Ct. of Cl. 123; *Bates v. U. S.*, 4 *Id.* 569; *Burke v. U. S.*, 13 *Id.* 231; *Spofford v. Kirk*, 7 Otto, 484; *Billings v. O'Brien*, 45 How. Pr. 392; 14 Abb. Pr., n. s., 238; *Heirs of Emerson v. Hall*, 13 Pet. 409.

² *Reynell v. Sprye*, 1 De G. M. & G. 660; *Strange v. Brennan*, 15 Sim. 346; *Knight v. Bowyer*, 2 De G. & J. 421; *Hilton v. Woods*, L. R. 4 Eq. 432; *Dorwin v. Smith*, 35 Vt. 69; *Thurston v. Percival*, 1 Pick. 415; *Arden v. Patterson*, 5 Johns. Ch. 44; *Thalmer v. Brinkerhoff*, 20 Johns. 386; *Slade v. Rhodes*, 35 Dev. & Bat. Eq. 24; *Coquillard's Adm'r v. Bearss*, 21 Ind. 479; *Martin v. Veeder*, 20 Wis. 466.

³ *Wind v. Jekyl*, 1 P. Wms. 572; *Trevor's Case*, 2 P. Wms. 191; *Lindsay v. Gibbs*, 22 Beav. 522; *Bennett v. Cooper*, 9 Beav. 252; *Warmstrey v. Lady Tanfield*, 1 Ch. Rep. 29; 2 Eq. Lead.

Cas. 1530; *Goring v. Bickerstaff*, 1 Ch. Cas. 4, 8; *Jewson v. Moulson*, 2 Atk. 417, 421; *Wright v. Wright*, 1 Ves. Sen. 409, 411; *Spragg v. Binkes*, 5 Ves. 583, 588; *Stokes v. Holden*, 1 Keen, 145, 152, 153; *Hobson v. Trevor*, 2 P. Wms. 191.

⁴ 1 Prest. Est. 76; 2 Cruise Dig. 333; *Fearne Cont. Rem.* 551; *Robertson v. Wilson*, 38 N. H. 48; *Loring v. Elliot*, 16 Gray, 574; *Knight v. Paxton*, 124 U. S. 552; *Doe v. Oliver*, 10 B. & C. 181; *Roe v. Dawson*, 3 Ld. Cas. Eq. 651; *Roe v. Jones*, 1 H. Bl. 33; *Roe v. Griffiths*, 1 W. Bl. 606. This matter is now regulated by statute in New Jersey and other states. *Wilkinson v. Sherman*, 45 N. J. Eq. 413; *Morse v. Proper*, 83 Ga. 13; *Taylor v. Stewart*, 45 N. J. —; *Griffin v. Shepard*, 40 Hun, 355.

⁵ 2 Washb. on Real Prop. 562.

⁶ *Walton v. Follansleege*, (Ill. '90) 23 N. E. 339; *Purefoy v. Rogers*, 2 Wm. Saund. 388; *Wright v. Wright*, 1 Ves. Sr. 409; *Jones v. Roe*, 3 T. R. 88; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray, 161; *Hall v. Chaffee*, 14 N. H. 215; *Edwards v. Warwick*, 5 Denio, 664; *Stover v. Eycleshimer*, 46 Barb. 87; *Den v. Manners*, 1 Spence,

executory devises are alienable only when the devisee is an ascertained person;¹ and this seems to be the generally accepted doctrine. But, as has been stated in respect to the alienability of contingent remainders, since the conveyance of a future contingent interest only operates in equity by way of estoppel, if a grant of the executory devise is made by one who, although not yet ascertained to be the devisee, becomes the devisee subsequently by the happening of the contingency by which the devisee is to be ascertained, his grant would, by estoppel, convey to his grantee the interest which he thus subsequently acquires.² But where the thing assigned does not partake of the character of a fixed interest, and the title to which is merely a possibility of acquiring the estate to which there is at present not even a contingent right, then the common law does not permit of the assignment of it; and if an attempt is made to so assign such a possibility, it will only be valid in equity. Equity does not object to enforce such assignments, as long as they are not assignments which are deemed to be against public policy.³ Thus, for example, an expectant heir may, during the life of his ancestor, make an equitable assignment of his possible interest in the estate of his ancestor.⁴ So, also, has it been held that one may make an equitable assignment of what one expects to take under the will of another, who is still living.⁵ But, on the other hand, it has been held, that a court of equity will not enforce an assignment of the expected proceedings of a fair, which is intended to be held in the future.⁶ In these cases, a court of equity enforces the assignment of the expectancy, whenever that expectancy is changed into a fixed interest or possession; and until this change takes place, the assignment is to be treated as an executory contract for an assignment.⁷

§ 374. **Assignments of property to be acquired in the future.—**
The rule in law.—For the same reason, there can be no actual sale, *i. e.*, an executed contract of sale, at law, where the thing sold does not yet exist, or is not yet acquired by the vendor.⁸ In most of the

142; *Kean v. Hoffeecker*, 2 Harr. 103; *Hall v. Robinson*, 3 Jones Eq. 348.

¹ 2 Washb. on Real Prop. 631.

² See *Tiedeman Real Prop.*, §§ 727-730, incl.

³ *Varick v. Edwards*, Hoff. Ch. 382; 11 Paige, 289; 5 Denio, 664; *McWilliams v. Nisly*, 2 Serg. & R. 507; *Baylor v. Comm.*, 40 Pa. St. 37; *Mimmo v. Davis*, 7 Tex. 26; *Graham v. Henry*, 17 *Id.* 164; *Horst v. Dague*, 34 Ohio St. 371; *Patton v. Coen, & Co.*, 3 Col. 265; *The Edward Lee*, 3 Ben. 114; *Sedam v. Cincinnati, & Canal Co.*, 2 Disney, 309; *In re Irving*, L. R. 7 Ch. D. 419; *Warmstrey v. Lady Tanfield*, 1 Ch. Rep. 29; 2 Eq. Lead. Cas. 1530, 1559, 1605 (4th Am. ed.); *Wright v. Wright*, 1 Ves. Sen. 409; *Beckley v. Newland*, 2 P. Wms. 182.

⁴ *Hobson v. Trevor*, 2 P. Wms. 191; *Stover v. Eyeshimer*, 4 Abb. App. Dec. 309; 46 Barb. 84; *McDonald v. McDonald*, 5 Jones Eq. 211; *Fitzgerald v. Vestal*, 4 Sneed, 258; but see, *contra*, *Needles v. Needles*, 7 Ohio St. 432.

⁵ *Bennett v. Cooper*, 9 Beav. 252; *In re Wilson's Estate*, 2 Barr. 325.

⁶ *Hurling v. Cabell*, 9 W. Va. 522; and see *Skipper v. Stokes*, 42 Ala. 255.

⁷ In *East Lewisburg, & Co. v. Marsh*, 91 Pa. St. 96, 99, the court said: "Equity will support assignments of contingent interests and expectancies, things which have no present actual existence, but rest in mere possibility, not indeed as a present positive transfer operating in *presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*."

⁸ *Reed v. Blades*, 5 Taunt. 212, 222; *Lunn v. Thornton*, 1 C. P. 379; *Brown v. Bateman*, L. R. 2 C. P. 272; *Gettings v. Nelson*, 86 Ill. 591; *Chesley v. Joselyn*, 7 Gray, 489; *Jones v. Richardson*, 10 Met. 481; *Moody v. Wright*, 13 Met. 17; *Head v. Goodwin*, 37 Me. 182; *Emerson v. European, & C. R. Co.*, 67 Me. 387; *Cressy v.*

cases, in which the question arises, there is a contest between the vendee and some attaching creditor or mortgagee of the vendor. But, although there are a few authorities which maintain that, as between the parties, the sale is complete, and the title passes at law to the vendee, as soon as the subject of the sale comes into being or is acquired by the vendor,¹ the better opinion is, that no title passes in any such case, unless the executory contract of sale becomes executed by the subsequent acquisition of the possession by the vendee, and before the rights of third persons have intervened. In that case, the title is good against third persons, as well as against the vendor himself.² This is in conformity with the general rule, that the non-existence of the thing does not affect the sale, as an executory contract, and that the executory contract may be enforced as soon as the thing sold comes into being or is acquired by the vendor.³ But it has been very generally held that where a thing is in potential existence, as, for example, all the wool from a flock of sheep, or a growing crop, a present sale with present transfer of title may be made of it, even as to third persons, having claims against the vendor.⁴ There are many authorities which hold that the title can pass, even as to third persons, especially where possession is taken before the rights of third persons can intervene; and where the sale was made of a crop, before it was even sown.⁵ So, also, it has been held that the sale of the unborn young of animals is valid, although made before pregnancy.⁶

§ 375. **The rule in equity.**—But in the court of equity, as long as the thing may be identified by the description contained in the bill of

Sabre, 17 Hun, 120; *Barnard v. Eaton*, 2 Cush. 295; *Codman v. Freeman*, 3 Cush. 306; *Chapin v. Cram*, 40 Me. 561; *Gale v. Burnell*, 7 Q. B. 850; *Hope v. Hayley*, 5 E. & B. 830; 25 L. J. Q. B. 155; *Carr v. Allatt*, 27 L. J. Ex. 385; *Congreve v. Evetts*, 10 Ex. 298; L. J. Ex. 273; *Chidell v. Galls-worthy*, 6 C. B., n. s., 471; *Noakes v. Nicholson*, 34 L. J. C. P. 273; 19 C. B., n. s., 290; *Otis v. Lill*, 8 Barb. 102; *Gardner v. McEwen*, 19 N. Y. 123; *Milliman v. Neber*, 20 Barb. 37; *Rice v. Stone*, 1 Allen, 569; *Williams v. Briggs*, 11 R. I. 476; *Hunter v. Bosworth*, 43 Wis. 583; *Hamilton v. Rogers*, 8 Md. 301; *Wright v. Bircher*, 5 Mo. App. 327; see *post*, § 230.

¹ *Allen v. Goodnow*, 71 Me. 420; *Frazier v. Hilliard*, 2 Strobh. 309; *Deering v. Cobb*, 74 Me. 334.

² *Cook v. Corthell*, 11 R. I. 482; *Rowley v. Rice*, 11 Met. 233; *Rowan v. Sharp's Rifle Co.*, 29 Conn. 283; *Chynoweth v. Tenny*, 10 Wis. 397; *Chase v. Denny*, 130 Mass. 566; *Chapman v. Weiner*, 4 Ohio St. 481; *Walker v. Vaughan*, 33 Conn. 577.

³ *Stanton v. Small*, 3 Sandf. 230; *Casard v. Hinman*, 1 Bosw. 207; *Tyler v. Barrows*, 6 Roberts, 104; *Clarke v. Foss*, 7 Biss. 541; *Reed v. Blades*, 5 Taunt. 212, 223; *Lunn v. Thornton*, 1 C. B. 379; *Hibblewhite v. Morine*, 5 M. & W. 462; *Mortimer v. McCallan*, 6 M. & W. 58; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Appleman v.*

Fisher, 34 Md. 551. Whether such contracts are void as wagers, see *Tiedeman on Sales*, §§ 301, 302.

⁴ 14 *Viner's Abr.*, Tit. Grant, p. 50; *Grantham v. Hawley*, Hob. 132; *Robinson v. Macdonnel*, 5 M. & S. 223; *Wood and Foster's Case*, 1 Leon. 42; *Cotton v. Willoughby*, 83 N. C. 75; *Sanborn v. Benedict*, 78; Ill. 309; *Hansen v. Dennison*, 7 Bradw. 73; *Stephens v. Tucker*, 55 Ga. 543; *Wilkinson v. Ketter*, 69 Ala. 435. See *Tiedeman's Real Property*, § 799, for discussion of the question, whether the sale of a growing crop is the sale of real or personal property. See, also, *Tiedeman on Sales*, § 59.

⁵ *Rawlings v. Hunt*, 90 N. C. 270; *Watkins v. Wyatt*, 9 Baxt. 250; *Conderman v. Smith*, 41 Barb. 404; *Heald v. Builders' Ins. Co.*, 111 Mass. 38; *Arques v. Wasson*, 51 Cal. 620; *Moore v. Byram*, 10 S. C. 452; *Parker v. Jacobs*, 14 S. C. 112; *Hurst v. Bell*, 72 Ala. 336; *Van Hoozer v. Cory*, 34 Barb. 9; *Smith v. Atkins*, 18 Vt. 461; *Headrick v. Brattain*, 63 Ind. 438; but see, *contra*, *Hutchinson v. Ford*, 9 Bush, 318; *Milliman v. Nahm*, 20 Barb. 38 (overruled); *Comstock v. Scales*, 7 Wis. 159; *Collier v. Faulk*, 69 Ala. 58 (overruled); *Redd v. Burrus*, 58 Ga. 574; *Gittings v. Nelson*, 86 Ill. 591.

⁶ *Hall v. Hall*, 48 Conn. 250; *Fonville v. Casey*, 1 Murphy, (N. C.) 389; *McCarty v. Blevins*, 5 Yerg. 195; *Sawyer v. Gerrish*, 70 Me. 254.

sale, the contract is valid, although the thing sold may not be even in potential existence or in potential possession of the vendor. In equity, the title will pass to the vendee, as soon as the property comes into existence or into the possession of the vendor.¹ Examples of such assignments in equity would be of a future cargo or freight of a vessel,² or of the subsequently acquired rolling-stock of a railroad, where such stock is not held to be a fixture and, as such, a part of the realty;³ assignments of future wages,⁴ payments to become due on existing accounts,⁵ assignments of future accounts and demands,⁶ and of future dividends and profits in general.⁷

Since these contracts only operate as sales in equity, it is well understood that they cannot prevail against third parties who have acquired rights in the property, before the possession has been acquired by the vendee, and without notice of the equitable sale. But in England, by a late statute, the equity rule is now applied in law, as well as in equity.⁸ As already stated, in all such cases of equitable sales, the thing sold must be capable of identification by the description of it in the contract of sale.⁹ This question of the right of assignment of things not yet in existence or acquired, more frequently arises in connection with chattel mortgages which are made to cover after-acquired goods, and in that connection, also, the question is more fully discussed.¹⁰

§ 376. Requisites of an assignment of after-acquired property.—The extent of the doctrine.—In order that an agreement will operate as the equitable assignment of after-acquired property, it must

¹ *Holroyd v. Marshall*, 10 H. L. C. 191; *Reeve v. Whitmore*, 4 De G. & J. & S. 1; 33 L. J. Ch. 63; *Bolding v. Reed*, 3 H. & C. 955; 34 L. J. Ex. 212; *Mitchell v. Winslow*, 2 Story, 630; *Pennock v. Coe*, 23 How. 117; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phillips v. Winslow*, 18 B. Mon. 431; *Pierce v. Milwaukee R. R. Co.*, 24 Wis. 551; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Williams v. Winsor*, 12 R. I. 9; *Apperson v. Moore*, 30 Ark. 56; *Brett v. Carter*, 2 Low. 458; *Morrill v. Noyes*, 56 Me. 458; *Philadelphia, &c. Co. v. Woelpper*, 64 Pa. St. 366; *Sillers v. Lester*, 48 Miss. 513; *Barnard v. Norwich, &c. R. R. Co.*, 4 Cliff. 351; *McCaffrey v. Woodin*, 65 N. Y. 459; *Butt v. Ellett*, 19 Wall. 544; but see, *contra*, *Phelps v. Murray*, 2 Tenn. Ch. 746; *Hunter v. Bosworth*, 43 Wis. 583; *Case v. Fish*, 58 Wis. 56.

² *Curtis v. Auber*, 1 J. & W. 506, 512; *In re Ship Warre*, 8 Price, 269, n. 273 h; *Lindsay v. Gibbs*, 22 Beav. 522; *Douglas v. Russell*, 4 Sim. 524; 1 My. & K. 488; *Langton v. Horton*, 1 Hare, 549; *Mitchell v. Winslow*, 2 Story, 630; *Leslie v. Guthrie*, 1 Bing. N. C. 697, 708.

³ *Pennock v. Coe*, 23 How. (U. S.) 117; *Phila., &c. R. R. v. Woelpper*, 64 Pa. St. 366; *Morrill v. Noyes*, 56 Me. 458; *Pierce v. Emery*, 32 N. H. 484; *Farmers' Loan, &c. Co. v. Hendrickson*, 25 Barb. 484; *Seymour v. Canandaigua, &c. R. R.*, 25 Id. 284, 303; *Phillips v. Winslow*, 18 B. Mon. 431; *Clay v. East Tenn., &c. R. R.*, 6 Heisk. 421.

⁴ *Murphy v. Murphy*, 121 Mass. 167; *Sullivan v. Sweeney*, 111 Id. 366; *Knowlton v. Cooley*, 102 Id. 233; *Harrop v. Landers, &c. Co.*, 45 Conn. 561; *Augur v. N. Y. Belting, &c. Co.*, 39 Id. 536; *Garland v. Harrington*, 51 N. H. 409.

⁵ *Herbert v. Bronson*, 125 Mass. 475; *Huling v. Cabell*, 9 W. Va. 522; *Jermyn v. Moffitt*, 75 Pa. St. 399; *Skipper v. Stokes*, 42 Ala. 255; *Ruple v. Bindley*, 91 Pa. St. 296; *Clafin v. Kimball*, 52 Vt. 6; *Schreyer v. Mayor of New York*, 8 J. & S. 255; *Hall v. Buffalo*, 2 Abb. App. Dec. 301; *Hawley v. Bristol*, 39 Conn. 26.

⁶ *East Lewisburg, &c. Co. v. Marsh*, 91 Pa. St. 96; *Guthrie & Byles' Appeal*, 92 Id. 269; *Sedam v. Cincinnati, &c. Canal Co.*, 2 Disney, 309; but see *Skipper v. Stokes*, 42 Ala. 255, and *White v. Coleman*, 130 Mass. 316.

⁷ *Patten v. Coen, &c. Co.*, 3 Col. 265; *People v. Dayton*, 50 How. Pr. 143; *The Edward Lee*, 3 Ben. 114; *McClure v. McDearmon*, 26 Ark. 66; *Brown v. Tanner*, L. R. 2 Eq. 806; 3 Ch. 597; *In re Irving*, L. R. 7 Ch. D. 419; *Swift v. Railway, &c. Ass'n*, 96 Ill. 309; *Gwin v. Biel*, 70 Ind. 506; *Horst v. Dague*, 34 Ohio St. 371.

⁸ See *Lazarus v. Audrade*, 5 C. B. Div. 318. *Leatham v. Amor*, 47 L. J. Q. B. 581; 38 L. T. R. 785.

⁹ *In re Count De Epinevill*, 20 Ch. Div. 758; *Pennington v. Jones*, 57 Iowa, 37.

¹⁰ See *post*, §§ 465, 466.

be something more than an executory agreement to deliver such property in the future, or to transfer to another the power of control over such property; it must, in other words, be an attempt to assign to the other whatever interest the assignor has therein, either present or future, which is not now capable of assignment. Where, therefore, as in the case of a chattel mortgage, the mortgage does not make a direct assignment of the after-acquired property, but only gives to the mortgagee the power to sell such after-acquired property in the enforcement of the payment of the debt, the acquisition of the property by the mortgagor does not, under the theory of an equitable assignment, transfer to the mortgagee any fixed interest in such property; he only acquires the power to sell the same. There is in such a case, therefore, no equitable assignment of the title to the property.¹ Not only will the provision for the assignment of property to be acquired in the future vest in the assignee an equitable right to the thing itself, but, also, where the property has been sold or exchanged by the owner, the lien thus created by the equitable assignment will extend to the resulting fund or the substituted goods.² So, also, will the doctrine of the equitable assignment of after-acquired goods be enforced, not only against the assignor himself, but also against all judgment creditors, assignees in bankruptcy and against subsequent purchasers, who take with notice of the assignment so made.³

§ 377. **Rationale of the doctrine.**—In the attempted assignment of future possibilities and after-acquired property, the objection to the recognition of those as valid at law is the inability of making a present grant to a thing not in existence. It is required that the thing should be in existence, or under the control of the assignor, in order that the title to the thing might be assigned.⁴ But in equity a different view is entertained; and it is permitted of one to make an assignment of property which is not in existence at the time or which is not yet acquired by him, which will operate in equity. It is not, however, as a present assignment of a present title that such an assignment will be recognized in equity as valid; but rather as an executory agreement, which is to

¹ *Cudworth v. Scott*, 41 N. H. 476; *Walker v. Vaughn*, 33 Conn. 577; *Rowan v. Sharps*, &c. Co., 29 *Id.* 282; *Henshaw v. Bk. of Bellows Falls*, 10 Gray, 568, 571, 572; *Reeve v. Whitmore*, 4 De G. J. & S. 1, 16-18, *per* Lord Westbury; and see *Gardner v. McEwen*, 19 N. Y. 123; *Head v. Goodwin*, 37 Me. 181; *Chapin v. Cram*, 40 *Id.* 561; *Rose v. Bevan* 10 Md. 466; *Chapman v. Weimer*, 4 Ohio St. 481; *Oliver v. Eaton*, 7 Mich. 108; *Person v. Oberteuffer*, 59 How. Pr. 339; *Williams v. Winsor*, 12 R. I. 9.

² *Abbott v. Goodwin*, 20 Me. 408; *Legard v. Hodges*, 1 Ves. 477; *Collyer v. Fallon*, T. & R. 459; *Fletcher v. Morey*, 2 Story, 555, 566; and see *Davis v. Marx*, 55 Miss. 376; *Ball v. Vason*, 56 Ga. 264; *Arnold v. Morris*, 7 Daly, 498. *Contra*, *Cowart v. Cowart*, 3 Lea. 57.

³ *Holroyd v. Marshall*, 10 H. L. Cas. 191; s. c.,

2 De G. F. & J. 596; and see *Reeve v. Whitmore*, 4 De G. J. & S. 1; *In re Ship Warre*, 8 Price, 269, n. 273; *Mitchell v. Winslow*, 2 Story, 630; *Seymour v. Canandaigua*, &c. R. R., 25 Barb. 284, 303; *Phila. &c. R. R. v. Woelpper*, 64 Pa. St. 366, 372; *Baxter v. Bush*, 29 Vt. 465, 469; *Page v. Gardner*, 20 Mo. 507; *Smithurst v. Edmunds*, 1 McCarter, 408; *Williams v. Winsor*, 12 R. I. 9; *Clay v. East Tenn. &c. R. R.*, 6 Heisk. 421.

⁴ *Moody v. Wright*, 18 Met. 17, 32; *Pettis v. Kellogg*, 7 Cush. 456; *Calkins v. Lockwood*, 16 Conn. 276; *Otis v. Sill*, 8 Barb. 102; *Hamilton v. Rogers*, 8 Md. 301; *Chapman v. Weimer*, 4 Ohio St. 481; *Lunn v. Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B. 850; *Mogg v. Baker*, 3 M. & W. 195; *Head v. Goodwin*, 37 Me. 181; *Jones v. Richardson*, 10 Met. 481.

be enforced in the future whenever the thing, which is now only a possibility, becomes a fact. And, according to the majority of the authorities, the enforcement of an equitable assignment of the kind here described differs very little, if at all, from a specific performance of an executory contract—except that prior to the enforcement of such contract a lien upon the after-acquired property is recognized in favor of the assignee—so that the same principle might be considered as furnishing the justification for the recognition in equity of the validity of these assignments of possibilities and expectancies; and such is the ordinary view which is adopted by the authorities in general.¹ But this distinction must be observed between ordinary causes of action for specific performance of purely executory contracts and the enforcement of executory assignments of property to be acquired in the future or other possibilities and expectancies, viz.: that in the latter class of cases the assignment will be enforced in respect to property which would not justify a court of equity in decreeing specific performances where the contract was purely an executory contract of sale. In contracts for the sale of personal property, specific performance will not be decreed, unless, on account of the peculiar character of the property to be sold, the common law action for damages will be inadequate.² But where there is an attempted assignment of such property, which is to be acquired in the future, if the property to be acquired in the future is at all specifically described, the assignment will be enforced; notwithstanding the fact that an executory contract for the sale of the same kinds of goods would not support a decree for specific performance. The doctrine of an equitable assignment of property to be acquired in the future may at times be the only effective remedy for the enforcement of the claims of the assignee and the protection of his interests, and the action at law for damages prove altogether inadequate; *i. e.*, where the assignor at the time is insolvent and the conflicting claims of

1 "It is quite true that a deed which professes to convey property which is not in existence at the time, is as a conveyance void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer. But if the vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which the court of equity would decree the specific performance. If

this be so, then immediately on the acquisition of the property described, the vendor or mortgagee would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For, if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer, when the means of doing so are afterwards obtained." Opinion of Lord Westbury, in *Holroyd v. Marshall*, 10 H. L. Cas. 191; *In re Ship Warre*, 8 Price, 269, n. 273; *Mitchell v. Winslow*, 2 Story, 630; *Seymour v. Canandaigua*, &c. R. R. 25 Barb. 284, 303; *Phila., &c. R. R. v. Woelpper*, 64 Pa. St. 366, 372; *Baxter v. Bush*, 29 Vt. 465, 469; *Page v. Gardner*, 20 Mo. 507; *Smithurst v. Edmunds*, 1 McCarter, 408; *Williams v. Winsor*, 12 R. I. 9; *Clay v. East Tenn.*, &c. R.R., 6 Heisk. 421; s. c., 2 De G. F. & J. 596; and see *Reeve v. Whitmore*, 4 De G. J. & S. 1.

² See *post*, § 493.

creditors have to be reconciled. In consequence of the variance, as to the grounds for equitable intervention, between ordinary actions for specific performance and cases of equitable assignment of the possibilities and expectancies, has led to a criticism of the comparison of such assignments with the claims for specific performance. And Mr. Pomeroy lays down the contrary proposition that the equitable assignment can only find a satisfactory explanation in the theory of an assignment of the present possibility which is subsequently to be converted into an absolute property, whenever the property comes into existence, or is acquired. In truth, although a sale or mortgage of property to be acquired in future, does not operate as an immediate alienation at law, it operates as an equitable assignment of the present possibility, which changes into an assignment of the equitable title as soon as the property is acquired by the vendor or mortgagor; and because his ownership thus transferred to the assignee is equitable and not legal, the jurisdiction by which the assignment is enforced, and is turned into a legal property accompanied by the possession, must be exclusively equitable; a court of law has no jurisdiction to enforce a right which is purely equitable. This, in my opinion, is the only correct and sufficient rationale of one of the most distinctively equitable doctrines in the whole scope of the equity jurisprudence.¹

§ 378. **Equitable assignment of a fund by order or otherwise.—****General doctrine.**—Apart from the common law prohibition of an assignment of *choses in action* in general, another difficulty is recognized in conceding the character of an assignment to the order, given by a creditor on his debtor, to pay the amount of his indebtedness to the third person. It is the difficulty of recognizing in equity such an order as having the characteristics of an assignment; it is rather an objection as to form than as to contents. If, instead of writing an order on the debtor to pay the amount of his indebtedness to the third person, the creditor should give to these third persons a formal transfer of his claim against his debtor, there would be no question as to the validity of such a transfer of the claim in a court of equity, and at present in a court of law. But, inasmuch as the creditor simply orders the amount to be paid, instead of transferring his claim against the debtor, in the transaction the ordinary words of assignment are not employed, and it is doubtful on the face of the transaction whether the parties intended to make a present transfer of the claim against the debtor, or simply to provide for a settlement of that debt by the payment of it to the third person designated in the order. For that reason, such orders are not treated in law as having the effect of an assignment; but inasmuch as equity looks rather at the substance of a thing than at the form, and recognizes in the transaction the general intent of the creditor, that the third person shall derive all of the benefits accruing from the enforcement of the claim against the

¹ Pomeroy Eq. Jur., Vol. 3, § 1288.

debtor, that intent will be considered by a court of equity as being the equivalent of the formal assignment of such a claim, and the third person will be treated, after his acceptance of the order, as an assignee of the debt; and, as such assignee, he could enforce the payment of it to him after duly notifying the debtor of the assignment. The obligation of the debtor to pay the sum of money to the third person would not depend at all upon his agreement to honor the order; he would be obliged to pay that sum of money to the payee of the order, if he had not made payment of the same to his own creditor, before receiving notice of the issue of the order. The general proposition, as here laid down, is fully supported by the cases, as long as there is an order for the whole of a particular fund.¹ There are, however, certain requirements which seem to limit, as a general proposition, the application to such an order of the doctrine of an equitable assignment. In the first place, it is required that there should be a specific sum of money, or fund, or debt, either existing or to become due in the future, and which is specifically described in the order.² And while at common law it is necessary, in order that the giving of an order on a fund may operate as an assignment, that it should call for the payment of the whole of the fund;³ yet, where it is strictly a question of equitable assignment, an order will be a valid assignment, although it only calls for the payment of a part of the designated amount.⁴

¹ "There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund as it accrues to the payment of the order and to no other purpose; and the payee may, by action, compel such application." Opinion of Rapallo, judge in the case of *Brill v. Tuttle*, 81 N. Y. 454, 457; see, also, *Row v. Dawson*, 1 Ves. Sen. 331; 2 Eq. Lead. Cas. 1531, 1562-1565, 1641-1660 (4th Am. ed.); *Wheatley v. Strobe*, 12 Cal. 92, 98; *Spain v. Hamilton*, 1 Wall. 604; *Tiernan v. Jackson*, 5 Pet. 580, 598; *Mandeville v. Welch*, 5 Wheat. 277, 288; and see, also, *Papineau v. Naumkeag, & Co.*, 126 Mass. 372; *Patten v. Wilson*, 31 Pa. St. 299; *Nesmith v. Drum*, 8 Watts & S. 9; *Gibson v. Finley*, 4 Md. Ch. 75; *U. S. Bk. v. Huth*, 4 B. Mon. 423; *Newby v. Hill*, 2 Met. (Ky.) 630; *McWilliams v. Webb*, 32 Iowa, 577; *Walker v. Mauro*, 18 Mo. 564; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Superintendent, & Co. v. Heath*, 2 McCarter, 22; *Caldwell v. Hartuppee*, 70 Pa. St. 74; *Lightner's Appeal*, 82 *Id.* (1 Norris) 301; *Chase v. Petroleum Bk.*, 66 *Id.* 169; *McLellan v. Walker*, 26 Me. 114; *Legro v. Staples*, 16 *Id.* 252; *Robbins v. Bacon*, 3 *Id.* 346; *Conway v. Cutting*, 51 N. H. 407; *Blin v. Pierce*, 20 Vt. 25; *Cutts v. Perkins*, 12 Mass. 206; *Lowery v. Stew-*

ard 25 N. Y. 239; *Lewis v. Berry*, 64 Barb. 593; *Hall v. Buffalo*, 2 Abb. App. Dec. 301; *Clark v. Mauran*, 3 Paige, 373; *Richardson v. Rust*, 9 *Id.* 243; *Morton v. Naylor*, 1 Hill, 583; *Luff v. Pope*, 5 *Id.* 413; *Kingman v. Perkins*, 105 Mass. 111; *Taylor v. Lynch*, 5 Gray, 49; *Ehrichs v. De Mill*, 75 N. Y. 370; *Risley v. Smith*, 64 *Id.* 576; *Munger v. Shannon*, 61 *Id.* 251; *Alger v. Scott*, 54 *Id.* 14; *Parker v. Syracuse*, 31 *Id.* 376; *Hydraulic, & Co. v. Saville*, 1 Mo. App. 96; *Farmers, & Co. Bk. v. Kansas, & Co.*, 3 Dillon, 287; *Belden v. Meeker*, 47 N. Y. 307; *Danklessen v. Braynard*, 3 Daly, 183; *Clafin v. Kimball*, 52 Vt. 6; *Adams v. Willmantic, & Co.*, 30 N. J. Eq. 171; *Whitehead v. Fitzpatrick*, 58 Ga. 348; *Kahnweiler v. Anderson*, 78 N. C. 133.

² *Ex parte Carruthers*, 3 De G. & Sm. 570; *Malcolm v. Scott*, 3 Hare, 39; *Kelley v. Mayor, & Co.*, 4 Hill, 263; *Brill v. Tuttle*, 81 N. Y. 454, 457; *Shaver v. West. U. Tel. Co.*, 57 N. Y. 459, 464; *Lowery v. Steward, Parker v. Syracuse, Alger v. Scott, and Ehrichs v. DeM.'l*, cited in the previous note. See, also, *Hutter v. Ellwanger*, 4 Lans. 8; *Lunt v. Bk. of North America*, 49 Barb. 221.

³ *Mandeville v. Welch*, 5 Wheat. 277, 286; *Palmer v. Merrill*, 6 Cush. 282, 287, *per Shaw*, C. J.; *Bulard v. Randall*, 1 Gray, 605; *Buck v. Swazey*, 35 Me. 41; *Hopkins v. Beebe*, 26 Pa. St. 85, 88; *Moore v. Gravelot*, 3 Ill. App. 442; *Burnett v. Crandall*, 63 Mo. 410; *Lindsay v. Price*, 33 Tex. 280.

⁴ *Superintendent, & Co. v. Heath*, 2 McCarter,

Another requirement of the theory of an assignment is, that the assignee must be notified and such order must be accepted by him expressly or by implication, in order that he may claim the absolute rights of an assignee; until such notice is given and the assignment assented to by the assignee, the order could be revoked.¹ Therefore, a secret communication to one's debtor to pay the amount of money owing, or any part of it, will not operate as an assignment, and can be withdrawn or revoked any time before the instructions have been complied with.² As long as the fund is sufficiently described in the order, the fact that it is not yet in existence will not interfere with the application to the case of the doctrine of equitable assignment.³ This general proposition finds a special application in the case of bills of exchange and checks; and in respect to them, a special discussion will follow in the succeeding paragraphs.

§ 379. **The effect of a bill of exchange.**—It is the common understanding, and usually it is the fact, that when one person draws a bill of exchange upon another in favor of a third party, the drawee has funds belonging to the drawer, or he is indebted to the drawer, in amount sufficient to cover the sum of money called for by the bill. The bill is received by the payee in reliance upon the supposed fact, although it is not necessary to the validity of the bill and the obligation of the drawee, if the drawee has accepted it. When the drawee has accepted unconditionally, his obligation to pay is absolute and not at all dependent upon the possession of funds belonging to the drawer. But cases may and often do arise, in consequence of the insolvency of the drawer or drawee, or of both, the only available remedy for the payee or holder of the bill is to seize hold of the funds or debt, against which the bill was supposed to have been drawn, and secure its appropriation to the satisfaction of the bill. But in order that this end may be attained, it is necessary to show that a bill of exchange operates as an assignment *pro tanto* of the fund or debt against which it was drawn. Until very lately modified by statute, it has been the invariable common law rule that no *chose in action* may be

22; *Risley v. Phoenix Bk.*, 11 Hun, 484; *Etheridge v. Vernoy*, 74 N. C. 800; *Lapping v. Duffy*, 47 Ind. 51; *Gardner v. Smith*, 5 Heisk. 256; *Raines v. U. S.*, 11 Ct. of Cl. 648; *Watson v. Duke of Wellington*, 1 Russ. & M. 602, 605; *Lett v. Morris*, 4 Sim. 607; *Smith v. Everett*, 4 Bro. Ch. 64; *Morton v. Naylor*, 1 Hill, 583; *Grain v. Aldrich*, 38 Cal. 514.

¹ *Garrard v. Lord Lauderdale*, 2 Russ. & M. 451; *Morrell v. Wootten*, 16 Beav. 197; *Glegg v. Rees*, L. R. 7 Ch. 71; *Scott v. Porcher*, 3 Meriv. 652; *Wallwyn v. Coutts*, 3 Id. 707, 708; 3 Sim. 14; *Acton v. Woodgate*, 2 My. & K. 492.

² *Burn v. Carvalho*, 7 Sim. 109; 4 My. & Cr. 690; *Carvalho v. Burn*, 4 B. & Adol. 382; 1 A. & E. 883; *Malcolm v. Scott*, 3 Macn. & G. 29; *Ex parte Shellard*, L. R. 17 Eq. 109; *Tooth v. Hallett*, L. R. 4 Ch. 242; *Ex parte Hall*, L. R. 10 Ch. D. 515;

White v. Coleman, 127 Mass. 34; *McEwen v. Brewster*, 17 Hun, 223.

³ *Ex parte Shellard*, L. R. 17 Eq. 109; *Tooth v. Hallett*, L. R. 4 Ch. 242; *Papineau v. Naumkeag, & Co.*, 126 Mass. 372; *Lightbody v. Smith*, 125 Id. 51; *White v. Coleman*, 130 Id. 316; *Adams v. Willimantic, & Co.*, 46 Conn. 320; *Hutter v. Ellwanger*, 4 Lans. 9; *Schreyer v. Mayor*, 8 J. & S. 255; *Dickinson v. Marrow*, 14 M. & W. 715; *Brill v. Tuttle*, 15 Hun, 289; s. c., 81 N. Y. 454, 457; *Garland v. Harrington*, 51 N. H. 409; *Tripp v. Brownell*, 12 Cush. 376; *Taylor v. Lynch*, 5 Gray, 49; *Macomber v. Doane*, 2 Allen, 541; *St. Johns v. Charles*, 105 Mass. 262; *Augur v. N. Y. Belting, & Co.*, 39 Conn. 536; *Howley v. Bristol*, 39 Id. 26; *Harrop v. Landers, & Co.*, 45 Id. 561; *Ruple v. Bindley*, 91 Pa. St. 296; *Brooks v. Hatch*, 6 Leigh, 534.

assigned, it being supposed to be contrary to public policy to permit such assignments.¹ And this rule has in form been strictly enforced in all courts of law, wherever it has not been repealed by statute, up to the present day. But courts of equity have for a long time disregarded the rule in its application to cases over which they could acquire jurisdiction, recognized the right of the assignee of a *chose in action* to sue on it in his own name, whenever the action could be maintained in an equity court, and compel the assignor by injunction to permit the assignee to bring in the former's name whatever suit at law may be necessary for the attainment of his rights. In consequence of this common law prohibition, which still prevails wherever it has not been changed by statute,² it would be impossible to show that the bill of exchange operated as a legal assignment of the indebtedness, against which it was drawn.³ The most that can be claimed for it, in those states in which the common law rule has not been abrogated, is that it is an equitable assignment of the fund or debt.

§ 380. **Bill of exchange for a part of fund.**—All the cases agree in stating that a bill of exchange, drawn for the part of a debt due to the drawer by the drawee, will not operate as an equitable assignment *pro tanto* of that debt, at least as against the drawee, unless he has accepted; the principal reason for the conclusion being, that a different rule would enable a creditor to harass and increase the burden upon the debtor, by splitting up one indebtedness into many distinct debts, with independent rights of action; and this the law does not permit, except with the consent of the debtor. By accepting the bill of exchange for a part of the debt, the drawee gives his assent to this increase of the burden.⁴ But if this be the only objection to the construction that an unaccepted bill of exchange for a part of the debt or fund operates as an equitable assignment *pro tanto*, the objection only holds good in favor of, and as against, the drawee; and if the entire debt or fund is brought into court in an equitable proceeding, to

¹ See *ante*, § 371.

² See *ante*, § 371.

³ "It is clearly settled that no action at law will lie in favor of the holder of a bill of exchange against the drawer, unless he accepts the bill." Ruggles, J., in *Harris v. Clark*, 3 Comst. 117. "There is no such privity between him (the drawee) and the holder as can entitle the latter to maintain an action against him." Duer, J., in *N. Y. & Va. State Bk. v. Gibson*, 5 Duer, 574; see, also, *Tiernan v. Jackson*, 5 Pet. 580; *Yates v. Bell*, 3 B. & Ald. 643; *Williams v. Everett*, 14 East, 582.

⁴ "The reason of the principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the consent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to

decline any legal or equitable assignments to which it may be broken into fragments. When he undertakes to pay an integral sum to his creditors, it is no part of his contract that he shall be obliged to pay in fragments to any other persons. So that, if the plaintiff could show a partial assignment to the extent of the present suit." Story, J., in *Mandeville v. Welch*, 5 Wheat. 277; see, to same effect, *Harris v. Comstock*, 3 N. Y. 115, 116; *Robins v. Bacon*, 3 Greenleaf, 346; *Gibson v. Cooke*, 20 Pick. 15; *Cowperthwaite v. Sheffield*, 1 Sandf. 416; *Gibson v. Finley*, 5 Md. Ch. 75; *Hopkins v. Beebe*, 2 Casey, 85; *Poydras v. Delamere*, 13 La. (O. S. 1838) 98; *Weinstock v. Bellwood*, 12 Bush, 139; *Christmas v. Russell*, 14 Wall. 84; *Noe v. Christie*, 51 N. Y. 273; *Shaver v. West U. Tel. Co.*, 57 N. Y. 461; *Atty.-Gen. v. Continental Life Ins. Co.*, 71 N. Y. 325; *Bull v. Tuttle*, 81 N. Y. 457; *Chase v. Alexander*, 6 Mo. App. 506.

which all persons interested have been made parties, there can be no reason why the bill should not be declared to be an equitable assignment *pro tanto* of the fund or debt, as against the drawer and his privies.¹

§ 381. **Bill of exchange for whole of fund.**—So, also, if there be no other objection to the assignment theory, it must be concluded, that an unaccepted bill of exchange for the whole of the fund or debt, makes an equitable assignment of the fund or debt, not only against the drawer, but also as against the drawee, and such is the conclusion of many of the courts.* But there are very many cases to the contrary. Some of them rest their objection to the theory on the ground that the bill of exchange does not necessarily contemplate the assignment of the drawer's claim against the drawee, although the acceptance and payment of the bill by the drawee will extinguish his indebtedness to the drawer.³ But it is conceded that a bill of exchange may

¹ Mr. Daniel says that such a bill or order "for a part of a fund does not operate as an equitable assignment *pro tanto* as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his whole debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment against all subsequent claimants, whether by assignment from the drawer, or by legal process served upon the drawee." 1 Daniel Negot. Inst. 26; see, to same effect, Story Eq. Jur., § 1044; 3 Lead. Cas. in Equity, 356; Field v. Mayor of N. Y. 2 Seld. 179; Poydras v. Delamere, 13 La. 98.

² "It seems to be equally well settled that a draft by the creditor on his debtor in the form of a bill of exchange for the amount of the debt, or the whole fund in his hands, is a good and valid assignment of the debt or fund." Dewey, J., in Gibson v. Cooke, 20 Pick. 15. "If the drawee refuses to accept and pay the bill, the right of the holder to the debt once assigned to him is not thereby impaired; although he may not be entitled to recover the same in his own name, for the want of a promise to pay. But he may sue the drawer, or the drawee in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a *chose in action* that the debtor shall pay, and on failure, that the assignor will. The bill being retained after protest, by the assignee, is evidence that the amount has not been paid by the drawer or by any of the indorsers. I see no possible mischief which can result from this doctrine,

For if after payment refused and protest made, the drawee should pay over the funds in his hands to the drawer or to his order, without notice from the first assignee, that he should retain the bill, and look to him for the amount, so far as he was bound to pay; this would be a good defense against a suit brought in the name of the drawer." Washington, J., in Corser v. Craig, 1 Wash. C. C. 426, in which suit was brought against the drawee by the payee and drawer, for the benefit of the indorsee. In Wheatley v. Strobe, 12 Cal. 97, the right of the holder of a bill to the fund, against which the bill was drawn, was asserted and recognized as against the attaching creditors of the drawer. Field, J., said: "The want of a written acceptance does not affect the right of Howell (the holder) to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party beneficially interested. Courts of law, equally with courts of equity gave effect to the assignments like the one under consideration, by controlling the proceeds of the judgment recovered for the benefit of the assignee." See, also, Roberts v. Austin, 26 Iowa, 315; Robins v. Bacon, 3 Greenleaf, 349; Kahnweiler v. Anderson, 78 N. C. 137.

³ "It is certainly new to me to hear that a bill of exchange in an ordinary mercantile transaction, in the shape in which this appears, can amount to an equitable assignment of the debt. The note might have been indorsed by any individual, or to any number of people, who might have indorsed it in succession. A mercantile instrument it is in its original, and in that shape it remains and has no other validity or effect; and to call it an

be received as evidence of an intention to make an assignment, and it will be permitted to operate as such, if the intention is clearly proven.¹ It has been said that "a proper bill of exchange does not of itself operate as an assignment to the payee of funds of the drawer, in the hands of the drawee, and even after an unconditional acceptance, it cannot in strictness be held to have that effect, since the drawee becomes bound by reason of the contract of acceptance, irrespective of the funds on his hands."² But the courts, and law writers generally, maintain that the bill of exchange does operate as an assignment of the fund, as soon as it is accepted by the drawee.³

There is some historical authority for the position that the parties to the bill of exchange do not contemplate an assignment of the fund or debt, against which the bill is drawn, in the fact that for many years, after the legal recognition of bills of exchange, assignments of *choses in action* were illegal in equity, as well as in law. There can be no doubt that at that time the bill must have been considered inchoate until it was accepted, and when accepted it partook of the character of a novation. The drawee was released *pro tanto* of his indebtedness to the drawer upon his acceptance of the bill, which obligated him to pay a like sum to the holder of the bill. In some respects, an accepted bill of exchange is a novation, a mercantile transaction that was ancient when bills of exchange first came into use. The new and necessary additional characteristics of the bill were its assignability and negotiability. In all innovations upon existing rules of law, the conservatism of jurisprudence compels a conformity of the new rule to the established rules, as nearly as this is possible. It is therefore unreasonable to claim that originally bills of exchange could have been looked upon as equitable assignments of the fund or debt against which they were drawn. And it is, without doubt, the influence of the common law rule against the assignment of *choses in action*, which more than anything else militates against the present application of the theory of assignment to accepted bills of exchange drawn from the whole of the fund or debt, although that rule has been very generally repealed by statute or nullified by the rules of equity.⁴ But this historical reason does not furnish any substantial objection to the theory

assignment of a debt would be to call it not by its right name." Bacon, V. C., in Shand v. De Buisson, L. R. 18 Eq. 233; see, to same effect, Bank of Commerce v. Bogy, 44 Mo. 17; First N. B. v. Dubuque S. R. R. Co., 52 Iowa, 378 (35 Am. Rep. 281); Harrison v. Williamson, 3 Edw. Ch. 438.

¹ First Nat. Bk. v. Dubuque S. R. R., 52 Iowa, 378 (35 Am. Rep. 281); Bank of Commerce v. Bogy, 44 Mo. 17.

² Hurlbut, J., in Cowperthwaite v. Sheffield, 3 Comst. 243; see, also, Marine & Fire Ins. Bk. v. Jauncey, 3 Sandf. 258; Wheeler v. Stone, 4 Gill, 47.

³ Mandeville v. Welch, 5 Wheat. 277; Harris v. Clark, 3 Const. 243; Buckner v. Sayre, 17 B.

Mon. 754; First Nat. Bk. v. Dubuque S. R. R., 52 Iowa, 378 (35 Am. Rep. 281); Lambert v. Jones, 2 Patton & H. 144; 2 Parsons' N. & B. 330, 381; Story on Bills, § 13.

⁴ In Johnson v. Collins, 1 East, 104, which was an action brought by the indorsee of a bill of exchange drawn on the promise of a debtor to accept it, Kenyon, J., said: "If we were to suffer the plaintiff to recover on the general counts, we must say that a *chose in action* is assignable—a doctrine to which I never will subscribe." In the same case, Gross, J., said that "to permit the plaintiff to recover, would virtually be making all *choses in action* assignable."

at the present time. Since the common law rule which constituted the obstacle to its adoption has been abrogated, the manifest value of the theory, in protecting the just rights of the payee or holder of the bill, is a sufficient justification for its adoption by the courts.

§ 382. **The right of check-holder to sue the bank.**—It has just been explained¹ why the holder of an unaccepted bill of exchange cannot sue the drawee for his refusal to honor the bill. It was there explained² that there is but one way to establish privity between the payee or holder and the drawee of an unaccepted bill, and that was on the theory that the bill operated as an assignment *pro tanto* of the fund against which it was drawn. This was shown to be inapplicable to bills of exchange, which were drawn for a part of the fund,³ because creditors are prohibited from splitting up a single indebtedness into many, without the consent of the debtor; and even where the bill was drawn for the whole of the fund, the further objection was to be met, that because it was not drawn against a particular fund there was not in the bill a sufficient description of the fund, to enable the bill to operate as an assignment.⁴

In this place, we raise the question whether a check-holder can sue the bank, before it has certified the check or agreed to pay it; or, in other words, does the check operate as an assignment *pro tanto* of the fund or deposit, against which it was drawn. And we ascertain from a discussion of the same question, in reference to unaccepted bills of exchange, that two things must be shown, in order to establish the doctrine that the check operates as an assignment as against the bank, on which it is drawn, viz.: *First*, that the bank or banker on whom the check is drawn had consented to the drawer's division of his one debt, in the shape of a deposit, into as many checks as the depositor is pleased to draw; and, *secondly*, that there was a sufficient description of the fund to enable an identification of the thing assigned.

The first proposition is very easily established. When the deposit is made at a bank, the bank impliedly promises to honor any and all checks which the depositor might draw against the deposit, and for any amount as long as the deposit has not been exhausted; and even those cases, which deny that the check operates as an assignment, so as to enable the holder to sue the bank, admit that the bank has broken its contract with the drawer, in not honoring the check, and is liable in damages to the drawer for its breach.⁵

¹ See *ante*, §§ 379-381.

² See § 379.

³ See *ante*, § 380.

⁴ See *ante*, § 281.

⁵ Bank of the Republic v. Millard, 10 Wall. 152; Carr v. Nat. Security Bank, 107 Mass. 45; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Tyler v. Gould, 48 N. Y. 682; Van Alen v. Am. Nat. Bank, 69 Ind. 579; Essex Bank v. Bank of Montreal, 7 Bliss, 193; Moses v. Franklin Bank, 34 Md. 580; Bellamy v. Majoribanks, 8

E. L. & Eq. 523; Chapman v. White, 2 Seld. 412; Planters' Bank v. Meritt, 7 Heisk. 117; Planters' Bank v. Kesse, 7 Heisk. 200, Bullard v. Randall, 1 Gray, 605; Purcell v. Allemon, 22 Gratt. 742; Case v. Henderson, 23 La. Ann. 49, overruling Van Bibber v. La. Bank, 14 La. Ann. 481; Rosenthal v. Martin Bank, U. S. C. C. (1879) 34 Am. Rep. 238; Dickinson v. Coates, 79 Mo. 250; Merchants' Nat. Bank v. Coates, 79 Mo. 258 (overruling Senter v. Continental Bank, 7 Mo. App. 532; McGrade v. German

The bank, therefore, has consented to the drawing of the checks in any amount; and since the checks are to be made payable to whomsoever the drawer selects, it is not a wide stretch of legal principles to claim that, if the check can operate as an assignment *pro tanto* of the deposit, as to any person or for any purpose, this obligation to honor the check will pass to the check-holder as an incident of the assignment. The drawer's interest in the deposit is a *chose in action* against the bank, coupled with the right to divide it up into as many *choses in action* as may suit him best, that interest *pro tanto* would pass into the hands of the check-holder, and invest him with the right of action against the bank to enforce payment, if there are funds in its possession and under its control, at the time of presentment and demand. An indorsement on the check by the payee, to pay to the holder of another, works an assignment of the payee's interest in the check. If such an indorsement assigns the indorser's interest in the check, what reasons can be urged why the check does not assign the drawer's interest *pro tanto* in the deposit of the payee? When a depositor draws a check on the bank, it is evidently his intention to transfer to the check-holder his interest in the deposit to the amount of the check. The words which are generally employed, "pay to the order of," "pay to the bearer," are sufficient to manifest that intention. Moreover, it is unquestionably the general understanding of the business world that such is the effect of the check, whatever opinion may prevail in respect to the right of the holder to sue the bank.

The most serious objection which has been raised to the assignment theory, is that to constitute an equitable assignment of money, by means of an order, the order must direct the payment out of a particular fund and not generally out of any to be received.¹

In equity an assignment will be valid, whenever the thing assigned is so described as that it can be identified. It matters not whether it be in existence at the time of assignment, or it is only a future possibility or expectancy.² So, whether the funds drawn against be in possession of the bank at the time that the check is issued, or they are to be received subsequently, the fact that the check is drawn against a

Sav. Inst., 4 Mo. App. 330; Zelle v. German Sav. Inst., 4 Mo. App. 401; Mayer v. Chattahoochee Nat. Bank, 51 Ga. 325; Harrison v. Wright, 100 Ind. 515; First Nat. Bank v. Gish, 72 Pa. St. 13; Atty.-Gen v. Continental L. Ins. Co., 71 N. Y. 330; Simmons v. Cincinnati Sav. Soc., 31 Ohio St. 457.

¹ In Lord *et al.* v. McGaffrey, 46 Pa. St. 410, Strong, J., said: "It cannot be maintained that Taylor's check, without more, amounted to any equitable appropriation of the funds in the hands of the banker to whom it was addressed. To make an order or draft of an equitable assignment, it must designate the fund upon which it is drawn." See, to the same effect, Phillips v. Staggs, 2 Edw. Ch. 108;

Harrison v. Williamson, 2 Edw. Ch. 530; Chapman v. White, 6 N. Y. 412.

² "To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments, not only of *choses in action* and of contingent interests and expectancies, but also of things which have no actual or potential existence, and rest in mere possibility; not indeed as a present positive transfer, operative *in presenti*, for that can only be a thing *in esse*, but as a present contract to take effect as soon as the thing comes *in esse*." Story's Eq. Jur., § 1040; see *ante*, §§ 373-376.

particular bank or banker, would seem to be a sufficient particularization of the fund, in order to work an equitable assignment *pro tanto* of the fund on deposit. It is probably rare that there is a more particular description of the fund in a general assignment for the benefit of creditors; and yet no one would question the right of such an assignee to draw out the money, so far as the bank is concerned.

The liability of the bank is, of course, restricted only to such cases where the check has not been countermanded. The agreement of the bank or banker, which forms a part of the contract of deposit, and which is claimed to pass with the check to the check-holder, is to pay the check, if there are sufficient funds in its possession and under its control at the time of presentment and demand. For this reason, the bank cannot be compelled to pay when payment has been countermanded by the drawer before presentment of the check by the holder; because countermanding is, as far as the bank is concerned, equivalent to another disposition of the money, which, having taken place before presentment, takes precedence; and whether the check-holder still has any interest in the fund depends upon the question whether the check works an assignment as against the drawer. This is but the natural consequence of the leading proposition. If the check works an assignment in respect to the drawee, it must have the same effect against the drawer and his privies. The holder of the check, therefore, can claim the right to appropriate the funds, even against other creditors and a general assignee for the benefit of creditors; for creditors and general assignees can only claim what belongs to the debtor. It being, however, an equitable assignment, and the thing assigned being identified simply as the indebtedness of the drawee to the drawer, it can only be enforced while the fund remains in a condition to be identified. Should the fund be innocently (*i. e.*, as to the drawee) paid over to the drawer or to his assigns, it loses its identity, unless the identical sum can be traced and discovered in the hands of the drawer or assignee, and the check is consequently deprived of its value as an assignment. Whether the check is such a complete assignment of the drawer's interest as that, after presentment, where the check has been previously countermanded, the drawee pays the money to the drawer at his peril, has never been determined by any adjudication. It is settled that he can refuse to honor the check; but does the countermand relieve him of all obligations to the holder, or does it place him in the position of a stake-holder, and compel him to retain the fund for the benefit of whichever of the two shows himself entitled thereto? It would be hard to expect a bank in each case of countermanded checks to hold the funds, and become

¹ This is conceded in very many cases which deny that the check-holder cannot sue the bank. See *Bank of Republic v. Millard*, 10 Wall. 152; *Robinson v. Hawkes*, 9 Q. B. 52; *Bell v. Alexander*, 21 Gratt. 6; *German Sav. Inst.*

v. Adae, 8 Fed. Rep. 106; *Matter of Brown*, 2 Story, 502; *Morrison v. Bailey*, 5 Ohio St. 13.

² See *Row v. Dawson*, 1 Ves. Sr. 331; *Cowperthwaite v. Sheffield*, 3 Comst. 243.

a party to suits on the same. It is likely that this position would not be assumed even by those courts which are inclined to push the assignment theory to the utmost limit.

The cases which deny the right of the check-holder to sue the bank are by far more numerous than those which recognize his right.¹ And, although it is not difficult to demonstrate that the ruling of the minority of the courts is more rational and more consistent with the general principles of the law, in order to secure the much desired uniformity of rules throughout the United States, in respect to the commercial law, it may be best for the minority to yield to the majority, on the ground that *communis error facit jus*.

¹ *Fogarties v. State Bank*, 12 Rich. L. 518; *Chicago Marine, &c. Ins. Co. v. Stanford*, 28 Ill. 168; *Brown v. Leckie*, 43 Ill. 500; *Munn v.*

Burch, 25 Ill. 35; *Union Nat. Bk. v. Oceanic Co. Bk.*, 80 Ill. 212; *Roberts v. Austin*, 26 Iowa, 316; *Lester v. Given*, 8 Bush, 358.

CHAPTER XXIII.

EQUITABLE LIENS.

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§ 384. **Their general nature and definition.**—The purpose of a lien is to secure the performance of some obligation by giving a remedy to the obligee, whereby to secure satisfaction out of certain property, in case the obligation is broken or not performed. The common law remedy for the breach of a contract is an action for damages; and under the very early common law, the result was the imprisonment of the debtor until he made satisfaction. But in modern times, the claim for damages is satisfied by a sale of sufficient property of the debtor, under execution, to satisfy the judgment for damages obtained for the breach of the contract. But in all such cases, the judgment creditor has only a general claim for satisfaction of the judgment against the property of the debtor in general, which may be found to be in the possession of the debtor when the execution is issued, and when the levy is made. Where the creditor desired at common law to obtain some special security for the payment of his debt, he could only resort to one of two methods: either to obtain a mortgage of the real or personal property of the debtor, or a pledge; and in both instances, the transaction arises out of the express agreement of the party and a transfer to the creditor of the right of possession of the property. The modification of the common law in respect to these securities will be treated in subsequent chapters. It is also possible at common law, in peculiar cases, for the creditor to assert his claim to a lien over specific property for the satisfaction of a debt or the performance of an obligation; and that claim was called a lien. But the peculiarity of the lien at common law was, that possession by the creditor was indispensable to the validity of the lien. If the debtor retained possession,

the creditor had no evidence of any claim against the property, which was supposed to exist in the lien for the satisfaction of a claim or debt. In consequence of the necessity of transferring the possession to the creditor in order to create a lien at common law, it was not of any special value except in a very few cases of bailments; for the general purpose of securing a satisfaction of debts in general, the common law lien was not at all efficacious. Equity, however, sees no obstacle to the existence of a lien in the retention of the possession by the debtor. So it is the doctrine of equity that a lien may exist and be asserted against the property of the debtor, although the debtor retains the possession.¹ The equitable lien is not an estate or property in the thing itself; nor is it a right to recover such property; to use the Latin phrase, it is neither a *jus ad rem* nor a *jus in re*. It constitutes nothing more than a claim against specific property to the satisfaction out of such property of some debt or obligation, which the owner of such property has assumed and has not performed. Until the time arrives for the enforcement of a claim of satisfaction against the property, the lien constitutes an incumbrance on the debtor's title to such property. The property is transferable subject to the enforcement of the lien, as long as it does not come into the hands of a *bona fide* purchaser without notice of the lien.²

§ 385. **Liens arising from express contract.**—The equitable lien, explained and defined in the preceding paragraph, may arise from express contract; and it may be stated, in general terms, that an equitable lien will arise whenever there is an express agreement in writing or a verbal agreement, whereby the obligor or contracting party indicates his intention to subject certain specific property, whether real or personal, to the obligation of serving as a security for a debt or other obligation; or whereby such contracting party promises that such specific property shall constitute a security for such debt or obligation. Such an equitable lien may be enforced against the property, not only in the hands of the original contracting party, but likewise in the hands of his assigns and personal representatives, except where the property is transferred to a *bona fide* purchaser for value and without notice.³ In order, however, that any express agreement

¹ *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Ex parte Knott*, 11 Ves. 609, 617; *Heywood v. Waring*, 4 Camp. 291, 295, *per* Lord Ellenborough; *Hammonds v. Barclay*, 3 East, 227, 235; *Ex parte Heywood*, 2 Rose, 355, 357; see *Oxenham v. Esdalle*, 2 You. & J. 493; *Gladstone v. Birley*, 2 Meriv. 401, 404.

² See *Peck v. Jenness*, 7 How. (U. S.) 612, 620, *per* Grier, J.

³ Bank of *Washington v. Nock*, 9 Wall. 373; *Skiddy v. Atlantic, &c. R. R.*, 3 Hughes, 320; *Pinch v. Anthony*, 8 Allen, 538; *Ex parte Wills*, 1 Ves. 162; 2 Cox, 233; *Brown v. Heathcote*, 1 Atk. 160, 162; *Russel v. Russel*, 1 Bro. Ch. 269; *Card v. Jaffray*, 2 Sch. & Lef. 374, 379; *Lanning*

v. Tompkins, 45 Barb. 308, 316; *Williams v. Ingersoll*, 23 Hun, 284; *Burdick v. Jackson*, 7 Id. 488; *Arnold v. Morris*, 7 Daly, 498; *In re Howe*, 1 Paige, 125; *Mitchell v. Winslow*, 2 Story, 630; *Bennington v. Evans*, 3 Y. & C. Ex. 384, 392; *Collyer v. Fallon*, T. & R. 459, 475, 476; *Countess of Mornington v. Kearne*, 2 De G. & J. 292, 313; *Gibson v. May*, 4 De G. M. & G. 512; *Ha.e v. Omaha Nat. Bk.*, 49 N. Y. 626; 64 Id. 550; *Payne v. Wilson*, 74 Id. 348; *Chase v. Peck*, 21 Id. 581; *Stevens v. Watson*, 4 Abb. App. Dec. 303; *Meyers v. United, &c. Co.*, 7 De G. M. & G. 112; *Twynam v. Hudson*, 4 De G. F. & J. 462; *Hastie v. Hastie*, L. R. 2 Ch. D. 304, *Husted v. Ingraham*, 75 N. Y. 251, 257; *Gilson v.*

of the sort indicated may operate to create an equitable lien, it must refer to some specific property which is sufficiently described in the agreement to be capable of differentiation from the other property of the contracting party. A general agreement that the obligor's property shall be liable for his debts will not serve to create an equitable lien,¹ except in the one case of a charge by will upon property, for the payment of debts;² the equitable presumption of a vested interest in the property, in the nature of a lien, arising from such an executory agreement is an application of the equitable maxim, "Equity regards as done that which ought to be done."³

§ 386. **Equitable lien on property to be acquired in the future.**—As long as the property is sufficiently described to be identified, equity does not require that the property should be either in the possession of or belonging to the obligor, or to be in existence at all, at the time when the contract is made for the lien. And if, when the lien is contracted for, the contracting party did not own the property, or the property itself was not in either actual or potential existence; in these cases, equity will hold the agreement for a lien in suspension, until the property to be covered by such lien comes into existence and becomes the property of the party providing for the lien. Then the lien will attach to the property, in conformity with the provisions therefor contained in the prior agreement of the party.⁴ This is in violation of the common law rules, in respect to liens and transfers of interests in property,⁵ but it is an exception which finds a common application in equity, not only in the case of liens, but likewise in the case of assignments.⁶ The most common application of the doctrine is to be found in connection with chattel mortgages, and in connection with that subject a fuller discussion of the power to create an equitable lien over after-acquired property is given.⁷

Gilson, 2 N. Y. 115; *Love v. Sierra Nevada Co.*, 32 Cal. 639, 652; *Daggett v. Rankin*, 31 Cal. 321; *Adams v. Johnson*, 41 Miss. 258; *Petrie v. Wright*, 6 Sm. & Mar. 647; *Morrow v. Turney's Adm'r*, 35 Ala. 131; *Kirksey v. Means*, 42 Ala. 426; *Delaire v. Keenan*, 3 Desau. 74; *Boorman v. Wisconsin, & Co.*, 36 Wis. 207; *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562; *Cotterell v. Long*, 20 Ohio, 464; *Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21.

¹ *Williams v. Lucas*, 2 Cox, 160; *Adams v. Johnson*, 41 Miss. 258; *Countess of Mornington v. Kearne*, 2 De G. & J. 292, 313; and see *ante*, § 583; and see *Roundell v. Breary*, 2 Vern. 482; *Pinch v. Anthony*, 8 Allen, 536, 539; *Person v. Oberteuffer*, 59 How. Pr. 339; *Chamberlain v. Peltz*, 1 Mo. App. 183; *Bk. of Washington v. Nock*, 9 Wall. 373; *Goemmel v. Arnett*, 100 Ill. 34; *Cook v. Black*, 54 Iowa, 693; *Fremoult v. Debire*, 1 P. Wms. 429; *Ravenshaw v. Hollier*, 7 Sim. 3; *Wellesley v. Wellesley*, 4 My. & Cr. 561; *Adams v. Johnson*, 41 Miss. 258.

² See *post*, § 405.

³ *Daggett v. Rankin*, 31 Cal. 321, 326, *per Cur. rey*, C. J.

⁴ *Lewis v. Madocks*, 17 Ves. 48; *Tooke v. Hastings*, 2 Vern. 97; *Curtis v. Auber*, 1 J. & W. 526; *Douglas v. Russell*, 4 Sim. 524; 1 My. & K. 488; *Alexander v. Duke of Wellington*, 2 Russ. & My. 35, cited 1 My. & Cr. 556; *Williams v. Winsor*, 12 R. I. 9; *Clay v. East Tenn.*, &c. R. R., 6 Heisk. 421; *McClure v. McDearmon*, 26 Ark. 66; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Wellesley v. Wellesley*, 4 My. & Cr. 561, 579, *per Lord Cottenham*; *Metcalf v. Archb. of York*, 6 Sim. 224; 1 My. & Cr. 547, 556; *Lyde v. Mynn*, 4 Sim. 505; 1 My. & K. 683.

⁵ *Smith v. Atkins*, 18 Vt. 461; *Van Hoozer v. Cory*, 34 Barb. 9, 12; *Conderman v. Smith*, 41 Id. 404; *Arques v. Wasson*, 51 Cal. 620; *Phila.*, &c. R. R. v. *Woelpper*, 64 Pa. St. 366, 371; *Forman v. Proctor*, 9 B. Mon. 124; *Otis v. Sill*, 8 Barb. 102; *Andrew v. Newcomb*, 32 N. Y. 417, 420; *Grantham v. Hawley*, Hob. 132; *Trull v. Eastman*, 3 Met. 121; *Jones v. Richardson*, 10 Id. 481, 488.

⁶ See § 374.

⁷ See *post*, §§ 465, 466.

§ 387. **Form and nature of the agreement.**—As may be surmised, the form of the agreement which shall create a lien is not of any particular importance; for equity will carry out the intent of the parties whatever form may be given to the contract, provided there is in the contract sufficient description to identify the security and the debt to be secured. Equitable liens may be said, therefore, to arise from any form or kind of an executory agreement which, instead of conveying a positive estate or interest in specific property, simply indicates the intention that such property shall serve as a security for the payment of a specific debt or debts.¹ Not only will an executory agreement for a mortgage create an equitable lien; but also where a mortgage is incomplete and invalid as a mortgage, on account of some informality or defect in its terms or mode of execution, a court of equity will treat such defective mortgage as an executory agreement for an equitable lien, and it will be enforced in equity as a valid and effective lien.² So, also, may there be an equitable lien arising from the assignments of executory agreements of various sorts: such, for example, as the assignment of a lease,³ of all the rents and profits of land;⁴ the assignment of a contract or bond of the parties for the sale of land;⁵ the assignment of certificates of entry of public lands, issued to a purchaser by a state or by the United States;⁶ of certificates of stock in a joint stock company where the property of the company consists of lands.⁷ And in all these cases, a lien may be created by the assignment of a partial interest under the executory contract, to the extent of such interest.⁸ But the lien in every such case is acquired by the assignee,

¹ *Husted v. Ingraham*, 75 N. Y. 251; *Hale v. Omaha Nat. Bk.*, 49 *Id.* 626; 64 *Id.* 550; *Boorman v. Wisconsin, &c. Co.*, 36 Wis. 207; *Monticello, &c. v. Loughry*, 71 Ind. 563; *Chase v. Peck*, 21 N. Y. 585; *Gilson v. Gilson*, 2 Allen, 115; *Kirksey v. Means*, 42 Ala. 426; *Whiting v. Eichelberger*, 16 Iowa, 422; *Lynch v. Utica Ins. Co.*, 18 Wend. 236; *Skiddy v. Atlantic, &c. R. R.*, 3 Hughes, 320; *Arnold v. Morris*, 7 Daly, 498; *Williams v. Ingersoll*, 23 Hun, 284; *Stewart v. Hutchins*, 6 Hill, 143; *Jackson v. Carswell*, 34 Ga. 279; *Mobile, &c. R. R. v. Talman*, 15 Ala. 472; *Racouillat v. Sansevain*, 32 Cal. 376; *De Leon v. Higuera*, 15 *Id.* 483; *Barroilhet v. Battelle*, 7 *Id.* 450; *Peckham v. Haddock*, 36 Ill. 38; and see *Chadwick v. Clapp*, 69 *Id.* 119; *Blackburn v. Tweedie*, 60 Mo. 505.

² *Love v. Sierra Nevada Co.*, 32 Cal. 639, 652, 653, *per* Shafter, J.; *McQuie v. Peay*, 58 Mo. 56; *Burnside v. Wayman*, 49 *Id.* 356; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Lake v. Doud*, 10 Ohio, 415; *Jones v. Brewington*, 58 Mo. 210; *McClurg v. Phillips*, 49 Mo. 315; 57 *Id.* 214; *Dunn v. Raley*, 58 *Id.* 134; *Harrington v. Fortner*, 58 *Id.* 468; *Gill v. Clark*, 54 *Id.* 415; *In re Howe*, 1 Paige, 125; *Bk. of Muskingum v. Carpenter's Adm'r*, 7 Ohio, 21; *Nelson v. Hagerstown Bk.*, 27 Md. 51, 76; *Dow v. Ker*, 1 Speer Eq. 414, 417; *Massey v. McIlwain*, 2 Hill Ch. 421, 428; *Welsh v. Usher*, 2

Id. 167, 170; *Delaire v. Keenan*, 3 Desau. 74; *Read v. Gillard*, 2 *Id.* 552; *Payne v. Wilson*, 74 N. Y. 348; *Daggett v. Rankin*, 31 Cal. 321; *Remington v. Higgins*, 54 *Id.* 620; *Newlin v. McAfee*, 64 Ala. 357; *Lewis v. Small*, 71 Me. 552.

³ *Barroilhet v. Battelle*, 7 Cal. 450.

⁴ *Ex parte Wills*, 1 Ves. 162; *Jackson v. Green*, 4 Johns. 186; *Smith v. Patton*, 12 W. Va. 541.

⁵ *Rockway v. Wells*, 1 Paige. 617; *Fessler's Appeal*, 75 Pa. St. 483; *Fitzhugh v. Smith*, 62 Ill. 486; *Purdy v. Bullard*, 41 Cal. 444; *Dwen v. Blake*, 44 Ill. 135; *Alden v. Garver*, 32 Ill. 32; *Lewis v. Boskins*, 27 Ark. 61; *Shall v. Biscoe*, 18 *Id.* 142; *Graham v. McCampbell*, Meigs, 52; *Tanner v. Hicks*, 4 Sm. & Mar. 294; *Button v. Schroyer*, 5 Wis. 598; *Sinclair v. Armitage*, 1 Beals, 174; *Neligh v. Michenor*, 3 Stockt. 539; *Alderson v. Ames*, 6 Md. 52; *Fenno v. Sayre*, 3 Ala. 458; *Newhouse v. Hill*, 7 Blackf. 584; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Bull v. Sykes*, 7 Wis. 449; *Jones v. Lapham*, 15 Kans. 540; *Christy v. Dana*, 34 Cal. 548.

⁶ *Wright v. Shumway*, 1 Biss. 23; *Heirs v. Stoyer v. Heirs of Bounds*, 1 Ohio St. 107; *Dodge v. Silverthorne*, 12 Wis. 644; *Mowry v. Wood*, 12 *Id.* 413; *Jarvis v. Dutcher*, 16 *Id.* 307; *Hill v. Eldred*, 49 Cal. 398.

⁷ *Durkee v. Stringham*, 8 Wis. 1.

⁸ *Northrup v. Cross*, Seid. Notes, 111.

subject to the performance by the assignor of his part of the obligation.¹

§ 388. **Lien or mortgage by deposit of title deeds.**—This is an ancient security for debt, which at one time was in general use in England, and even now is employed there to some extent. The deposit of the title deeds of a tract of land with the creditor secured to him in equity a lien upon the land for the amount of the debt. It was looked upon in equity as an agreement to execute a mortgage which would be enforced against the depositor and all other persons claiming under him, except subsequent purchasers and incumbrancers for value and without notice.² Although it has been strongly objected to, as violating the Statute of Frauds, it is now definitely settled in England that the mortgage by deposit of the title deeds does not come within the operation of the statute.³ The mere possession by the creditor of the debtor's muniments of title will not raise for the former a lien upon the land. They must have been deposited with him with the express intention of providing a lien, in order that the possession may have that effect.⁴ But it is not necessary that all the title deeds in the chain of title should be deposited. A single title deed would be sufficient as against the depositor, and it would only be invalid as to those, who were fairly misled by the fact that the mortgagor or depositor was in possession of the other deeds.⁵ And as against the mortgagor and all others claiming under him with notice, the mere agreement to deposit the title deeds as security would suffice to make the debt an equitable charge upon the estate, if it be evidenced by some writing.⁶

§ 389. **Continued.—Notice to subsequent purchasers.**—If the subsequent purchaser for value has received no notice of the existence of this equitable mortgage, it cannot be enforced against him and the land in his hands. What will be sufficient notice to such a purchaser would depend upon the circumstances of each particular case. In England, where there is no registration law, and the purchaser is accustomed to depend upon the original title deeds in investigating the title to lands, the absence of these deeds or of any of them would con-

¹ *Dodge v. Silverthorne*, 12 Wis. 644.

² *Story's Eq. Jur.*, § 1020; 2 Washb. on Real Prop. 83; 4 Kent's Com. 150, 151; *Russell v. Russell*, 1 Bro. C. C. 269; *Ex parte Langston*, 17 Ves. 230; *Pain v. Smith*, 2 Myl. & K. 417; *Mandeville v. Welch*, 5 Wheat. 277; *Roberts v. Craft*, 24 Beav. 223; *Edge v. Worthington*, Cox, 211; *Ex parte Corning*, 9 Ves. Jr. 115; *Carey v. Rawson*, 8 Mass. 159; *Jarvis v. Dutcher*, 16 Wis. 307.

³ *Whitbread, ex parte*, 19 Ves. 209; *Haigh, ex parte*, 11 Ves. 403; *Ex parte Hooper*, 19 Ves. 477; *Norris v. Wilkinson*, 19 Ves. 192; *Russell v. Russell*, 1 Bro. C. C. 269. In Pennsylvania, a written agreement must accompany the deposit of the title deeds, in order that the transaction may create a mortgage. *Luch's Appeal*, 44 Pa. St. 519; *Edwards v. Trumbull*, 50 Pa. St. 509.

⁴ *Norris v. Wilkinson*, 12 Ves. 162; *Bozon v. Williams*, 3 Y. & J. 150; *James v. Rice*, 23 Eng. L. & E. 567; *Chapman v. Chapman*, 3 Eng. L. & E. 70; s. o., 13 Beav. 308; *Ex parte Bruce*, 1 Rose, 374; *Ex parte Wright*, 19 Ves. 258; *Ex parte Langston*, 17 Ves. 227; *Lucas v. Darren*, 7 Taunt. 278; *Mandeville v. Welch*, 5 Wheat. 277; *Story's Eq. Jur.*, § 1020. If the intention is declared by a memorandum in writing, it cannot be controlled by parol evidence. *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

⁵ *Ex parte Chippendale*, 2 Mont. & A. 299; *Ex parte Wetherall*, 11 Ves. 398; *Lacon v. Allen*, 3 Drew. 582; *Roberts v. Crofty*, 24 Beav. 253; s. c., 2 De G. & J. 1.

⁶ *Edwards, ex parte*, 1 Deac. 611; 4 Kent's Com. 151.

stitute sufficient notice to put the purchaser on his inquiry. But the burden of proof is on the equitable mortgagee to show that the purchaser has received notice of the mortgage.¹ In this country, however, where all deeds of conveyance are required to be recorded, in order to give constructive notice to subsequent purchasers, actual notice of the deposit of the deeds must be brought to such purchasers, in order to bind the land in their hands. The purchaser in this country is not required to look beyond the record for the evidences of title.²

§ 390. **Continued.—Their recognition in this country.**—The equitable mortgage by deposit of title deeds is recognized in some of the states of this country, but in view of the general prevalence of the recording law, it is at best a very inefficacious kind of security. It can never be relied upon, and is rarely, if ever at the present day, met with in practice. Its value as a security is destroyed, as soon as the land has been sold or mortgaged to one having no actual notice of the deposit. And it being a purely equitable interest, not even an equitable estate, the mortgagee cannot have an instrument of notice recorded for the purpose of giving constructive notice of its existence. The mortgage is, however, recognized in Maine, Rhode Island, New York, New Jersey, South Carolina, Georgia, Wisconsin, and in the United States Courts.³ While in Pennsylvania, Vermont, Kentucky, Ohio and Tennessee, the doctrine has been repudiated.⁴

§ 391. **Continued.—Foreclosure.**—Since the mortgage by deposit of title deeds is only an equitable lien, it can be enforced only in a court of equity, and it is a matter of doubt in the English courts, whether the decree should be for foreclosure, or simply direct a sale of the premises, and the application of the proceeds to the liquidation of

¹ *Herrick v. Atwood*, 25 Beav. 212; *Colyer v. Finch*, 5 H. L. Cas. 924; *Ex parte Hardy*, Deac. & C. 383; *Hiern v. Mill*, 13 Ves. 114; *Hewitt v. Loosemore*, 9 Eng. L. & E. 35; *Head v. Egerston*, 3 P. Wms. 279; *Adam's Eq.* 123; *Story's Eq. Jur.*, § 1020; *Jones, Mortg.*, § 179; *Ex parte Kensington*, 2 V. & B. 79, 84; *Ex parte Langston*, 17 Ves. 227; *Baynard v. Woolley*, 20 Beav. 583; *Parker v. Housefield*, 2 My. & K. 419; *Pryce v. Bury*, 2 Drew. 41, 42; *Lacon v. Allen*, 2 Drew. 579; *Whitbread v. Jordan*, 1 Y. & C. Ex. 303; *National Bank of Austr. v. Cherry*, L. R. 3 P. C. 299; *Russell v. Russell*, 1 Bro. Ch. 289; 1 Eq. Lead. Cas. 931 (4th Am. ed.); *Pye v. Daubuz*, 2 Dick. 759; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Wright*, 19 Ves. 255; *Ex parte Hooper*, 1 Meriv. 7.

² *Story's Eq. Jur.*, § 1020; *Jones, Mortg.*, § 179; *Hall v. McDuff*, 24 Me. 311; *Whitworth v. Gainsain*, 3 Hare, 416; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 604; *Luch's Appeal*, 44 Pa. St. 522; *Edwards v. Trumbull*, 50 Pa. St. 612; *Probasco v. Johnson*, 2 Disney, 96; *Walker Am. Law*, 315.

³ *Hall v. McDuff*, 24 Me. 311; *Hackett v. Reynolds*, 4 R. I. 512; *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Robinson v. Urquhart*, 1 Deas.

523; *Stoddard v. Hart*, 23 N. Y. 261; *Mounce v. Byars*, 16 Ga. 469; *Jarvis v. Dutcher*, 16 Wis. 307; *Mandeville v. Welch*, 5 Wheat. 277; *Chase v. Peck*, 21 N. Y. 581; *Williams v. Stratton*, 10 Sm. & Mar. 418, 426; *Gothard v. Flynn*, 25 Miss. 58; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Welsh v. Usher*, 2 Hill Ch. 167, 170, *per Harper, J.*; *Williams v. Stratton*, 10 Sm. & Mar. 418, 426; *Mowry v. Wood*, 12 Wis. 413; *First Nat. Bk. v. Caldwell*, 4 Dillon, 314.

⁴ *Shitz v. Dieffenback*, 3 Pa. St. 233; *Bowers v. Oyster*, 3 Pa. St. 233; *Strauss' Appeal*, 49 Pa. St. 258; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Bicknell v. Bicknell*, 31 Vt. 498; *Van Meter v. McFaddin*, 8 B. Mon. 435, 438; *Meador v. Meador*, 3 Heisk. 582; *Probasco v. Johnson*, 2 Disney, 96; *Bloom v. Noggle*, 4 Ohio St. 45, 56; *Gothard v. Flynn*, 25 Miss. 58; but comp. *per contra*, *Williams v. Stratton*, 10 Sm. & Mar. 418; *Thomas' Appeal*, 30 Pa. St. 378; *Edwards' Ex'rs v. Trumbull*, 50 Pa. St. 509; *Bowers v. Oyster*, 3 P. & W. 239. But in Pennsylvania, if the deposit is accompanied by an instrument, declaring the purpose of the deposit, it will be a good, equitable mortgage. *Luch's Appeal*, 44 Pa. St. 522; *Edwards v. Trumbull*, 56 Pa. St. 512.

the debt. But the later English cases hold that the mortgagee of such a mortgage has the same rights of foreclosure as any other mortgagee.¹

§ 392. **Liens arising from implied contracts.**—As Mr. Pomeroy has justly stated, the term *implied contract* is a fiction indulged in for the purpose of accounting for the obligation imposed by law, under the iron-cast rule of the common law, which is itself a fiction, that the action at law must arise *ex contractu* and *ex delicto*; so that when the dictates of justice required the imposition of an obligation, where there is no actual contract, the law is said to imply the contract, as a foundation for the just imposition of the obligation. But the full explanation of the whole doctrine is, that the obligation is imposed by the court, and usually by the court of equity, for the purpose of doing justice between man and man, and the satisfaction of some righteous claim; it is really an obligation imposed by law and not at all dependent upon any agreement of the parties, express or implied. It is upon these general principles of justice and right that the equitable lien is said to arise by implication, and be enforced against the parties who would otherwise have acquired the property which they could not justly claim, and by whose acquisition of the property some other party would have suffered an injustice. The cases of liens, arising by implied contracts, so-called, are quite numerous, but the same general principle rules over them all, that the lien is implied, whenever it is just that the one party should have a special claim against the property of another to secure the performance of some obligation. Some examples of this implied lien will be given.

§ 393. **Liens upon joint owners and co-tenants.**—Where two or more persons are joint owners or purchasers of property, and one of them acting in good faith makes the necessary repairs upon the property, he has a lien upon the interest of the other party for his share of the expense of such repairs, which enables him to secure an enforcement of his demand for contribution.² Of the same character is the so-called partnership lien which enables each partner, by the assertion of the lien upon the interest of the other partners in the partnership property, to secure an application of the entire property of the firm to the full satisfaction of the firm's debts, or the exhaustion of the firm's assets. Until the debts of the firm have been fully satisfied, no partner can acquire an absolute right to any part of the partnership property; nor can any person claiming under such partner

¹ Adams Eq. 125; Pain v. Smith, 2 M. & K. 417; Parker v. Housefield, *Id.* 419; Brocklehurst v. Jessop, 7 Sim. 438; Moores v. Choat, 8 *Id.* 508; Price v. Carver, 3 M. & C. 157; Lister v. Turner, 5 Hare, 281; Tuckley v. Thompson, 1 Johns. & H. 123; James v. James, L. R. 16 Eq. 153; Redmagne v. Forster, L. R. 2 Eq. 487; Backhouse v. Charlton, L. R. 8 Ch. D. 444; Carter v. Wake, L. R. 4 Ch. D. 605; James v. James, L. R. 16 Eq. 153; Pryce v. Bury, L. R. 16 Eq. 153 n. In *Jarvis v. Dutcher*, 16 Wis. 307, it was held

that the decree should be for a sale of the premises. See, to same effect, *Hackett v. Reynolds*, 4 R. I. 512; *Mowry v. Wood*, 12 Wis. 413.

² *Swan v. Swan*, 8 Price, 518; *Rathburn v. Colton*, 15 Pick. 471; *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, pl. 3; *Lake v. Craddock*, 3 P. Wms. 158; 1 Eq. Lead Cas. 264, 268 (4th Am. ed.); *Gladstone v. Birley*, 2 Meriv. 401, 403; *Scott v. Nesbitt*, 14 Ves. 437, 444.

acquire such rights as against the other partners who have been called upon to satisfy partnership debts for the protection of their own private property.¹

§ 394. **Expenditure by a life-tenant.**—As a general rule, a life-tenant is charged with the making of repairs of the property, and has no claim against the reversioner or remainder-man for contribution toward the expense of keeping up the estate; and if he makes improvements upon the land beyond what he may remove before the termination of the tenancy, he has no claim for such improvements against the reversioner or remainder-man.² But if the tenant for life acquires property under a will upon which beneficial permanent improvements had been begun, he can then complete these improvements and claim of the reversioner's right of contribution towards this extraordinary expense, and equity will concede to him a lien upon the interest of the reversioner as a security for such contribution.³

§ 395. **Improvements made upon the land of another.—Betterment laws.**—The common law rule is, that where one enters into possession of land belonging to another, under the mistaken belief that the true title to the property has been acquired by him; and in reliance upon this belief he makes improvements upon such land; and subsequently the true owner should assert his title to the land in an action of ejectment; it is impossible for the person in possession, who has made these improvements, to obtain any redress or claim of contribution for such improvements, when he is obliged to deliver up the possession to the holder of the true title. He loses the improvements, as well as the consideration he paid for the land.⁴ But if the true owner cannot recover his property by a common law action of ejectment, and is obliged to resort to equity or to equitable remedies for the recovery of his property, equity will compel him to do equity before he can obtain the equitable aid sought for.⁵ The court of equity will consider it inequitable for the true owner to claim the benefit of the improvements, which have been made by the party in possession, under the mistaken belief that the land belonged to him, and will compel him to pay for such improvements as a condition precedent to the employment of the equitable remedies for the recovery of the property. Equity recognizes in favor of the party in possession a lien upon the title of the true owner, as a security for the reimbursement of the expenses of the improvements, which may be enforced as a defence, not only against the original owner, but likewise against any

¹ See *West v. Skip*, 1 Ves. Sen. 239, 456; *Lake v. Gibson*, 1 Eq. Lead Cas. 264, 268 (4th Am. ed.); *Mycok v. Beatson*, L. R. 13 Ch. D. 384; *Nicholl v. Mumford*, 4 Johns. Ch. 522.

² See *Tiedeman Real Prop.*, § 68.

³ *In re Leigh's Estate*, L. R. 6 Ch. 887; *Sohier v. Eldredge*, 103 Mass. 345; see *Floyer v. Bankes*, L. R. 8 Eq. 115; *Taylor v. Foster's Adm'r*, 22 Ohio St. 255; and *Todd v. Moorhouse*,

L. R. 19 Eq. 69; *Hibbert v. Cooke*, 1 S. & S. 552; *Dent v. Dent*, 30 Beav. 363; *Dunne v. Dunne*, 3 Sm. & Gif. 22.

⁴ *Bright v. Boyd*, 1 Story, 478, 494; *Putnam v. Ritchie*, 6 Paige, 390, 403; *Green v. Winter*, 1 Johns. Ch. 26, 39; *Moore v. Cable*, 1 Johns. Ch. 385; see *ante*, §§ 807, 821.

⁵ *Appeal of Cross & Gault*, 97 Pa. St. 471.

assignee or purchaser from him.¹ The claim for reimbursement for the expenses of the improvements in equity becomes still stronger, where the true owner has permitted the party in possession to make these extensive improvements while he remained silent, and failed to assert his title until the improvements have been completed. In such a case, the claim for reimbursement operates with the full force and effect of an estoppel upon the true owner.² But in all of these cases the element of good faith and want of notice of the defect of one's title, on the part of the person making the improvements, is absolutely essential. If the improvements have been made with full knowledge of the defective title, a claim to reimbursement is never recognized by a court of equity, and hence no lien for the protection of such a claim.³ It is proper to add that this equitable doctrine, conceding the right to reimbursement where one makes improvements upon land under the mistaken belief that the land belonged to him, has now been commonly adopted as a legal rule, and applied to all cases for the recovery of land from those who have acquired possession under color of title and in good faith, and who have, in reliance upon such apparent good title, made improvements upon the land. The general statutory rule ordinarily subjects the true owner to the alternative of, either paying for the improvements, or selling the land to the party making them, at a fair valuation.

§ 396. **Equitable lien on life insurance policies.**—It is also held that where one, not the owner of a policy of life insurance, nor in any way bound to pay the premium, pays such premium for the benefit of the person to whom the insurance is payable, he has an equitable lien upon the proceeds of the policy, as a security for the repayment to him of the premiums thus paid.⁴

§ 397. **Vendor's and grantor's liens distinguished.**—The distinction between a vendor's lien and a grantor's lien is not commonly made, although the distinction is very important; and perhaps a failure to make the distinction may have been the occasion for all the confusion which prevails among the authorities concerning the nature and characteristics of the grantor's lien. Some of the cases have even held that the vendor's lien may arise both before and after the performance of the executory contract of sale; that is, before or after the formal conveyance of the title to the land to the purchaser.⁵ While it is true that

¹ *Robinson v. Ridley*, 6 Madd. 2; *Atty.-Gen. v. Balliol Coll.*, 9 Mod. 407, 411; *Bright v. Boyd*, 1 Story, 478; 2 *Id.* 605; *Rathburn v. Colton*, 15 Pick. 471; *Miner v. Beekman*, 50 N. Y. 337; *Smith v. Drake*, 23 N. J. Eq. 302; *McLaughlin v. Barnum*, 31 Md. 425; *Sale v. Crutchfield*, 8 Bush, 630; and see *Preston v. Brown*, 35 Ohio St. 18.

² *Cawdor v. Lewis*, 1 Y. & C. Ex. 427; *Preston v. Brown*, 35 Ohio St. 18; *Green v. Bid-
dle*, 8 Wheat. 1, 77, 78; *Bright v. Boyd*, 1 Story, 478, 483; see *ante*, Vol. II, §§ 807, 821, and

cases cited; *Shine v. Gough*, 1 Ball & B. 436, 444.

³ *Rennie v. Young*, 2 De G. & J. 136; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Cook v. Kraft*, 3 Lans. 512; *Davidson v. Barclay*, 63 Pa. St. 406; *Dart v. Hercules*, 57 Ill. 446; *Cannon v. Cope-
land*, 43 Ala. 252.

⁴ *Todd v. Moorhouse*, L. R. 19 Eq. 69; *Norris v. Caledonian Ins. Co.*, L. R. 8 Eq. 127; *Gill v. Downing*, L. R. 17 Eq. 316.

⁵ See *Dixon v. Gayfere*, 1 De G. & J. 655; *Atty.-
Gen. v. Sittingbourne, &c. Ry.*, L. R. 1 Eq. 636;

a lien may be considered as existing, both before and after the conveyance, the character of the lien is essentially different in the two cases, and for the purpose of distinguishing between the two liens, it is proper to speak of the *vendor's lien* in connection with the subject of the transfer of property, only where the title to the property is not yet transferred to the vendee and is still retained by the vendor, while the term *grantor's lien* is that which the grantor of lands has upon the title of the lands in the vendee, for the purpose of securing the payment of the purchase money. Under the circumstances, as a general security for the payment of the purchase money, the vendor's lien differs in every respect from his legal rights as an owner of the property; he still has the legal title, and hence cannot be said to have any equitable lien on such property, for the possession of the legal title is a more perfect security to him than any equitable lien could be.¹ But there is, perhaps, some ground or necessity for the application of the principles of a lien to the case of the vendor under an executory contract for the sale of lands for the purpose of giving to him a lien, not upon the land, but upon the consideration in the executory contract; that is, under the doctrine of equitable conversion, the vendor is treated as a trustee in respect to the land for the vendee, and the vendee trustee for the vendor in respect to the consideration of the contract, so that the vendor will have a right to the specific performance of the contract, and therefore a specific claim to a recovery of the consideration. Where, therefore, the contract for the sale of the land is made upon the consideration of a transfer to the vendor of some specific property instead of merely a sum of money, it would be an advantage to the vendor to claim a lien upon the property which he is to acquire by the full or specific performance of his contract. In that respect, he may be said to have a lien upon the consideration of the contract of sale. Such is, in fact, and can only be, the nature of the vendor's lien; that is, prior to the formal conveyance of the legal title of his property to the vendee.²

Earl of Jersey v. Briton, &c. Dock Co., L. R. 7 Eq. 409; Weare v. Linnell, 29 Mich. 224; Willis v. Searcy, 49 Ala. 222; Willard v. Reas, 26 Wis. 540; Cotten v. McGehee, 54 Miss. 510; Prentice v. Nutter, 25 Minn. 484; Johnson v. Godden, 33 Ark. 600; Martin v. O'Bannon, 35 Id. 62; Stephenson v. Rice, 12 W. Va. 275; Day v. Hale, 22 Gratt. 146; Vail v. Drexel, 9 Ill. App. 439; *In re Patent Carriage Co.*, L. R. 2 Eq. 349; Lycett v. Stafford, &c. Ry., L. R. 13 Eq. 261; Earl St. Germain v. Crystal Palace Ry., L. R. 11 Eq. 568; Wing v. Tottenham, &c. Ry., L. R. 3 Ch. 740; Morgan v. Swansea, &c. Authority, L. R. 9 Ch. D. 582; Nives v. Nives, L. R. 15 Ch. D. 649; Fry v. Prewett, 56 Miss. 783; Servis v. Beatty, 32 Miss. 52; English v. Russell, 1 Hempst. 35; Amory v. Reilly, 9 Ind. 490; Stevens v. Chadwick, 10 Kans. 406; Smith v. Rowland, 13 Kans. 245; Hill v. Grigsby, 32 Cal. 55; Haughwout v. Murphy, 22 N. J. Eq. 531; Hall v. Jones,

21 Md. 439; Yancey v. Mauck, 15 Gratt. 300; Neel v. Clay, 48 Ala. 252; Smith v. Hibbard, 2 Dick. 730; Smith v. Evans, 28 Beav. 59; Whitehurst v. Yandall, 7 Baxt. 228; Bizzell v. Nix, 60 Ala. 281; Johnson v. Nunnerly, 30 Ark. 153.

¹ Vail v. Drexel, 9 Ill. App. 439; Morgan v. Swansea, &c. Authority, L. R. 9 Ch. D. 582, 584; Lysaght v. Edwards, L. R. 2 Ch. D. 499, 506, 507; Wall v. Bright, 1 J. & W. 494, 508; Rose v. Watson, 10 H. L. Cas. 672, 678; Shaw v. Foster, L. R. 5 H. L. 321; McCreight v. Foster, L. R. 5 Ch. 604, 610; see, also, McCaslin v. The State, 44 Ind. 151; Moore v. Anders, 14 Ark. 623, 634; Hutton v. Moore, 26 Ark. 382; Pitts v. Parker, 44 Miss. 247; Wells v. Smith, 44 Id. 296; Driver v. Hudspeth, 16 Ala. 348; Reese v. Burts, 39 Ga. 565; Hines v. Perkins, 2 Heisk. 395; Sparks v. Hess, 15 Cal. 186, 194, *per* Field, J.; Church v. Smith, 39 Wis. 492, 496, *per* Lyon, J.

² Roberts v. Francis, 2 Heisk. 127; Carter v.

§ 398. **Characteristics of the vendor's lien.**—The vendor's lien, as just described, has many points in common with the grantor's lien, which will be more specifically explained in a subsequent paragraph; on the other hand, it differs from such grantor's lien in one or two respects. Thus, for example, it is not in general waived by the taking of any additional security.¹ The vendor's lien will have priority over any subsequent judgment which might be recovered against the vendee.² It is also held that the right to the enforcement of the lien will be passed to the assignee, where the rights of the vendor under the contract have been assigned.³

§ 399. **Grantor's lien.**—This is also an equitable lien recognized in favor of the grantor as a security for the purchase money. It is founded on the equitable theory that, until the payment of the purchase money, the grantee holds the land as trustee of the grantor for the purpose of a security. No agreement is necessary for its creation; it is presumed to exist, until the contrary is shown.⁴ This lien has been generally recognized in the states of this country, Alabama, California, Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oregon, Tennessee, Texas, Wisconsin, Arkansas, Dakota, Rhode Island,⁵ but has been denied or left in doubt

Sims, 2 *Id.* 166; Cleveland *v.* Martin, 2 Head, 128; Sitz *v.* Deihl, 55 Mo. 17; Seitz *v.* Union Pac. Ry., 16 Kans. 133; Smith *v.* Moore, 26 Ill. 392; Greene *v.* Cook, 29 *Id.* 186; Grove *v.* Miles, 58 *Id.* 338; 71 *Id.* 376; Button *v.* Schroyer, 5 Wis. 598; Merritt *v.* Judd, 14 Cal. 59; Purdy *v.* Bul-lard, 41 *Id.* 444; see *ante*, Vol. I, §§ 368, 372; Lewis *v.* Hawkins, 23 Wall. 119; Lingan *v.* Henderson, 1 Bland, Ch. 236; Tuck *v.* Calvert, 33 Md. 209; Richards *v.* Fisher, 8 W. Va. 55; Hadley *v.* Nash, 69 N. C. 162; Harvill *v.* Lowe, 47 Ga. 214; Taylor *v.* Eckford, 11 Sm. & Mar. 21; Money *v.* Dorsey, 7 Sim. & Mar. 15, 22; Cochran *v.* Wimberly, 44 Miss. 503; Holman *v.* Patterson's Heirs, 29 Ark. 357; Lewis *v.* Boskins, 27 *Id.* 61; Shinn *v.* Taylor, 28 *Id.* 523; Relfe *v.* Relfe, 34 Ala. 500, 504; Scroggins *v.* Hoadley, 56 Ga. 165.

¹ Sehorn *v.* McWhirter, 6 Baxt. 311, 313; Warren *v.* Branch, 15 W. Va. 21; Bozeman *v.* Ivey, 49 Ala. 75; McCaslin *v.* The State, 44 Ind. 151; Day *v.* Hale, 22 Gratt. 146; but see Hollis *v.* Hollis, 4 Baxt. 524.

² Grubbs *v.* Wysors, 32 Gratt. 127; Shipe *v.* Re-pass, 28 *Id.* 716; Wooten *v.* Bellinger, 17 Flor. 289; Paris Exch. Bk. *v.* Beard, 49 Tex. 358; Jones *v.* Sackett, 36 Mich. 192.

³ Martin *v.* O'Bannon, 35 Ark. 62; McMillen *v.* Rose, 54 Iowa, 522.

⁴ Walker Am. Law, 366 n.; Mackreth *v.* Sym-mons, 15 Ves. 339; Chapman *v.* Tanner, 1 Vern. 267; Blackburn *v.* Gregson, 1 Bro. C. C. 420; Payne *v.* Atterbury, Harr. (Mich.) 414; Warren *v.* Fenn, 28 Barb. 334; Wilson *v.* Lyon, 51 Ill. 166; Truebody *v.* Jacobson, 2 Cal. 269; Dodge *v.* Evans, 43 Miss. 570; Schnebly *v.* Ragan, 7 Gill & J. 120; Ahrend *v.* Odiorne, 118 Mass. 266;

Kauffelt *v.* Bower, 7 Serg. & R. 64; Moreton *v.* Harrison, 1 Bland Ch. 491; Iglehart *v.* Armiger, 1 Bland Ch. 519, 524, 525; 2 Story's Eq. Jur., §§ 1218, *et seq.*; Snell's Eq., p. 136 (5th ed.); Perry on Trusts, §§ 231, 232; Blackburn *v.* Greg-son, 1 Bro. Ch. 420, *per* Lord Loughdorough; Mackreth *v.* Symmons, 15 Ves. 339, *per* Lord Eldon; Ringgold *v.* Bryan, 3 Md. Ch. 488.

⁵ Haley *v.* Bennett, 5 Port. 452; Pylant *v.* Reeves, 53 Ala. 132; Thames *v.* Caldwell, 60 *Id.* 644; Blankhead *v.* Owen, 60 *Id.* 457; Bizzell *v.* Nix, 60 *Id.* 281; Simpson *v.* McAllister, 56 *Id.* 228; Moore *v.* Worthy, 56 *Id.* 163; Bryant *v.* Stephens, 58 *Id.* 636; Dugger *v.* Tayloe, 60 *Id.* 504; Terry *v.* Keaton, 58 *Id.* 667; Flinn *v.* Barber, 61 *Id.* 530; Gordon *v.* Bell, 50 *Id.* 213; Dennis *v.* Williams, 40 *Id.* 633; Griffin *v.* Cam-mack, 36 *Id.* 695; Bradford *v.* Harper, 25 *Id.* 337; Burns *v.* Taylor, 23 *Id.* 255; Roper *v.* McCook, 7 Ala. 318; Barnett *v.* Riser's Ex'rs, 63 *Id.* 347; Thurman *v.* Stoddard, 63 *Id.* 336; Chapman *v.* Lee, 64 *Id.* 483; Burgess *v.* Greene, 64 *Id.* 509; Shorter *v.* Frazer, 64 *Id.* 74; Carver *v.* Eads, 65 *Id.* 190; Walker *v.* Carroll, 65 *Id.* 61; Shall *v.* Bis-coe, 18 Ark. 142; Lavender *v.* Abbott, 30 Ark. 192, 172; Neal *v.* Speigle, 33 *Id.* 63; Mayers *v.* Hendry, 33 *Id.* 240; Swan *v.* Benson, 31 *Id.* 728; Blevins *v.* Rogers, 32 *Id.* 258; Johnson *v.* Nun-nerly, 30 *Id.* 153; Linthicum *v.* Tapscott, 28 *Id.* 267; Holman *v.* Patterson's Heirs, 29 *Id.* 357; Stroud *v.* Pace, 35 *Id.* 100; Young *v.* Harris, 36 *Id.* 162; Harris *v.* Hanie, 37 *Id.* 348; English *v.* Russell, 1 Hempst. 35; Scott *v.* Orbison, 21 Ark. 202; Harris *v.* Hanks, 25 *Id.* 510, 517; Refeld *v.* Ferrell, 27 *Id.* 534; Campbell *v.* Rankin, 28 *Id.* 401; Turner *v.* Horner, 29 *Id.* 440; Salmon *v.*

in some. Denied and repudiated in Kansas, Maine, Massachusetts,

- Hoffman, 2 Cal. 138; Gallagher v. Mars, 50 Id. 23; Wells v. Harter, 56 Id. 342; Truebody v. Jacobson, 2 Cal. 269; Cahoon v. Robinson, 6 Id. 225; Walker v. Sedgwick, 8 Id. 398; Sparks v. Hess, 15 Id. 186; Williams v. Young, 17 Id. 403; Taylor v. McKinney, 20 Id. 618; Baum v. Grisby, 21 Id. 172; Burt v. Wilson, 28 Id. 632; Francis v. Wells, 2 Col. 660; Ford v. Smith, 1 McArthur, 592; Bradford v. Marvin, 2 Flor. 463; Woods v. Bailey, 3 Id. 41; Keith v. Horner, 32 Ill. 524; Dyer v. Martin, 4 Scam. 146; Trustees v. Wright, 11 Ill. 603; McLaurie v. Thomas, 39 Id. 291; Boynton v. Champlin, 42 Id. 57; Wilson v. Lyon, 51 Id. 166; Kirkham v. Boston, 67 Id. 599; Wing v. Goodman, 75 Id. 159; Moshier v. Meek, 80 Id. 79; Andrus v. Coleman, 82 Id. 26; Henson v. Westcott, 82 Id. 224; Small v. Stagg, 95 Id. 39; Manning v. Frazier, 96 Id. 279; Yaryan v. Shriner, 26 Ind. 364; Anderson v. Donnell, 66 Id. 150; Haskell v. Scott, 56 Id. 564; Fouch v. Wilson, 60 Id. 64; Nichols v. Glover, 41 Id. 24; Martin v. Cauble, 72 Id. 67; Higgins v. Kendall, 73 Id. 522; Richards v. McPherson, 74 Id. 158; Carty v. Pruett, 4 Id. 226; Merritt v. Wells, 18 Id. 171; Mattix v. Weand, 19 Id. 151; Cox's Adm'r v. Wood, 20 Id. 54; Lagow v. Badollet, 1 Blackf. 416; Evans v. Goodlet, 1 Id. 246; Deibler v. Barwick, 4 Id. 339; Johnson v. McGrew, 42 Iowa, 55; Tinsley v. Tinsley, 52 Iowa, 14; Stuart v. Harrison, 52 Id. 511; Allen v. Loring, 34 Id. 499; Escher v. Simmons, 54 Id. 269; Pierson v. David, 4 Iowa, 23; Grapengether v. Fejervary, 9 Id. 163; Hays v. Horine, 12 Id. 61; Rakestraw v. Hamilton, 14 Id. 147; Patterson v. Linder, 14 Id. 414; Tupples v. Viers, 14 Id. 515; Poler v. Dubuque, 20 Id. 440; McDole v. Purdy, 23 Id. 277; Tiernan v. Thurman, 14 B. Mon. 277, 284; Gritton v. McDonald, 3 Metc. 252; Burrus v. Roulhac's Adm'r, 2 Bush, 39; Maupin v. McCormick, 2 Id. 206; Ledford v. Smith, 6 Id. 129; Emison v. Risque, 9 Id. 24; Gen. Stat. (1873) p. 589; Phillips v. Skinner, 6 Bush, 662; Fowler v. Heirs of Rust, 2 A. K. Marsh. 294; Thornton v. Knox's Ex'r, 6 B. Mon. 74; Muir v. Cross, 10 Id. 277; Magruder v. Peter, 11 Gill & J. 217; Repp v. Repp, 12 Id. 341; Carr v. Hobbs, 11 Md. 285; Hummer v. Schott, 21 Id. 307; Hall v. Jones, 21 Id. 439; Bratt v. Bratt, 21 Id. 578; Carrico v. Farmers, & Co. Bk., 33 Id. 235; Gen. Laws, Art. 16, § 130; Moreton v. Harrison, 1 Bland Ch. 491; Iglehart v. Armiger, 1 Id. 519; Ringgold v. Bryan, 3 Md. Ch. 488; White v. Casenave's Heirs, 1 Har. & J. 106; Ghiselin v. Fergusson, 4 Id. 522; Pratt v. Vanwyck's Ex'rs, 6 Gill & J. 495; Carroll v. Van Rensselaer, Harr. (Mich.) 225; Payne v. Avery, 21 Mich. 524; Merrill v. Allen, 38 Id. 487; Palmer v. Sterling, 41 Id. 218; Clark v. Stillson, 36 Id. 482; Hiscock v. Norton, 42 Id. 320; Brown v. Porter, 2 Mich. N. P. 12; Carroll v. Van Rensselaer, Harring. Ch. 225; Sears v. Smith, 2 Mich. 243; Converse v. Blumrich, 14 Id. 109; Daughaday v. Paine, 6 Minn. 306; Selby v. Stanley, 4 Id. 65; Dawson v. Girard L. Ins. Co., 27 Minn. 411; Duke v. Balme, 16 Minn. 306; Dodge v. Evans, 43 Miss. 570; Davidson v. Allen, 36 Miss. 419; Perkins v. Gibson, 51 Miss. 699; Tucker v. Hadley, 52 Id. 414; McLain v. Thompson, 52 Id. 418; Walton v. Hargroves, 42 Id. 18; Lindsey v. Bates, 42 Id. 397; Richardson v. Bowman, 40 Id. 782; Harvy v. Kelly, 41 Id. 490; Russell v. Watt, 41 Id. 602; Dodge v. Evans, 43 Id. 570; Pitts v. Parker, 44 Id. 247; Rutland v. Brister, 53 Id. 683; Stewart v. Ives, 1 Sm. & Mar. 197; Tanner v. Hicks, 4 Id. 294; Dunlap v. Burnett, 5 Id. 702; Upshaw v. Hargrove, 6 Id. 286; Trotter v. Erwin, 27 Miss. 772; Servis v. Beatty, 32 Id. 52; Littlejohn v. Gordon, 32 Id. 235; March v. Turner, 4 Mo. 253; Stevens v. Rainwater, 4 Mo. App. 292; Davenport v. Murray, 68 Mo. 198; Pearl v. Hervey, 70 Id. 160; McKnight v. Brady, 2 Mo. 110; Marsh v. Turner, 4 Mo. 253; Delassus v. Poston, 19 Id. 425; Davis v. Lamb, 30 Id. 441; Bledsoe v. Games, 30 Id. 448; Pratt v. Clark, 57 Id. 189; Armstrong v. Ross, 20 N. J. Eq. 109; Corlies v. Howland, 26 Id. 311; Graves v. Coutant, 31 Id. 763; Ogden v. Thornton, 30 Id. 569; Vandoren v. Todd, 2 Green Ch. (N. J.) 397; Brinkerhoff v. Tansciven, 3 Id. 251; Herbert v. Scofield, 1 Stockt. Ch. 492; Dudley v. Matlack, 1 McCarter, 252; Shirley v. Sugar Ref. Co., 2 Edw. Ch. 505; Warren v. Fenn, 28 Barb. 333; Dubois v. Hull, 43 Id. 26; Smith v. Smith, 9 Abb. Pr., n. s., 420; Chase v. Peck, 21 N. Y. 581; Hazeltine v. Moore, 21 Hun, 355; Lamberton v. Van Voorhis, 15 Id. 336; Gaylord v. Knapp, 15 Id. 87; Champion v. Brown, 6 Johns. Ch. 398, 402; Garson v. Green, 1 Id. 308; Stafford v. Van Rensselaer, 9 Cow. 316; White v. Williams, 1 Paige, 502; Fish v. Howland, 1 Id. 20; Warner v. Van Alstyne, 3 Id. 513; Mayham v. Coombs, 14 Ohio, 428; Neil v. Kinney, 11 Ohio St. 58; Anketel v. Converse, 17 Id. 11; Whetsel v. Roberts, 31 Id. 503; Tiernan v. Beam, 2 Ohio, 383; Williams v. Roberts, 5 Id. 35; Brush v. Kinsley, 14 Id. 20; Pease v. Kelly, 3 Oreg. 417; Brown v. Vanier, 7 Humph. 239; Ellis v. Temple, 4 Coldw. 315; Choate v. Tighe, 10 Heisk. 621; Durant v. Davis, 10 Id. 522; Irvine v. Muse, 10 Id. 477; Russell v. Dodson, 6 Baxt. 16; Uzzell v. Mack, 4 Id. 319; Medeley v. Davis, 5 Id. 387; Norvell v. Johnson, 5 Id. 489; Taylor v. Hunter, 5 Id. 569; Eskridge v. McClure, 2 Yerg. 84; Ross v. Whitson, 6 Id. 50; Campbell v. Baldwin, 2 Humph. 248; Marshall v. Christmas, 3 Id. 616; Burgess v. Millican, 50 Tex. 397; Ball v. Hill, 48 Id. 634; Irvin v. Garner, 50 Id. 48; Wasson v. Davis, 34 Id. 159; De Bruhl v. Maas, 54 Id. 464; Waldrom v. Zacharie, 54 Id. 503; Burford v. Rosenfield, 37 Id. 42; White v. Downs, 40 Id. 225; Yarborough v. Wood, 42 Id. 91; Robinson v. McWhirter, 52 Id. 201; Baker v. Compton, 52 Id. 252; Dibrell v. Smith, 49 Id. 474; Briscoe v. Bronaugh, 1 Tex. 326; Pinchain v. Collard, 13 Id. 333; Glasscock v. Glasscock's Adm'r, 17 Id. 480; Wheeler v. Love, 21 Id. 583; McAlpine v. Burnett, 23 Id. 649; Tobey v. McAllister, 9 Wis. 643, 663; Williard v. Reas, 26 Wis. 540; Madden v. Barnes, 45 Id. 135; De Forest v. Holum, 38 Id. 516; Lavender v. Abbott, 30 Ark. 172; Neal v. Speigle, 33 Id. 63; Mayes v.

North Carolina, Pennsylvania and South Carolina,¹ and left in doubt in Connecticut, New Hampshire and Rhode Island,² while in Georgia, Vermont, Virginia and West Virginia, although upheld judicially, it is now abolished by statute, except that in the last two states, it may be reserved on the face of the deed of conveyance.³ The decisions differ as to details, but agree in respect to the general features of such a lien. The grantor's lien is binding upon the grantee, and all persons claiming under him who had notice of the lien or who are not purchasers for value. A volunteer to whom the land is conveyed without consideration, a widow with respect to her dower, and the heirs and devisees, cannot plead the want of notice as a defence.⁴ The decisions, however, are not uniform in determining to what extent

Hendry, 33 *Id.* 240; *Swan v. Benson*, 31 *Id.* 728; *Blevins v. Rogers*, 32 *Id.* 258; *Johnson v. Nunnerly*, 30 *Id.* 153; *English v. Russell*, Hempst. 35; *Scott v. Orbison*, 21 Ark. 202; *Shall v. Briscoe*, 18 *Id.* 142; *Harris v. Hanks*, 25 *Id.* 510, 517; *Linthicum v. Tapscott*, 28 *Id.* 267; *Holman v. Patterson's Heirs*, 29 *Id.* 357; *Stroud v. Pace*, 35 *Id.* 100; *Young v. Harris*, 36 *Id.* 162; *Harris v. Hanie*, 37 *Id.* 348; *Refeld v. Ferrell*, 27 *Id.* 534; *Campbell v. Rankin*, 28 *Id.* 401; *Turner v. Horner*, 29 *Id.* 440; *Kent v. Gerhard*, 12 R. I. 92.

¹ *Simpson v. Mundee*, 3 Kans. 172; *Brown v. Simpson*, 4 *Id.* 76; *Smith v. Rowland*, 13 *Id.* 245; *Greene v. Barnard*, 18 *Id.* 518; *Gilman v. Brown*, 1 Mason, 191, 192, 210; *Philbrook v. Delano*, 29 Me. 410, 415; *Gilman v. Brown*, *supra*; *Ahrend v. Odiorne*, 118 Mass. 216; *Wright v. Dame*, 5 Metc. 603; *MaGehee v. Sneed*, 1 Dev. & Bat. Eq. 333; *Womble v. Battle*, 3 Ired. Eq. 182; *Henderson v. Burton's Ex'r*, 3 *Id.* 259; *Cameron v. Mason*, 7 *Id.* 180; see *Mast v. Raper*, 81 N. C. 330; *McKay v. Gilliam*, 65 *Id.* 130; *Zentmeyer v. Mittlerow*, 5 Pa. St. 403; *Kaufelt v. Bower*, 7 S. & R. 64; *Semple v. Burd*, 7 *Id.* 236; *Megargel v. Saul*, 3 Whart. 19; *Bear v. Whistler*, 7 Watts, 144, 147; *Cook v. Trimble*, 9 *Id.* 15; *Hepburn v. Snyder*, 3 Barr. 72; *Springer v. Walters*, 34 Pa. St. 328; *Steven's Ex'r's Appeal*, 38 *Id.* 9; *Heister v. Green*, 48 *Id.* 96; *Heist v. Baker*, 49 *Id.* 9; *Strauss' Appeal*, 49 *Id.* 353; *Wragg v. Comptroller-Gen.*, 2 Desau. 509, 520.

² *Watson v. Wells*, 5 Conn. 468; *Dean v. Dean*, 6 *Id.* 285; *Megis v. Dimock*, 6 *Id.* 458, 464; *Atwood v. Vincent*, 17 Conn. 575; *Chapman v. Beardsley*, 31 Conn. 115; *Buntin v. French*, 16 N. H. 592; *Arlin v. Brown*, 44 *Id.* 102; *Perry v. Grant*, 10 R. I. 334; *Kent v. Gerhard*, 12 R. I. 92.

³ Ga. Code, 1873, § 1997; *Jones v. Jones*, 56 Ga. 325; but see *Drinkwater v. Moreman*, 61 *Id.* 395; *Mims v. Macon, &c. R. R.*, 3 *Id.* 333; *Mounce v. Byars*, 16 Ga. 469; *Mims v. Lockett*, 23 *Id.* 237; *Chance v. McWhorter*, 26 *Id.* 315; *Still v. Mayor, &c.* 27 *Id.* 502, 504; Stat. Laws of 1851, Ch. 47; Gen. Stat. (1862) Ch. 65, § 33; *Manly v. Slason*, 21 Vt. 271, *per* Redfield, C. J.; Code Va. 1873, Ch. 115, § 1; *Wade v. Greenwood*, 2 Robt. 475; *Yancey v. Mauck*, 15 Gratt. 300; *Cole v. Scott*, 2 Wash. 141; *Tomkins v. Mitchell*, 2 Rand. 428;

Redford v. Gibson, 12 Leigh, 332; *Kyles v. Tait's Adm'r*, 6 Gratt. 44; W. Va. Code, 1870, Ch. 75, § 1; *Hempfield R. R. v. Thornburg*, 1 W. Va. 261; see, also, *Bayley v. Greenleaf*, 7 Wheat. 46; *Chilton v. Braiden*, 2 Black, 458; *McLean v. McLean*, 10 Pet. 625; *Gilman v. Brown*, 4 Wheat. 254; s. c., 1 Mason, 191; *McLean v. Wallace*, 10 Pet. 625, 640; *Galloway v. Finley*, 12 *Id.* 264; *Bush v. Marshall*, 6 How. (U. S.) 284; *Chilton v. Braiden's Adm'r*, 2 Black, 458; *Cordova v. Hood*, 17 Wall. 1, 5.

⁴ *Pintard v. Goodloe*, 1 Hempst. 527; *Webb v. Robinson*, 14 Ga. 216; *Carson v. Green*, 1 Johns. Ch. 308; *Amory v. Reilley*, 91 Ind. 490; *Upshaw v. Hargrove*, 8 Smed. & M. 286; *Fisher v. Johnson*, 5 Ind. 492; *Crane v. Palmer*, 8 Blackf. 12; *Williams v. Wood*, 1 Humph. 408; *Besland v. Hewitt*, 11 Smed. & M. 164; *Nazareth v. Lowe*, 1 B. Mon. 257; *Ellicott v. Welch*, 2 Bland, 242; *Warner v. Van Alstyne*, 3 Paige Ch. 513; *Newton v. McLean*, 41 Barb. 285; *Cole v. Scott*, 2 Wash. (Va.) 141; *Bayley v. Greenleaf*, 7 Wheat. 46; *Duval v. Bibb*, 4 Hen. & M. 113; *Shirley v. Sugar Refin. Co.*, 2 Edw. Ch. 505; *Mackreth v. Symmons*, 15 Ves. 39; *Simpson v. McAllister*, 56 Ala. 228; *Bankhead v. Owen*, 60 *Id.* 457; *Shorter v. Frazer*, 64 *Id.* 74; *Walton v. Hargroves*, 42 Miss. 18; *McHendry v. Reilly*, 13 Cal. 75; 1 Eq. Lead Cas. 477-481; *Graves v. Coutant*, 31 N. J. Eq. 763; *Simpson v. McAllister*, 56 Ala. 228; *Gordon v. Bell*, 50 *Id.* 213; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Magruder v. Peter*, 11 Gill & J. 217; *Grant v. Mills*, 2 V. & B. 306; *Frail v. Ellis*, 16 Beav. 350; *Tucker v. Hadley*, 52 Miss. 414; *McLain v. Thompson*, 52 *Id.* 418; *Pylant v. Reeves*, 53 Ala. 132; *Carver v. Eads*, 65 *Id.* 190; *Higgins v. Kendall*, 73 Ind. 523; *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Norris v. Chambers*, 29 Beav. 246; *Mast v. Raper*, 81 N. C. 330; *Whetsel v. Roberts*, 31 Ohio St. 503; *Swan v. Benson*, 31 Ark. 728; *Cator v. Earl of Pembroke*, 1 Bro. Ch. 302; *Dagger v. Taylor*, 60 Ala. 504; *Burgess v. Green*, 64 *Id.* 509; *Thurman v. Stoddard*, 63 *Id.* 336; *Russell v. Dodson*, 6 Baxt. 16; *Robinson v. McWhirter*, 52 Tex. 201; *Dugger v. Tayloe*, 60 Ala. 504; *Fisk v. Potter*, 2 Abb. App. Dec. 138; *Lench v. Lench*, 10 Ves. 511.

the grantor's lien will be enforced against creditors of the purchaser, who are not charged with notice. It is certain that it will prevail against the assignment for the benefit of creditors, if the vendor enforces his lien by filing a bill in equity, before the assignee executes the trust.¹ But where the conveyance is direct to the creditor, or the land is attached under levy of execution, issued upon a judgment against the vendee, the courts generally hold that the lien will not prevail.² It is also very doubtful whether a subsequent judgment creditor of the grantee can claim priority for his lien over the purchased land, or whether the grantor's lien can be enforced against such judgment creditor. The courts differ on this question, some holding that the judgment lien has priority,³ while other courts give the priority to the grantor's lien.⁴ In respect to what constitutes notice of the grantor's lien, it may be stated that any notice, which is sufficient to put a reasonable man upon his inquiry, will charge the purchaser with knowledge of the existence of the lien. Thus the grantor's possession, or a recital in the deed that the consideration has not been paid, would be sufficient notice to bind the land in the purchaser's hands.⁵

§ 400. **Continued—Discharge of waiver of the lien.**—Since this lien is raised in favor of the grantor, on the theory that he is without remedy in a court of law, and the lien is necessary to prevent his incurring the loss of both the land and the purchase money, if the grantor shows by any act that he does not rely upon the grantor's lien for protection, the land will vest in the grantee, discharged of the lien. The reservation of the lien depends upon the intention of the parties. In the absence of any evidence to the contrary, the law presumes that it was their intention to reserve the lien. This presumption may, however, be rebutted. An express agreement, that the lien shall not be reserved, will, of course, have that effect; and the general

¹ *Brown v. Vanlier*, 7 Humph. 239; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505; *Repp v. Repp*, 12 Gill & J. 341; *Truebody v. Jacobson*, 2 Cal. 269; *Pearce v. Foreman*, 29 Ark. 563; *Green v. Demoss*, 10 Humph. 371; *Walton v. Hargroves*, 42 Miss. 18; *Warren v. Fenn*, 28 Barb. 333; *Corlies v. Howland*, 26 N. J. Eq. 311; *Bowles v. Rogers*, 6 Ves. 95.

² *Bayley v. Greenleaf*, 7 Wheat. 46; *Aldridge v. Dunn*, 7 Blackf. 249; *Taylor v. Baldwin*, 10 Barb. 626; *Webb v. Robinson*, 14 Ga. 216; *Gaun v. Chester*, 5 Yerg. 205; *Roberts v. Rose*, 2 Humph. 145; *Roberts v. Salisbury*, 3 Gill & J. 425; *Cook v. Banker*, 50 N. Y. 655; *Johnson v. Cawthorne*, 1 Dev. & B. Eq. 32; *Adams v. Buchanan*, 49 Mo. 64; *Allen v. Loring*, 3 Iowa, 499; *Porter v. City of Dubuque*, 20 Iowa, 440.

³ *Thurman v. Stoddard*, 63 Ala. 336; *Shorter v. Frazer*, 64 Id. 74; *Simpson v. McAllister*, 56 Id. 228; *Bankhead v. Owen*, 60 Id. 457; *Gordon v. Bell*, 50 Id. 213; *Russell v. Dodson*, 6 Baxt. 16; *Higgins v. Hargroves*, 42 Miss. 18; *Higgins v. Kendall*, 73 Ind. 522; *Cator v. Earl of Pembroke*, 1 Bro. Ch. 302; *Bayley v. Greenleaf*, 7

Wheat. 46; *Dugger v. Tayloe*, 60 Ala. 504; *Burgess v. Greene*, 64 Id. 509.

⁴ *Lamberton v. Van Voorhis*, 15 Hun, 336; *Tucker v. Hedley*, 52 Miss. 414; *Walton v. Hargroves*, 42 Id. 18; *Parker v. Kelly*, 10 Sim. & Mar. 184; *Thompson v. McGill*, Freem. Ch. (Miss.) 401; *Lewis v. Caperton's Ex'r*, 8 Gratt. 148; *Aldridge v. Dunn*, 7 Blackf. 249.

⁵ *McRimmons v. Martin*, 14 Texas, 318; *Tiernan v. Thurman*, 14 B. & Mon. 277; *Honore v. Bakewell*, 6 B. Mon. 67; *Daughady v. Paine*, 6 Minn. 452; *Hopkins v. Garrard*, 6 B. Mon. 66; *Thorpe v. Dunlap*, 4 Heisk. 674; *Briscoe v. Bronaugh*, 1 Tex. 326; *Frail v. Ellis*, 17 Eng. L. & Eq. 457; *Hamilton v. Fowlkes*, 16 Ark. 340; *Manly v. Glason*, 21 Vt. 271; *Wilson v. Lyon*, 51 Ill. 166; *Baum v. Grisby*, 21 Cal. 176; *Thornton v. Knox*, 6 B. Mon. 74; *Woodward v. Woodward*, 7 B. Mon. 116; *Kilpatrick v. Kilpatrick*, 23 Miss. 124; *Parker v. Foy*, 43 Miss. 260; *McAlpine v. Burnett*, 23 Texas, 649; *Melross v. Scott*, 18 Ind. 250; *Mounce v. Byars*, 11 Ga. 180; *Cordova v. Hood*, 17 Wall. 1; *Masich v. Shearer*, 49 Ala. 226.

rule in all other cases is, that nothing less than the acceptance of some other security will constitute a waiver of the lien.¹ Such would be a mortgage or pledge of the same or of other property,² or a note with surety or indorser.³ The execution of an invalid mortgage on the same land would not discharge the lien.⁴ Nor would a mere change in the form of the vendee's indebtedness, such as the acceptance of the vendee's bond, note, or check,⁵ unless the parties expressly agree that such change in the form of the indebtedness will operate as an actual payment of the consideration.⁶ And, on the other hand, if the parties expressly agree or did not intend that the grantor's lien shall be retained notwithstanding additional security is given, the lien will not be discharged by the receipt of such security.⁷

§ 401. **Continued—In whose favor raised.**—It is doubtful if any one but the grantor and his heirs can claim the benefit of this lien. It certainly does not enure to a third person, who pays the consideration at the request of the purchaser.⁸ And whether it is assignable with

¹ *Anderson v. Donnell*, 66 Ind. 150; *Clark v. Stilson*, 36 Mich. 482; *Perry v. Grant*, 10 R. I. 334; *Walker v. Carroll*, 65 Ala. 61; *Brown v. Gilman*, 4 Wheat. 255, 290; *Fish v. Howland*, 1 Paige, 20, 30; *Mackreth v. Symmons*, 15 Ves. 329; *Nairn v. Prowse*, 6 Ves. 752, 760; *Bond v. Kent*, 2 Vern. 281; *Hughes v. Kearney*, 1 Sch. & Lef. 132, 135; 1 Eq. Lead. Cas. 471, 472.

² *Burgess v. Millican*, 50 Tex. 397; see *contra*, *Wasson v. Davis*, 34 Id. 159; *De Bruhl v. Maas*, 54 Id. 464; *Tinsley v. Tinsley*, 52 Iowa, 14; *Stuart v. Harrison*, 52 Id. 511; *Escher v. Simmons*, 54 Id. 269; *Neal v. Speigle*, 33 Ark. 63; *Gaylord v. Knapp*, 15 Hun, 87; *Pease v. Kelly*, 3 Oreg. 417; *Wells v. Harter*, 56 Cal. 342; *Camden v. Vail*, 23 Cal. 633; *Richards v. McPherson*, 74 Ind. 158; *Little v. Brown*, 2 Leigh, 353; *Young v. Wood*, 11 B. Mon. 123; *Johnson v. Sugg*, 13 Sm. & Mar. 346; see *contra*, *Armstrong v. Ross*, 20 N. J. Eq. 109; *De Forest v. Holum*, 38 Wis. 516; *Anketel v. Converse*, 17 Ohio St. 11; *Boos v. Ewing*, 17 Ohio, 500; *Linville v. Savage*, 58 Mo. 248; *Morris v. Pate*, 31 Id. 315.

³ *Carrico v. Farmers, &c. Bk.* 33 Md. 235; *McGonigal v. Plummer*, 30 Id. 422; *Campbell v. Henry*, 45 Miss. 326; *Sanders v. McAfee*, 41 Ga. 684; *Baum v. Grisby*, 21 Cal. 172; *Hazeltine v. Moore*, 21 Hun, 355; *Vail v. Foster*, 4 N. Y. 312; *Stevens v. Rainwater*, 4 Mo. App. 292; *Durette v. Briggs*, 47 Mo. 356; *Durham v. Heirs of Daugherty*, 30 La. Ann. pt. 2, 1255; *Haskell v. Scott*, 56 Ind. 564.

⁴ *Fouch v. Wilson*, 60 Ind. 64; *Camden v. Vail*, 23 Cal. 633; *Kent v. Gerhard*, 12 R. I. 92; *Martin v. Cauble*, 72 Ind. 67.

⁵ *Brinkerhoff v. Vanscoien*, 3 Green Ch. 251; *Thornton v. Knox's Ex'r*, 6 B. Mon. 74; *Denny v. Steakly*, 2 Heisk. 156; *Aldridge v. Dunn*, 7 Blackf. 249; *Tobey v. McAllister*, 9 Wis. 463; *Baum v. Grigsby*, 21 Cal. 172; *Grant v. Mills*, 2 V. & B. 306; *Winter v. Lord Anson*, 3 Russ. 488; 1 S. & S. 434; *Mackreth v. Symmons*, 15 Ves. 329; *Tardiffe v. Scrugnan*, cited 1 Bro. Ch. 422;

White v. Williams, 1 Paige, 502; *Garson v. Green*, 1 Johns. Ch. 308; *Warren v. Fenn*, 28 Barb. 333; *Vandoren v. Todd*, 2 Green Ch. 397; *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Clarke v. Royle*, 3 Sim. 499; *Matthew v. Bowler*, 6 Hare, 110; *Collins v. Collins*, 31 Beav. 346; 1 Eq. Lead. Cas. 464, 465 (4th Am. ed.); *Flinn v. Barber*, 61 Ala. 530; *Bizzell v. Nix*, 60 Id. 231; *Chapman v. Lee*, 64 Id. 483; *Shorter v. Frazer*, 64 Id. 74; *contra*, *Linthicum v. Tapscott*, 28 Ark. 287; *Ogden v. Thornton*, 30 N. J. Eq. 569; *Simpson v. McAllister*, 56 Ala. 228; *Bankhead v. Owen*, 60 Id. 457; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Davenport v. Murray*, 68 Mo. 198; *Lavender v. Abbott*, 30 Ark. 172; *Corlies v. Howland*, 26 N. J. Eq. 311; *Nichols v. Glover*, 41 Ind. 24; *Brown v. Porter*, 2 Mich. N. P. 12; *Walton v. Hargroves*, 42 Miss. 18; *Dodge v. Evans*, 43 Id. 570; *Kent v. Gerhard*, 12 R. I. 92; *Dibrell v. Smith*, 49 Tex. 474; *Irvin v. Garner*, 50 Id. 48; *Madden v. Barnes*, 46 Wis. 135; *Moore v. Worthy*, 56 Ala. 163; *Graves v. Coutant*, 31 N. J. Eq. 763; *Ball v. Hill*, 48 Tex. 634; *Waldrom v. Zacharie*, 54 Id. 503.

⁶ 1 Eq. Lead. Cas. 466-470 (4th Am. ed.); *Parrott v. Sweetland*, 33 My. & K. 655; *Buckland v. Pocknell*, 13 Sim. 406; *Dixon v. Gayfere*, 21 Beav. 118; 1 De G. & J. 655; *Dyke v. Randall*, 2 De G. M. & G. 209; *Keith v. Wolf*, 5 Bush, 646; *Thames v. Caldwell*, 60 Ala. 644; *Moshier v. Meek*, 80 Ill. 79.

⁷ *Mayes v. Hendry*, 33 Ark. 240; *Stroud v. Pace*, 35 Id. 100; *Lavender v. Abbott*, 30 Id. 172; *De Forest v. Holum*, 38 Wis. 516; *Fonda v. Jones*, 42 Miss. 792; *Sanders v. McAfee*, 41 Ga. 684; *Irvine v. Muse*, 10 Heisk. 477; *Durette v. Briggs*, 47 Mo. 356.

⁸ *Stansell v. Roberts*, 3 Ohio, 148; *Skaggs v. Nelson*, 25 Miss. 88; *Crane v. Caldwell*, 14 Ill. 468; *Nolte's Appeal*, 45 Pa. St. 361; *Brown v. Budd*, 2 Ind. 442. But see *contra*, where this is done by agreement of all the parties, and a note is given by the grantee to a third person who pays the purchase money to the grantor.

the grantor's claim for the purchase money, is a matter of great doubt. There are decisions in support of both positions, but the better opinion is, that the lien is personal to the vendor and cannot be assigned, unless the right is expressly reserved by the parties, when it will have all the characteristics of an express lien, and will pass with the assignment. It is held to be non-assignable in Arkansas, California, Georgia, Illinois, Iowa, Maryland, Mississippi, Missouri, New York, North Carolina, Ohio and Tennessee.¹ While in Alabama, Indiana, Kentucky and Texas, the lien is held to be assignable.² And in some of the states, where it is generally held that the lien is not assignable with the debt, a distinction is made between a transfer by sale of the debt and a deposit of the debt as security for the grantor's indebtedness. In the latter case, it is held that the pledgee may assert the grantor's lien in his own behalf.³ The assignment of the note or other instrument of indebtedness of the vendee does not discharge the lien, although the lien does not pass to the assignee, as long as the vendor is liable as indorser or grantor. He may enforce it for his own benefit.⁴

§ 402. **Vendee's lien.**—Where the vendee has paid any part of the purchase money on the faith of the contract of sale, before a conveyance has been made to him, equity gives him a lien upon the title of the vendor for the amount so advanced, which has all the characteristics of the vendor's lien, and is enforceable in the

Campbell v. Roach, 45 Ala. 667; Hamilton v. Gilbert, 2 Heisk. 680; Mitchell v. Butt, 45 Ga. 162; Francis v. Wells, 2 Col. 660; Perkins v. Gibson, 51 Miss. 699; Nichols v. Glover, 41 Ind. 24; Latham v. Staples, 46 Ala. 462.

¹ Carlton v. Buckner, 28 Ark. 66; Hutton v. Moore, 26 Ark. 382, 396; Baum v. Grigsby, 21 Cal. 172; Ross v. Heintzen, 36 Cal. 313; Webb v. Robinson, 14 Ga. 216; Welborn v. Williams, 9 Ga. 86; Keith v. Horner, 32 Ill. 524; Dickenson v. Chase, 1 Morris, 492; Crow v. Vance, 4 Iowa, 436; Moshier v. Meek, 80 Ill. 79; Dixon v. Dixon, 1 Md. Ch. 220; Inglehart v. Armiger, 1 Bland, 519; Pitts v. Parker, 44 Miss. 247; Walker v. Williams, 30 Miss. 165; Adams v. Cowherd, 30 Mo. 458; White v. Williams, 1 Paige, 502; Smith v. Smith, 9 Abb. Pr., n. s., 420; Green v. Crockett, 2 Dev. & B. Eq. 390; Jackman v. Hallock, 1 Ohio, 318; Brush v. Kingsley, 14 Ohio, 20; Thorpe v. Dunlap, 4 Heisk. 674; Green v. De Moss, 10 Humph. 371; Hallock v. Smith, 3 Barb. 267; Graham v. McCampbell, Meigs, 52; Tanner v. Hicks, 4 Smed. & M. 294; Norvell v. Johnson, 5 Humph. 489; Eskridge v. McClure, 2 Yerg. 84; Gann v. Chester, 5 Yerg. 205; Sheratz v. Nicodemus, 7 Yerg. 9; Briggs v. Hill, 6 How. (Miss.) 362; Moreton v. Harrison, 1 Bland, 491; Shall v. Biscoe, 18 Ark. 162; Horton v. Horner, 14 Ohio, 437; Durant v. Davis, 10 Heisk. 522; Williams v. Christian, 23 Ark. 255; Jones v. Doss, 27 Id. 518; Blevins v. Rogers, 32 Id. 258; Crawley v. Riggs, 24 Id. 563; Williams v. Young,

21 Cal. 227; Small v. Stagg, 95 Ill. 39; Wing v. Goodman, 75 Id. 159; Carpenter v. Mitchell, 54 Id. 126; Rutland v. Brister, 53 Miss. 683; Lindsay v. Bates, 42 Id. 397; Stratton v. Gold, 40 Id. 778; see Perkins v. Gibson, 51 Id. 699; Pearl v. Hervey, 70 Mo. 160; White v. Williams, 1 Paige, 502.

² Grigsby v. Hair, 25 Ala. 327; Simpson v. McAllister, 56 Ala. 228; Wells v. Morrow, 38 Id. 125; White v. Stover, 10 Id. 441; Bankhead v. Owen, 60 Ala. 457; Barnett v. Riser's Ex'rs, 63 Id. 347; Walker v. Carroll, 65 Id. 61; Fisher v. Johnson, 5 Ind. 492; Nichols v. Glover, 41 Ind. 24; Johns v. Sewell, 33 Id. 1; Wiseman v. Hutchinson, 20 Id. 40; Kern v. Hazlerigg, 11 Id. 443; Honore v. Bakewell, 6 B. Mon. 67; Ripperdon v. Cozine, 8 B. Mon. 465; White v. Downs, 40 Texas, 225; Moore v. Raymond, 15 Texas, 554; Watt v. White, 33 Id. 421; De Bruhl v. Maas, 54 Id. 464; Broadwell v. King, 3 B. Mon. 449.

³ Carlton v. Buckner, 28 Ark. 66; Hallock v. Smith, 3 Barb. 272; Crowley v. Riggs, 24 Ark. 563.

⁴ Kelly v. Payne, 18 Ala. 371; White v. Williams, 1 Paige, 502; Lindsey v. Bates, 42 Miss. 397; Turner v. Horner, 29 Ark. 440; Smith v. Smith, 9 Abb. Pr., n. s., 420. In Missouri, it is held that the assignment of note for purchase money will pass the vendor's lien to the assignee, where the vendor retains the legal title and has only conditioned for the execution of a deed upon payment of the purchase money. Adams v. Cowherd, 30 Mo. 458.

same way against the vendor and all his privies who have notice.¹

§ 403. **Grantor's lien by express reservation.**—The grantor's lien, which has been already explained, is one which arises by implication of law, and therefore does not rest upon any agreement of the parties; but it is possible for the grantor to expressly stipulate in his conveyance that he reserves for himself a lien upon the property as security for the payment of the purchase money, and, of course, this express reservation of the lien takes the place of the implied lien already explained; and even in those states where the implied grantor's lien has been abolished, this express lien would be recognized as a valid lien.² No particular form of reservation is needed in order to create this lien; any language which indicates such intention will have this effect. The more common forms of reservation of the lien are those in which it is expressly declared that the title to the property is acquired by the purchaser subject to the payment of the consideration; or that the conveyance will be void, unless the consideration is paid; or that the title to the property of the grantee shall become absolute, only upon payment of the consideration, and the like.³ These grantor's liens are in fact nothing more than a mortgage of the property, as a mortgage is conceived and permitted to operate; in fact, it is in other words an express lien upon the property so acquired, that it may be enforced against the property as fully and effectively as the formal mortgage.⁴ The liens, which arise by express reservation, subject the title of the property to a positive incumbrance, which may be enforced against the property into whosoever hands the property might

¹ *Burgess v. Wheate*, 1 W. Bl. 150; *Mackreth v. Symmons*, 15 Ves. 352; *Payne v. Atterbury*, Harr. Ch. 414; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Lowell v. Middlesex Ins. Co.*, 8 Cush. 127; *Shirley v. Shirley*, 7 Blackf. 452; *Chase v. Peck*, 21 N. Y. 555; *Hope v. Stone*, 10 Minn. 151; *Taft v. Kessel*, 16 Wis. 273; *Wickman v. Robinson*, 14 Wis. 493; *Stewart v. Wood*, 63 Mo. 252; *Brown v. East*, 5 Mon. 407; *Lane v. Ludlow*, 6 Paige, 316, note; 2 Story Eq. Jur., § 1216; *Cator v. Earl of Pembroke*, 1 Bro. Ch. 301; *Wythes v. Lee*, 3 Drew. 396, 406; *Anderson v. Spencer*, 51 Miss. 869; *Hughes v. Hatchett*, 55 Ala. 539; *Lane v. Ludlow*, 2 Paine, 591; *Chase v. Peck*, 21 N. Y. 581; *Clark v. Jacobs*, 56 How. Pr. 519; *Wright v. Dufield*, 2 Baxt. 218; *Flinn v. Barber*, 64 Ala. 193; *Stewart v. Wood*, 63 Mo. 252; *Cooper v. Merritt*, 30 Ark. 686; *Shirley v. Shirley*, 7 Blackf. 452; *Ewing v. Osbaldiston*, 2 My. & Cr. 53, 88; *Dinn v. Grant*, 5 De G. & Sm. 451; *Rose v. Watson*, 10 H. L. Cas. 672; *Turner v. Marriott*, L. R. 3 Eq. 744; *Torrance v. Bolton*, L. R. 14 Eq. 124; *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101; 5 Eq. 485.

² *Kausler v. Ford*, 47 Miss. 289; *Moore v. Lackey*, 53 *Id.* 85; *Blaisdell v. Smith*, 3 Ill. App. 150; *Osborne v. Royer*, 1 Lea, 217; *Collins v. Richart*, 14 Bush, 621; *Carr v. Thompson*, 67 Mo. 472; *King v. Young Men's Ass'n*, 1 Woods,

386; *Helst v. Baker*, 49 Pa. St. 9; *Stratton v. Gould*, 40 Miss. 778, 781; *Davis v. Hamilton*, 50 *Id.* 213; *Pugh v. Holt*, 27 *Id.* 461; *Campbell v. Rankin*, 28 Ark. 401; *Cordova v. Hood*, 17 Wall. 1; *Caldwell v. Fraim*, 32 Tex. 310; *White v. Downs*, 40 *Id.* 225; *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 *Id.* 34; *Carr v. Holbrook*, 1 Mo. 240; *Dingley v. Bk. of Ventura*, 57 Cal. 467; *Talleferro v. Barnett*, 37 Ark. 511.

³ *Helst v. Baker*, 49 Pa. St. 9; *Pugh v. Holt*, 27 Miss. 461; *Carr v. Holbrook*, 1 Mo. 240; *Harvey v. Kelley*, 41 Miss. 490; *Talleferro v. Barnett*, 37 Ark. 511; *Ledford v. Smith*, 6 Bush, 129; *Kausler v. Ford*, 47 Miss. 289; *Moore v. Lackey*, 53 Miss. 85; *Patton v. Hoge*, 22 Gratt. 443; *Blaisdell v. Smith*, 3 Ill. App. 150; and see, also, *Carr v. Thompson*, 67 Mo. 472; *Pillow v. Helm*, 7 Baxt. 545; *Hobson v. Edwards*, 57 Miss., 128; *Osborne v. Royer*, 1 Lea. 217; *French v. Dickey*, 8 Tenn. Ch. 302; *Dingley v. Bk. of Ventura*, 57 Cal. 467; *Baker v. Compton*, 52 Tex. 252.

⁴ *King v. Young Men's Ass'n*, 1 Woods, 386; *Markoe v. Andras*, 67 Ill. 34; *Carpenter v. Mitchell*, 54 Ill. 126; *Talleferro v. Barnett*, 37 Ark. 511; *Coles v. Withers*, 33 Gratt. 186; *Peters v. Clements*, 46 Tex. 114; *Masterson v. Cohen*, 46 Tex. 520; *Robinson v. Woodson*, 33 Ark. 307; *Collins v. Richart*, 14 Bush, 621; *White v. Downs*, 40 Tex. 225; *Gray, J.*

come, where the deed containing the reservation is duly recorded and any subsequent purchaser takes the property charged with the notice of the existence of the lien.¹ The lien is also held to take precedence over the prior judgment against the grantee, in the same manner as the mortgage for the purchase money is given precedence.² The grantor may waive this lien, but such waiver must appear by express provision, or by acts which are inconsistent with the continued existence of the lien.³ Thus, the express lien so acquired would not be waived by his taking additional security upon the land or otherwise, as would be the case in respect to an implied grantor's lien.⁴ So, also, will the continued existence of the lien not be in anywise affected by the change in the form of the indebtedness, as long as the debt for the purchase money remains unsatisfied by the change in its form.⁵ It has also been held that this grantor's lien is not personal to the grantor when expressly reserved; but it may be transferred to the assignee with the note, bond or other instrument of indebtedness given for the purchase money, and may be enforced by such assignee.⁶

§ 404. **Enforcement of grantor's, vendor's and vendee's lien.**—All of these liens are enforced by a bill in equity; and if the debt cannot be liquidated in any other way, the court will order the property to be sold, or so much of it as is necessary, and the proceeds of sale applied to the satisfaction of the debt. But in order that the property might be subjected to the lien, the action must be brought directly for that purpose. It cannot be enforced in any collateral suit.⁷ In some of the states, the lien-holder must exhaust his remedy at law before he can file a suit in equity to enforce his lien.⁸ But the contrary rule is

¹ *Stratton v. Gold*, 40 Miss. 778; *Thompson v. Heffner's Ex'rs*, 11 Bush, 353; *Collins v. Richart*, 14 *Id.* 621; *Roosevelt v. Davis*, 49 Tex. 463; *Peters v. Clements*, 46 *Id.* 114; *Caldwell v. Fraim*, 32 *Id.* 310; *Masterson v. Cohen*, 46 *Id.* 520; *Moore v. Lackey*, 53 Miss. 85; *Cardova v. Hood*, 17 Wall, 1; *Ledford v. Smith*, 6 Bush, 129; *Dingley v. Bk. of Ventura*, 57 Cal. 467; *Talieferro v. Barnett*, 37 Ark. 511.

² See *Parsons v. Hoyt*, 24 Iowa, 154.

³ *Coles v. Withers*, 33 Gratt. 186; *Butler v. Williams*, 5 Heisk. 241; *French v. Dickey*, 3 Tenn. Ch. 302.

⁴ *Hatcher's Adm'r v. Hatcher's Ex'rs*, 1 Rand. 53; *Luddington v. Gabbert*, 5 W. Va. 330; *Conner v. Banks*, 18 Ala. 42; *Bradford v. Harper*, 25 *Id.* 337; *Bozeman v. Ivey*, 49 *Id.* 75; *Carr v. Thompson*, 67 Mo. 472; *Strickland v. Summerville*, 55 *Id.* 164; *Adams v. Cowherd*, 30 *Id.* 458; *Price v. Lauve*, 49 Tex. 74; *Fogg v. Rogers*, 2 Coldw. 290; *Hines v. Perkins*, 2 Heisk. 395; *Magruder v. Peter*, 11 Gill & J. 217; *Schwartz v. Stein*, 29 Md. 112, 119; *Hurley v. Hollyday*, 35 *Id.* 469; *Knisley v. Williams*, 3 Gratt. 265; *Carpenter v. Mitchell*, 54 Ill. 126; *McCaslin v. The State*, 44 Ind. 151; *Lusk v. Hopper*, 3 Bush, 179; *Lewis v. Pursey*, 8 *Id.* 615.

⁵ *Coles v. Withers*, 33 Gratt. 186; *Kausler v.*

Ford, 47 Miss. 289; *French v. Dickey*, 3 Tenn. Ch. 302.

⁶ *Summers v. Kilgus*, 14 Bush, 449; *Robinson v. Woodson*, 33 Ark. 307; *Campbell v. Rankin*, 28 Ark. 401; *Kausler v. Ford*, 47 Miss. 289; *Dingley v. Bk. of Ventura*, 57 Cal. 467; *Talieferro v. Barnett*, 37 Ark. 511; but see *Pillow v. Helm*, 7 Baxt. 545; *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 *Id.* 34; *Hobson v. Edwards*, 57 Miss. 128; *Osborne v. Royer*, 1 Lea. 217; *Blaisdell v. Smith*, 3 Ill. App. 150; *Moore v. Lackey*, 53 Miss. 85.

⁷ *Wilson v. Davison*, 2 Robt. 384; *Mullikin v. Mullikin*, 1 Bland, 538; *Eskridge v. McClure*, 2 Yerg. 84; *Clark v. Bell*, 2 B. Mon. 1; *Williams v. Young*, 17 Cal. 406; *Converse v. Blumrick*, 14 Mich. 124; *Payne v. Harrell*, 40 Miss. 498; *Clark v. Hunt*, 3 J. J. Marsh. 558; *Jones v. Conde*, 6 Johns. Ch. 77; *Ely v. Ely*, 6 Gray, 439; *Codwise v. Taylor*, 4 Sneed, 346; *Burger v. Potter*, 32 Ill. 66; *Milner v. Ramsey*, 48 Ala. 287; *Emison v. Risque*, 9 Bush, 24; *Edwards v. Edwards*, 5 Heisk. 123.

⁸ *Roper v. McCook*, 7 Ala. 318; *Battorf v. Conner*, 1 Blackf. 287; *Ford v. Smith*, 1 McArthur, 592; *Pratt v. Van Wyck*, 5 Gill & J. 495. In Maryland, it has now been charged by statute. Gen. Laws, Md. (1880) p. 99.

maintained in some states, where the vendor or vendee may enforce his lien, although he may have a complete remedy at law.¹

§ 405. **Liens arising from charges by will or by deed.**—Another kind of equitable lien, which does not depend upon any express contract of the parties, is held by equity to exist, when specific property or property in general, included in a residuary devise, is conveyed or disposed of by will, subject to or charged with the payment of debts, legacies, or annuities in favor of some third party. The legal title to the property is conveyed or devised to the grantee or devisee, subject to a lien in favor of the person to whom the legacy, debt, or annuity is to be paid. This lien can be enforced against the property subject to it or in favor of the intended beneficiary. These equitable liens may appear in deeds, as in the case of marriage settlements and the like, but it is more common to find them in wills, and in this country they are rarely found elsewhere.² This lien may be enforced, not only against the devisee, but also against the grantee, mortgagee and other subsequent purchasers, who take it with notice.³ And the record and probate of the will, in which the charge is made, is notice to a subsequent purchaser of the equitable lien arising therefrom.⁴ At one time this was the only way in which land could be subjected to liability for the debts of the decedent owner; and therefore the charge of the land by the will with the payment of the debts was a provision of the greatest importance to creditors. But, now, all lands as well as personal property are made generally liable for the satisfaction of the debts; and it is now of value to creditors, only so far as the charge of specific property with the payment of specific debts gives to the particular creditors a special exclusive lien for the satisfaction of their claims.

In order that any property may be subject to an equitable lien in favor of the payment of debts or legacies, the intention of the testator to so charge the property must either be expressly stated in the will, so as to create an express charge upon the property; or the charge upon the property must be implied from the provisions of the will, or from the circumstances surrounding the parties, and the disposition of the property by will. The lien may arise from express and implied charges, wherever the intention of the testator to so charge the prop-

¹ *Bradley v. Bosley*, 1 Barb. Ch. 125; *Dubois v. Hull*, 43 Barb. 26; *Stewart v. Caldwell*, 54 Mo. 536; *Pratt v. Clark*, 57 Mo. 189; *Campbell v. Roach*, 45 Ala. 667; *Richardson v. Baker*, 5 J. J. Marsh. 323; *Vail v. Drexel*, 9 Ill. App. 439; *McCaslin v. The State*, 44 Ind. 151; *Sehorn v. McWhirter*, 6 Baxt. 311, 318; *Church v. Smith*, 39 Wis. 492; see *Sent v. Knight*, 3 Tenn. Ch. 232; *Bruce v. Tilson*, 25 N. Y. 194.

² *King v. Denison*, V. & B. 260, 272, 276; *Hill v. Bk. of London*, 1 Atk. 618, 620; *Graves v. Graves*, 8 Sim. 43; *Bright v. Larcher*, 4 De G. & J. 608; *Makings v. Makings*, 1 De G. F. & J. 355; *Richardson v. Morton*, L. R. 13 Eq. 123;

Pearson v. Helliwell, L. R. 18 Eq. 411; *Metcalf v. Hutchinson*, L. R. 1 Ch. D. 591; *Hoyt v. Hoyt*, 85 N. Y. 142; *Finch v. Hull*, 24 Hun, 226; *Dill v. Wisner*, 23 Id. 123; *Ferris v. Van Vechten*, 9 Id. 12; *Loder v. Hatfield*, 4 Id. 36; *Horning v. Wiederspalen*, 28 N. J. Eq. 387; *Grode v. Van Valen*, 25 Id. 95; *Gardenville, &c. Ass'n v. Walker*, 52 Md. 452; *Siron v. Ruleman's Ex'r*, 32 Gratt. 215; *Burch v. Burch*, 52 Ind. 136; *Rhoades v. Rhoades*, 88 Ill. 139.

³ *Perkins v. Emory*, 55 Md. 27; *Donnelly v. Edelen*, 40 Id. 117; *Blauvelt v. Van Winkle*, 29 N. J. 111.

⁴ *Wilson v. Piper*, 77 Ind. 437.

erty can be clearly deduced from all the circumstances of the case.¹

§ 406. **Liens by express charges.**—The testator may, of course, by express terms charge the payment of his debts and legacies or any one of them, either upon a particular piece of land, or upon the land contained in the residuary devise. These charges could be made upon both real and personal property, as well as upon the residue of personal property, which is given to the residuary legatee. No particular language is required to be used in creating the express charge, provided the intention to so charge the property with the payment of the legacy or debt is manifest in the will. The express charges of property with the payment of debts and legacies may be divided into two classes. In the first class will be found all those cases, where the testator devises the lands or funds subject to the payment of one or more specific debts or legacies. In such a case, the property devised, or funds bequeathed, will be expressly charged with the payment of the specified debts or legacies; but the devisee or legatee will not be personally liable for the payment of such debts or legacies. The only remedy in such a case for the beneficiaries of the charge will be against the property, which has been charged with the payment of the debts or legacies. The second class of cases will include all those where the language employed charges the devisee or legatee with the payment of a debt or legacy, in consideration of a devise or bequest to him; and in such a case, the charge created not only a lien upon the property devised or bequeathed, but likewise imposed a personal liability upon the devisee or legatee; and the beneficiary of the charge can proceed against the devisee personally, as well as against the subject-matter of the devise.²

§ 407. **Liens arising from the implied charges.**—The intention of the testator, to charge debts and legacies upon the real property devised by his will, may also be implied from the circumstances surrounding the parties and the subject-matter of the will, as well as from the general disposition of such property by the will; but the implication of a charge must be more or less a necessary one. The authorities in England and America are not agreed in the statement of the cases, in which there will be an implied charge of the debts and legacies upon the property devised. The authorities in both countries agree that there will be an implied charge upon land devised, where the devise is made expressly “after payment of” the debts and legacies, or where the provision is that the debts and legacies must be paid.

¹ *Hoyt v. Hoyt*, 85 N. Y. 142; *Taylor v. Dodd*, 58 *Id.* 335; *Owens v. Clayton*, 56 Md. 129; *Steele v. Steele's Adm'r*, 64 Ala. 438; *Taylor v. Harwell*, 65 *Id.* 1; *Heslop v. Gattton*, 71 Ill. 528; *Kirkpatrick v. Chestnut*, 5 S. C. 216.

² *Gardenville, &c. Ass'n v. Walker*, 52 Md. 452; *Donnelly v. Edelen*, 40 *Id.* 117; *Frampton v. Blume*, 129 Mass. 152; *Birch v. Sherratt*, L. R. 2 Ch. 644; *Kermode v. Macdonald*, L. R. 3 Ch. 584; *Metcalf v. Hutchinson*, L. R. 1 Ch. D. 591;

In re Hill's Trusts, L. R. 16 Ch. D. 173; *Mannox v. Greener*, L. R. 14 Eq. 456; *Taylor v. Taylor*, L. R. 17 Eq. 324; *Earl of Potarlington v. Damer*, 4 De G. J. & S. 161; *Brook v. Beadley*, L. R. 4 Eq. 106; 3 Ch. 672; *Phillips v. Gutteridge*, 3 De G. J. & S. 332; *In re Cooper's Trusts*, 4 De G. M. & G. 757; *Kempe v. Kempe*, 5 *Id.* 346; *Makings v. Makings*, 1 De G. F. & J. 355; *Maskell v. Farrington*, 3 De G. J. & S. 338.

Any general direction of the will indicating the intention to pay debts and legacies, followed by the disposition of land by will, will create by implication a charge upon such lands of the payment of the debts and legacies, both in England and in this country.¹ So, also, do the cases in England and in this country generally hold that there will be an implied charge, where lands are devised, either to executors or to third persons, accompanied by a direction to them to pay the debts or legacies, or some specific number of them, without any express charge upon the land so devised in favor of the debts and legacies. The personal obligation, imposed upon the devisees to pay such debts and legacies, is held to support the implication of an intention to charge the payment of such debts and legacies upon the land devised to them.² But this doctrine is repudiated by some of the American courts, who hold that nothing but express charges of the debts and legacies upon the land will be sufficient to create a lien in favor of the creditors or legatees.³ But where in the will, after making specific legacies without any declaration in the will as to the payment of the debts, there should follow a general residuary disposition of all the property, both real and personal, or the residue of the real property alone; the authorities are completely at variance as to whether there are sufficient facts in the case, on which the intention to charge the property with the payment of the debts and legacies, or any part of them, may be implied. The English rule, which is supported by the majority of the American courts, including the United States Supreme Court, is to the effect that where legacies are given generally, and the residuary devise is made of the rest or residue of the real and personal property, the legacies are charged upon the residue of real and personal property by implication.⁴ Where the will contains a direction to convert all the

¹ *Shallcross v. Finden*, 3 Ves. 738; *Graves v. Graves*, 8 Sim. 43, 55; *Cook v. Dawson*, 29 Beav. 123; *Harris v. Watkins*, Kay, 438, 447; *Harding v. Grady*, 1 Dr. & War. 430; *Ronalds v. Feltham*, T. & R. 418; *Douce v. Lady Torrington*, 2 My. & K. 600; *Taylor v. Taylor*, 6 Sim. 246; *Jones v. Williams*, 1 Coll. 156; *Coxe v. Basset*, 3 Ves. 155; *Tuohy v. Martin*, 2 McArthur, 572; *Smith v. Fellows*, 131 Mass. 20; *O'Donnell v. Barbey*, 129 Id. 453; *Hill v. Jones*, 65 Ala. 214.

² *Ogle v. Tayloe*, 49 Md. 158; *Horning v. Wiederspallen*, 28 N. J. Eq. 387; *Merrill v. Bickford*, 65 Me. 118; *Wilson v. Piper*, 77 Ind. 437; *Markille v. Ragland*, 77 Ill. 98; *Henvill v. Whitaker*, 3 Russ. 343; *Cross v. Kennington*, 9 Beav. 150; *Gallimore v. Gill*, 2 Sm. & Giff. 158; 8 De G. M. & G. 567; *Preston v. Preston*, 2 Jur., n. s., 1040; *Dormay v. Dorradalle*, 10 Beav. 263; *Hartland v. Murrell*, 27 Id. 204; *In re Tanqueray-Williaume*, L. R. 20 Ch. D. 465; *In re Bailey*, L. R. 12 Ch. D. 268; *Parker v. Fearnley*, 2 S. & S. 592, *contra*, is overruled; see, also, *Chapin v. Waters*, 116 Mass. 140; *Lapham v. Clapp*, 10 R. I. 543; *Hoyt v. Hoyt*, 85 N. Y. 142, 146, 149; *Guellich v. Clark*, 3 T. & C. 315; *Corwine v. Corwine*, 24 N. J. Eq. 579; 23 Id. 268; *Bynum v. Hill*, 71 N. C. 319; *Finch v. Hull*,

24 Hun, 226; *Stoddard v. Johnson*, 13 Id. 606; *Turner v. Turner*, 57 Miss. 775.

³ *Starke v. Wilson*, 65 Ala. 576; *Kirkpatrick v. Chesnut*, 5 S. C. 216; *Cable's Appeal*, 91 Pa. St. 327; *Owens v. Claytor*, 56 Md. 129.

⁴ *Cole v. Turner*, 4 Russ. 376; *Greville v. Browne*, H. L. Cas. 689; *Wheeler v. Howell*, 3 K. & J. 193; *Gyett v. Williams*, 2 J. & H. 429; *In re Bellis' Trusts*, L. R. 5 Ch. D. 504; *Bray v. Stevens*, L. R. 12 Ch. D. 162; *In re Booke*, L. R. 3 Ch. D. 630; *Lapham v. Clapp*, 10 R. I. 543; *Derby v. Derby*, 4 R. I. 414, 431; *Corwine v. Corwine*, 24 N. J. Eq. 579; and see *Hall v. Thompson*, 23 Hun, 334; *Forster v. Civill*, 20 Id. 282; *Ragan v. Allen*, 7 Id. 537; *Buckley v. Buckley*, 11 Barb. 43, 77; *Wert's Appeal*, 69 Pa. St. 173; *Brisben's Appeal*, 70 Id. 405; *Robinson v. McIver*, 63 N. C. 645, 649; *Hart v. Williams*, 77 Id. 426; *Moore v. Beckwith's Ex'r*, 14 Ohio St. 129, 135; *Clyde v. Simpson*, 4 Id. 445, 459; *Knotts v. Bailey*, 54 Miss. 235; *Smith v. Fellows*, 131 Mass. 20; *Gallagher's Appeal*, 48 Pa. St. 121; *Becker v. Kehr*, 49 Id. 223; *McLaughlin v. McLaughlin*, 12 Harris, 20; *Davis' Appeal*, 83 Pa. St. 348; *Lewis v. Darling*, 16 How. (U. S.) 1; *Hays v. Jackson*, 6 Mass. 149; *Adams v. Brackett*, 5

real property into personal, and in this converted form to go to the residuary legatee, the intention to charge the residuary estate with the debts and legacies is established beyond a doubt.¹ But in no case will such a general charge of legacies on the residue of the realty and personalty operate to charge property specifically devised or bequeathed.²

In a few of the states, the courts have laid down a rule different from that which has been established by the English courts, and generally adopted by the American courts. In New York and Connecticut, it has been held, that there will be no implied charge of legacies upon the residue of the estate, unless the circumstances, as they appear from the provisions of the will, show that the testator must have contemplated the necessity of resorting to the real estate for the satisfaction of the legacy, from the fact that he must have known, that his personal estate was not sufficient to satisfy all of the legacies which he had made.³ In New Jersey, it is held that the intention to charge legacies upon the real estate, given with the personal property under a residuary clause, may be implied from facts and circumstances outside of the will; as, for example, that the personal property is insufficient, or that the legacies are given to children and the like.⁴ Additional cases are added in the note below, in which the courts have held that there was not sufficient language employed in the will, from which to imply an intention to charge the real property with the payment of the debts and legacies.⁵

§ 408. **Mechanics' statutory and maritime liens.**—**Statutory liens.**—In the United States, it is not uncommon to provide by statute for the creation of a variety of liens against property, both real and personal, but more particularly against real property, in favor of the persons who have done work upon such property, or who have supplied materials with which to do such work, enabling such persons thereby to enforce a special lien upon such property to the exclusion of other creditors. These liens are generally known as mechanics' liens, and their characteristics depend necessarily upon the express provisions of the statute creating them. These mechanics' liens are, of course, legal in character and therefore are not strictly equitable liens. The equitable character, however, is given to these

Met. 280, 282; *Wilcox v. Wilcox*, 13 Allen, 252.

¹ *Field v. Peckett*, 29 Beav. 568.

² *Castle v. Gillett*, L. R. 16 Eq. 530; *Spong v. Spong*, 3 Bligh. n. s., 84; *Conron v. Conron*, 7 H. L. Cas. 168.

³ *Canfield v. Bostwick*, 21 Conn. 550; *Gridley v. Andrews*, 8 *Id.* 1; *Hoyt*, 85 N. Y. 142, 146, 149; *Bevan v. Cooper*, 72 N. Y. 317; *Le Fevre v. Toole*, 84 N. Y. 95; *Kalbfleisch v. Kalbfleisch*, 67 *Id.* 354; *Taylor v. Dodd*, 58 *Id.* 335; *Reynolds v. Reynolds*, 16 *Id.* 257; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Myers v. Eddy*, 47 Barb. 263; *Shulters v. Johnson*, 38 *Id.* 80; *Goddard v. Pomeroy*, 36 *Id.* 546, 556; *Finch v. Hull*, 24 Hun, 226; *Stoddard v. Johnson*, 13 *Id.* 606; but see

contra, *Forster v. Civill*, 20 Hun, 282; *Hall v. Thompson*, 23 *Id.* 334; *Ragan v. Allen*, 7 *Id.* 537; *Buckley v. Buckley*, 11 Barb. 43, 77.

⁴ *Van Winkle v. Van Houten*, 2 Green Ch. 172, 187; *Leigh v. Savidge*, 1 McCart. 124; *Dey v. Dey's Adm'r*, 19 N. J. Eq. 137; *Corwine v. Corwine's Ex'rs*, 23 *Id.* 568; *Massaker v. Massaker*, 2 Beasli. 264; *Johnson v. Poulson*, 32 N. J. Eq. 390; but see *Corwine v. Corwine*, 24 N. J. Eq. 579.

⁵ *Power v. Davis*, 3 MacArthur, 153; *Steele v. Steele's Adm'r*, 64 Ala. 438; *Taylor v. Harwell*, 65 *Id.* 1; *Chase v. Davis*, 65 Me. 102; *Gilder v. Gilder*, 1 Del. Ch. 331; *Whitehead v. Thompson*, 79 N. C. 450.

liens by statute; and while in many, and perhaps in most of the states where such statutory liens prevail, the statute provides for a sufficient remedy without resorting to the equitable remedy for the enforcement of the equitable lien; yet, wherever the statute did not make provision for a specific remedy, the parties would have to resort to the ordinary equitable remedy for the enforcement of liens. So far as these mechanics' liens rely upon a resort to equitable foreclosure for their enforcement, they constitute a part of equity jurisprudence. The cases cited are those in which resort had to be made to the equitable remedies.¹

There are also several maritime liens, which bear a close resemblance to equitable liens, inasmuch as the possession of the property in the lien-holder is not necessary to the validity of the lien; but the enforcement of this lien is generally, perhaps universally, attained in the courts of admiralty, and, therefore, nothing but a passing reference to them can be required in the present connection.²

¹ Winslow v. Urquhart, 39 Wis. 260; Ogg v. Tate, 52 Ind. 159; Ball v. Vason, 56 Ga. 284; Watson v. Columbia Bridge Co., 13 S. C. 433; Gaskill v. Davis, 63 Ga. 645; Lawton v. Case, 73 Ind. 60; Cummings v. Halsted, 26 Minn. 151; Willer v. Bergenthal, 50 Wis. 474; Spink v. McCall, 52 Iowa, 432; Phillips v. Gilbert, 11 Otto,

721; Burroughs v. Tostevan, 75 N. Y. 567; Kealing v. Voss, 61 Ind. 466.

² Aurora, 1 Wheat. 96, 105; The General Smith, 4 *Id.* 438, see Doddington v. Hallet, 1 Ves. Sen. 497, *per* Lord Hardwicke; *Ex parte* Young, 2 V. & B. 242, *per* Lord Eldon; Nicholl v. Mumford, 4 Johns. Ch. 522; 20 Johns. 611.

CHAPTER XXIV.

MORTGAGES OF REAL ESTATE AS AFFECTED BY EQUITY.

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§ 411. **Mortgage at common law.**—A common law mortgage is a conveyance of an estate in lands upon condition that it will be defeated by the payment of the debt or the performance of the obligation, to secure which the conveyance was made. The conveyance is a security and for that purpose the mortgage is given a defeasible estate, which is to become absolute upon the failure of the mortgagor to perform the condition. It is a species of estate upon condition subsequent, and grew out of the doctrine of those estates.¹ The common law mortgage is to be distinguished from two kinds of securities, which once were used quite extensively in Great Britain, viz.: *vivum vadium* and the Welsh mortgage, which do not require any explanation in this connection as they have long since fallen into innocuous desuetude.²

¹ 2 Washb. on Real Prop. 34; 4 Kent's Com. 136; Jones on Mortg., § 4; Williams on Real Prop. 422; Erskine v. Townsend, 2 Mass. 493;

Mitchell v. Burnham, 44 Me. 299; Wing v. Cooper, 37 Vt. 179; Lund v. Lund, 1 N. H. 39.

² See Tiedeman, Real Prop., §§ 297, 298.

§ 412. **Equity of redemption.**—If the mortgagor in a common law mortgage failed to perform the condition at the time stipulated, the estate became absolute in the mortgagee, even though the estate may have been worth much more than the mortgage debt.¹ There was no remedy by which the mortgagor could enforce the acceptance of payment after the breach of the condition, even where his failure arose from some accident or unavoidable delay, or where the payment of the debt with interest to date of the tender of payment would do no injury to the mortgagee. This rigorous rule of the common law did not fail to be productive of great injustice in many instances, and like all cases of hardships resulting from the technicality of the common law it attracted the attention of the court of chancery. A long contest ensued between these courts from the time of the *Magna Charta* until the reign of James I., when chancery acquired jurisdiction over questions arising out of mortgages, and decreed that the mortgagor may become entitled to redeem his estate from the mortgagee, after condition broken, by the payment of the debt and interest; and in the reign of Charles I. the law of mortgages was firmly established as a breach of equity jurisprudence.² This right of the mortgagor to redeem the estate after the breach of the condition was recognized only in a court of equity. The legal estate, as viewed from the legal stand-point, was still considered to be absolute in the mortgagee, but discharged of all rights of the mortgagor. The right to redeem was therefore no estate in the land. It was simply an equity, and hence was called the EQUITY OF REDEMPTION.

§ 413. **The mortgage in equity.**—As a result of this equitable jurisdiction, mortgages assumed in equity a different character from what they had in law. Equity seized hold of the real intention of the parties, and construed the mortgage to have only the effect of a lien, instead of vesting a defeasible estate in the land. This equitable construction conforms more nearly to the purposes and desired effect of a mortgage. It is given only to secure the payment of a debt, or the performance of some obligation, and its ends are satisfied, if after condition broken means are provided to the mortgagee for satisfying his claim by an appropriation of the land, while in the *interim* his interests are protected against any subsequent conveyance of the land. All this is attained by a lien. Equity, therefore, held the mortgage to be a lien upon the land, and not an estate in it.³

¹ 2 Washb. on Real Prop. 35; 4 Kent's Com. 140; Fay v. Cheney, 14 Pick. 399; Brigham v. Winchester, 1 Metc. 390; Wood v. Trask, 7 Wis. 566; Goodall's Case, 5 Rep. 96; Wade's Case, 5 Rep. 115; Jones on Mortg., § 11.

² 1 Spence Eq. Jur. 603; Jones on Mortg., § 6; How v. Vigures, 1 Rep. in Ch. 32; Emanuel College v. Evans, *Id.* 18; 2 Washb. on Real Prop. 39; Roscarrick v. Barton, 1 Ca. in Ch.

217; Casborne v. Scarfe, 1 Atk. 603; Willett v. Winnelly, 1 Vern. 488; Price v. Perrie, 2 Freem. 258.

³ Headley v. Goundray, 41 Barb. 282; Jackson v. Willard, 4 Johns. 41; Green v. Hart, 1 Johns. 580; Kinna v. Smith, 2 Green. Ch. 14; Hughes v. Edwards, 9 Wheat. 500; Runyan v. Mersereau, 11 Johns. 534; Deedly v. Cadwell, 19 Conn. 218; Eaton v. Whiting, 3 Pick. 494;

§ 414. **Influence of equity upon the law.**—As soon as equity assumed jurisdiction over mortgages, it began to exert a potent influence over the law in respect to that class of interests, and has in the course of time almost entirely superseded the courts of law in their jurisdiction. This is specially true in regard to the foreclosure of mortgages. Although in some of the states the common law foreclosure still prevails in a modified form, yet in most of them, and in England, it has given way to the more practicable and just foreclosure in equity.¹

Not only has equity supplanted the jurisdiction of courts of law in respect to foreclosure, but it has everywhere, in England and in this country, produced, through a legislation judicial and statutory, greater or less influence upon the legal theories in regard to the interests of the mortgagor and the mortgagee. In some of the states the modifications effected by equity are but slight and pertain only to minor details, while the mortgage is still held to be a conveyance of an estate in the land. Such is the law in Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, Vermont, North Carolina, Mississippi, Alabama, Missouri, Indiana, and Minnesota. In others the mortgage is still considered a conveyance of an interest corresponding to an estate, while the mortgagee possesses in the estate only such rights and remedies as are recognized in a court of equity. The ordinary legal rights of ownership do not attach. Such will be found to be the law in Pennsylvania, South Carolina, Texas, Kentucky, Ohio, Illinois, Iowa, and Wisconsin. This class approximates so nearly to the next class to be mentioned, that in the subsequent discussion of the rights of the mortgagor and mortgagee, they will be treated as constituting one subdivision; so far at least as general rules are concerned. In the last class of states, namely, in New York, Georgia and California, the whole common law theory has been repudiated, and the mortgage is construed to be simply a lien upon the land conveying no legal estate, not even after condition broken.² In South Carolina it has been held lately that the mortgage is so far not an alienation or conveyance of land as that the word "heirs" is not required to give a mortgage in fee, although words of limitation are still required in that state in conveyances *inter vivos*.³ This general statement of the change which the law of mortgages has undergone, and is still undergoing, for in most of the states it is still in a state of transition, will serve to explain why, in the presentation of the law, so much difficulty is experienced in attaining perspicuity

Ellison v. Daniels, 11 N. H. 280; Anderson v. Baumgartner, 27 Mo. 80; Whitney v. French, 25 Vt. 663; Ragland v. Justices, 10 Ga. 65; Myers v. White, 1 Rawle, 353; Hanna v. Carrington, 18 Ark. 85; McMillan v. Richards, 9 Cal. 365; Matthews v. Wallwyn, 4 Ves. 118; Timms v. Shannon, 19 Md. 296; 4 Kent's Com. 138.

¹ 2 Washb. on Real Prop. 98; 4 Kent's Com. 181; see *post*, § 440.

² 2 Washb. on Real Prop. 100-108; Jones on Mortg., § 17-60.

³ Bredenburg v. Landrum, (S. C. 1890) 10 S. E. 956.

of statement and a reconciliation of authorities. This fact must ever be borne in mind, that, although in all the states the law is developing into the lien theory so-called, yet the development in some is not as advanced as in others. In the consultation of authorities, therefore, in order to ascertain the law in any particular state, only such cases may be referred to with safety, as are found in those states which are in the same stage of development. It is to be further remembered that even the decisions from these states can only be relied upon as furnishing general rules of analogy. The details of the law of mortgages must be sought for in the reports of the state in which the question arises.

§ 415. **The form of a mortgage.**—The mortgage consists of a deed, similar in terms to the ordinary deed of conveyance, conveying the estate to the mortgagee, but qualified by a defeasance clause, in which it is provided that the conveyance shall be void, when the condition, usually the payment of money, is performed, and shall become absolute in the mortgagee upon breach of the condition. Generally, any deed which appears upon its face to have been intended as a security for the payment of money, will be construed as a mortgage.¹ If the instrument does not conform to the legal requirements for the execution of a deed, as where the seal has been neglected, or the proper number of attesting witnesses is not obtained, the deed will be inoperative as a mortgage at law, and it is believed generally in equity. But in some of the states, such an imperfect mortgage has been treated in equity as imposing a lien upon the land for the benefit of the creditor, which partakes of the same nature as a mortgage by deposit of title deed.² And it has been held that a written agreement for security on certain property will in equity, under the doctrine of equitable conversion, operate as a lien on such property against every one interested therein, who has notice of the agreement.³

§ 416. **The defeasance clause in equity.**—If the instrument

¹ Co. Lit. 205 a, Butler's note, 96; Hughes v. Edwards, 9 Wheat, 489; Morris v. Nixon, 1 How. 118; Russell v. Southard, 12 How. 139; Bigelow v. Topliff, 25 Vt. 273; Steel v. Steel, 4 Allen, 419; Gilson v. Gilson, 2 Allen, 115; Parks v. Hall, 2 Pick. 211; Nugent v. Riley, 1 Metc. 117; Vanderhaize v. Hughes, 13 N. J. 244; James v. Morey, 2 Cow. 246; Hodges v. Tenn. Marine, &c. Ins. Co., 8 N. J. 416; Conway v. Alexander, 7 Cranch, 218; Howe v. Russell, 36 Me. 115; Stoever v. Stoever, 9 Serg. & R. 434; Bk. of Westminster v. Whyte, 1 Md. Ch. 539; s. c., 3 Md. Ch. 508; Mende v. Delaire, 2 Desau. 564; Yarborough v. Newell, 10 Yerg. 376; Delabay v. McConnell, 4 Seam. 156; Flagg v. Mann, 2 Sumn. 386; Edington v. Harper, 3 J. J. Marsh. 353; Davis v. Stonestreet, 4 Ind. 101; Gibson v. Eller, 13 Ind. 124; Henry v. Davis, 7 Johns. Ch. 40; McBrayer v. Roberts, 2 Dev. Eq. 75; Hauser v. Lash, 2 Dev. & B. Eq. 212; Clark v. Henry, 2 Cow. 324; Woodworth v. Guzman, 1

Cal. 203; Wilson v. Drumrite, 21 Mo. 325; Cotterell v. Long, 20 Ohio, 464; English v. Lane, 1 Port. 328; Chowning v. Cox, 1 Rand. 306; Rogan v. Walker, 1 Wis. 527; Burnside v. Terry, 45 Ga. 621; Mason v. Moody, 26 Miss. 184; 4 Kent's Com. 461; Newman v. Samuels, 17 Iowa, 528.

² Coe v. Columbia, &c. R. R. Co., 10 Ohio St. 372; Price v. Cutts, 29 Ga. 142-148; McQuie v. Rag, 58 Mo. 56; Daggett v. Rankin, 31 Cal. 321; McClurg v. Phillips, 49 Mo. 315; Burnside v. Wayman, 48 Mo. 356; Harrington v. Fortner, 58 Mo. 468; Dunn v. Raley, 58 Mo. 134; Lake v. Doud, 10 Ohio, 515; Abbott v. Godfroy, 1 Mann. (Mich.) 198; Jones v. Brewington, 58 Mo. 565; Black v. Gregg, 58 Mo. 505; Brown v. Brown, 103 Ind. 23; Bullock v. Whipp, 15 R. D. 195; Watkins v. Vrooman, 51 Hun, 175; Bell v. Pelt, 51 Ark. 433; Westerly Sav. Bank v. Stillman Mfg. Co., (R. I. 1889) 17 Atl. Rep. 918.

³ Gest v. Packwood, 39 Fed. Rep. 525; Watkins v. Vrooman, 51 Hun, 175

containing the defeasance does not fulfill all the legal requirements of a deed, it will not in a court of law have the effect of converting an absolute conveyance into a mortgage. But it will be good in equity, and in that court the conveyance will be treated and enforced as a mortgage against all having actual notice of its real character. Thus, the want of a seal, the absence of the requisite number of witnesses, an improper acknowledgment of the deed, would invalidate the defeasance in law, but it would be enforced in equity.¹ Courts of equity have not only gone thus far in correcting and supplementing the common law, but they have, also, in cases where the defeasance was not put to writing, sustained

§ 417. **The admissibility of parol evidence.**—To prove that a deed, absolute on its face, was intended to be a mortgage. The authorities are not uniform as to how far, or in what cases, such evidence is admissible. Some have held that in any case parol evidence can be introduced to prove a deed to be a mortgage, thus ignoring completely the application to mortgages of the rule that parol evidence is inadmissible to vary or control a written instrument,² while others either deny the right altogether,³ or limit its admissibility to such

¹ Story Eq. Jur., § 1018; *Kelleran v. Brown*, 4 Mass. 444; *Eaton v. Green*, 22 Pick. 526; *Delaire v. Keenan*, 3 Desau. 74; *Woods v. Wallace*, 22 Pa. St. 171; *Flagg v. Mann*, 14 Pick. 467; *Cutter v. Dickinson*, 8 Pick. 386; *Jewett v. Bailey*, 5 Me. 87; *Warren v. Louis*, 53 Me. 463; *Murphy v. Calley*, 1 Allen, 107; *Gillis v. Martin*, 2 Dev. Eq. 470; see 2 Washb. 59.

² *Russell v. Southard*, 12 How. 139; *Babcock v. Wyman*, 19 How. 239; *Sprigg v. Bk. of Mt. Pleasant*, 14 Pet. 201; *Jordon v. Fenno*, 13 Ark. 593; *Anthony v. Anthony*, 23 Ark. 479; *Pierce v. Robinson*, 13 Cal. 116; *Farmer v. Grose*, 42 Cal. 169; *Kuhn v. Rumpp*, 46 Cal. 299; *Klock v. Walter*, 70 Ill. 416; *Wynkoop v. Cowing*, 21 Ill. 570; *Sutphen v. Cushman*, 35 Ill. 186; *Conwell v. Evill*, 4 Ind. 67; *Heath v. Williams*, 30 Ind. 495; *Roberts v. McMahan*, 4 Green, (Iowa) 34; *Johnson v. Smith*, 39 Iowa, 549; *Zuver v. Lyons*, 40 Iowa, 570; *Moore v. Wade*, 8 Kans. 381; *Richardson v. Woodbury*, 43 Me. 206; *Whitney v. Batchelder*, 32 Me. 313; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 371; *Hassam v. Barrett*, 115 Mass. 24; *McDonough v. Squire*, 111 Mass. 256; *Flagg v. Mann*, 14 Pick. 467, 478; *Glass v. Hulbert*, 102 Mass. 24; *Emerson v. Atwater*, 7 Mich. 12; *Swetland v. Swetland*, 3 Mich. 482; *Wadsworth v. Loranger*, Har. (Mich.) 113; *Belate v. Morrison*, 8 Minn. 87; *Weide v. Gehl*, 21 Minn. 449; *Freeman v. Wilson*, 51 Miss. 329; *Littlewort v. Davis*, 50 Miss. 403; *O'Neill v. Capelle*, 62 Mo. 202; *Hogel v. Lindell*, 10 Mo. 483; *Slowey v. McMurry*, 27 Mo. 116; *Schade v. Bessenger*, 3 Neb. 140; *Cookes v. Culbertson*, 9 Nev. 199; *Sweet v. Parker*, 22 N. J. Eq. 453; *Crane v. Bonnell*, 1 Green Ch. 264; *Strong v. Stewart*, 4 Johns. 167; *Horn v. Keteltas*, 46 N. Y. 605; *Carr v. Carr*, 52 N. Y. 258; *Fielder v. Darien*, 50 N. Y. 437; *Murry v. Walker*, 31 N. Y. 399; *Miami Lx. Co. v. U. S. Bank*, Wright, 249;

Cottrell v. Long, 20 Ohio, 464; *Kerr v. Gilmore*, 6 Watts, 405; *Rhines v. Baird*, 41 Pa. St. 256; *Palmer v. Guthrie*, 76 Pa. St. 441; *Taylor v. Luther*, 3 Sumn. 238; *Nichols v. Reynolds*, 1 R. I. 30; *Nichols v. McCabe*, 3 Head, 93; *Haynes v. Swan*, 6 Heisk. 560; *Ruggles v. Williams*, 1 Head, 141; *Mead v. Randolph*, 8 Texas, 191; *Carter v. Carter*, 5 Texas, 93; *Gibbs v. Penny*, 43 Texas, 560; *Wright v. Bates*, 13 Vt. 248; *Hills v. Loomis*, 42 Vt. 562; *Ross v. Norvell*, 1 Wash. (Va.) 14; *Bird v. Wilkinson*, 4 Leigh, 266; *Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Rogan v. Walker*, 1 Wis. 527; *Wilcox v. Bates*, 26 Wis. 465; *Cadman v. Peter*, 118 U. S. 731; *Lance's Appeal*, 112 Pa. St. 456; *Matheny v. Sandford*, 26 W. Va. 385; *Workman v. Greening*, 115 Ill. 477; *Bailey v. Bailey*, 115 Ill. 551; *Jones v. Blake*, 33 Minn. 362; *Miller v. Ausenig*, 2 Wash. 22; *McMillon v. Bissell*, 63 Mich. 66; *Murdock v. Clark*, (Cal. 1890) 24 Pac. 272; *Gilchrist v. Boswick*, 33 W. Va. 168; *Broughton v. Vasquez*, 73 Cal. 325; *Ashton v. Shepherd*, 120 Ind. 64; *McPherson v. Haywood*, 81 Me. 329; *Hart v. Epstein*, 71 Tex. 752; *Hanks v. Rhodes*, 128 Ill. 404; *Tower v. Fetz*, 26 Neb. 706; *Hall v. Arnott*, 80 Cal. 348; *Jackson v. Jones*, 74 Tex. 104.

³ *Bassett v. Bassett*, 10 N. H. 64; *Porter v. Nelson*, 4 N. H. 130; *Boody v. Davis*, 20 N. H. 140. By statute, in Georgia, the admissibility of parol evidence is limited to cases of fraud in the procurement of the absolute deed, *Code Ga.* (1873) p. 689; *Spence v. Steadman*, 49 Ga. 133; *Broach v. Barfield*, 57 Ga. 601; *Mitchell v. Fulington*, 83 Ga. 301. In Pennsylvania, a similar statute has been enacted. *Smolly v. Ulrich*, (Pa. 1890) 19 Atl. 305. In Connecticut, it has been lately held to be a doubtful question. *Osgood v. Thompson Bk.*, 30 Conn. 27.

cases as fall within the ordinary equitable jurisdiction of fraud, accident or mistake, *i. e.*, where the failure to reduce the defeasance to writing arose out of some fraud, accident or mistake.¹ As a general rule, such evidence will be received only in a court of equity, and although perhaps the majority of the courts apply the rule in every case, irrespective of any question of fraud, yet, upon a closer analysis of the cases, it will be found that in no case does the court of equity interfere and permit the introduction of parol evidence, unless the circumstances of the case are such as would make the vendee guilty of at least constructive fraud in insisting upon the deed being treated as an absolute conveyance.² In any case, the evidence must be clear and free from doubt as to the intention to execute a mortgage in order that a deed absolute on its face may, by parol evidence, be converted into a mortgage.³ It is to be understood, however, that the deed cannot be shown to be a mortgage, so as to disturb the title of a purchaser from the grantee, in reliance upon his apparent absolute title.⁴

§ 418. **The mortgagor's interest.**—Whatever may be the view taken in any particular state of the character of a mortgage, whether it is construed as a conveyance of an estate in lands, or only the grant of a lien, the mortgagor's interest *before condition broken* is a legal estate, the only difference being, that under the common law theory of the mortgage, it is an estate in reversion, or more strictly a possibility of reverter, while under the lien theory it is a present vested estate, only liable to be destroyed by the enforcement of the lien. It is subject to the same rules of conveyance and descends to the heirs as

¹ Washburn v. Merrills, 1 Day, 139; Collins v. Tillon, 26 Conn. 368; Brainerd v. Brainerd, 15 Conn. 575; French v. Burns, 35 Conn. 359; Chaires v. Brady, 19 Fla. 133; Spence v. Steadman, 49 Ga. 133; Biggars v. Bird, 55 Ga. 650; Skinner v. Miller, 5 Litt. 86; Blanchard v. Kenton, 4 Bibb, 451; Green v. Sherrod, 105 N. C. 197; Couter v. Muir's Ex'r, (Ky. 1890) 13 S. W. 435. And if the deed is made absolute so as to cover up a usurious contract, it will be such a ground of fraud in Kentucky as will admit parol evidence. Murphy v. Trigg, 1 Mon. 72; Cook v. Coyle, 2 B. Mon. 71; Bk. of Westminster v. Whyte, 1 Md. Ch. 536; s. c., 3 Id. 508; Artz v. Grove, 21 Md. 474; Price v. Grover, 40 Md. 102; Kelly v. Bryan, 6 Ired. Eq. 283; Brothers v. Harrill, 2 Jones Eq. 209; Glisson v. Hill, Id. 256; Arnold v. Mattison, 3 Rich. Eq. 153.

² In most of the states where the rule is broad, as above stated, it is held, to employ the language of Mr. Jones, that "fraud in the use of the deed is as much a ground for the interposition of equity as fraud in its creation." Jones on Mortg., § 288; Pierce v. Robinson, 13 Cal. 116; Conwall v. Evill, 4 Ind. 67; O'Neill v. Capelle, 62 Mo. 202; Moreland v. Bernhart, 44 Texas, 275, 283; Wright v. Bates, 13 Vt. 348; Rogan v. Walker, 1 Wis. 52; Strong v. Stewart, 4 Johns. Ch. 167. See generally the cases cited *supra*.

Under this theory, the extreme doctrine, that parol evidence is admissible to show an absolute deed to be a mortgage, does not conflict with the ordinary construction of the Statute of Frauds. But the statute is thus subjected to a very strained construction, whatever theory may be applied to the solution of this question.

³ Cadman v. Peters, 118 Pa. St. 73; Lance's Appeal, 112 Va. St. 456; Matheny v. Sandford, 26 W. Va. 386; Bentley v. O'Bryne, 111 Ill. 53; Parmer's Adm'r v. Parmer, 88 Ala. 545; Fisher's Appeal, 132 Pa. St. 488; Langes v. Musurvey, (Iowa, 1890) 45 N. W. 732; Armor v. Spalding, (Colo. 1890) 23 Pac. 789; Franklin v. Ayers, 22 Fla. 654; McMillan v. Bissell, 63 Mich. 66; Jameson v. Emerson, 82 Me. 359; Sanborn v. Magee, (Iowa, 1890) 44 N. W. 720; Sherrer v. Harris, (Ark. 1890) 13 S. W. 730; Jones v. Pierce, (Pa. 1890) 19 Atl. 689; Winston v. Burrell, (Kans. 1890) 24 Pac. 477; Strong v. Strong, 27 Ill. App. 148; s. c., 126 Ill. 301; Shattuck v. Bascom, 55 Hun, 14; Null v. Fries, 110 Pa. St. 521; Munger v. Casey, (Pa. St. 1889) 17 Atl. 36; Townsend v. Peterson, 12 Colo. 491; Jackson v. Jones, 74 Tex. 104.

⁴ Jackson v. Lawrence, 117 U. S. 679; Parrott v. Baker, 82 Ga. 364.

any other kind of real estate.¹ And it may be stated as a general proposition that, except as against the mortgagee, he is clothed with all the rights and liabilities which are usually incident to an estate in lands.² Upon the breach of the condition, under the common law theory that the mortgage conveyed a defeasible estate, the estate became absolute in the mortgagee, leaving nothing in the mortgagor but the equitable right to redeem the estate. This was called the *equity of redemption*. It was no estate in the land, simply an equitable right to regain the legal estate. At common law, therefore, the interest of the mortgagor after condition broken, although still considered real estate and descendible to the heirs of the mortgagor, and capable of alienation by the usual methods, could not be levied upon by creditors. But in this country at the present day the equity of redemption is generally held to have all the characteristics and qualities of a legal estate, and this too in those states whose courts still cling to the common law theory of mortgages. The equity is now generally subject to levy and sale under execution.³

¹ Co. Lit. 205 a, Butler's note, 96; Thorne v. Thorne, 1 Vern. 141; Cashborne v. Scarfe, 1 Atk. 606; Ledyard v. Butler, 9 Paige Ch. 132; Chamberlain v. Thompson, 10 Conn. 243; Baxter v. Dyer, 5 Ves. 656; McTaggart v. Thompson, 14 Pa. St. 149; Wilkins v. French, 20 Me. 111; White v. Whitney, 3 Metc. 81; Huckins v. Straw, 34 Me. 166; Bird v. Decker, 64 Me. 550; Orr v. Hadley, 36 N. H. 575; Kennett v. Plummer, 28 Mo. 143; White v. Rittenmeyer, 30 Iowa, 273; Wright v. Rose, 2 Sim. & S. 323; Glass v. Ellison, 9 N. H. 69; Bourne v. Bourne, 2 Hare, 35; Bigelow v. Wilson, 1 Pick. 485.

² Willington v. Gale, 7 Mass. 138; Taylor v. Porter, 7 Mass. 355; Blaney v. Pearce, 2 Greenl. 132; Wilkins v. French, 20 Me. 111; Felch v. Taylor, 13 Pick. 133; Savage v. Dooley, 28 Conn. 411; Bird v. Decker, 64 Me. 550; Collins v. Torrey, 7 Johns. 278; Orr v. Hadley, 36 N. H. 575; Schuykill Co. v. Thoburn, 7 Serg. & R. 411; Hitchcock v. Harrington, 6 Johns. 290; Assay v. Hoover, 5 Pa. St. 21; Clark v. Reyburn, 1 Kans. 281; Trustees of Donations v. Streeter, 64 N. H. 106; Tilden v. Greenwood, 149 Mass. 567. Except as against the mortgagee and his privies, the mortgagor may maintain actions to recover possession or to recover damages for waste. Huckins v. Straw, 34 Me. 166; Stinson v. Ross, 51 Me. 556; Ellison v. Daniels, 11 N. H. 274; Den v. Dimon, 5 Halst. 156; Doe v. McLoskey, 1 Ala. 708; Brown v. Snell, 6 Fla. 745; Ballard v. Ballardvale Co., 5 Gray, 468; Bird v. Decker, 64 Me. 550; Hall v. Lance, 25 Ill. 277; Glass v. Ellison, 9 N. H. 69; Woods v. Hildebrand, 46 Mo. 284; 2 Am. Rep. 513; Pueblo, &c. Valley R. R. Co. v. Beshoar, 8 Col. 32. In Meyer v. Campbell, 12 Mo. 603, it was held that ejectment will not lie by the mortgagor after the breach of the condition. And where the mortgagee has taken possession, an action for waste cannot be maintained by the mortgagor, unless the inheritance has been injured by the tres-

pass. Sparhawk v. Bagg, 16 Gray, 583. And an action by the mortgagee for trespass is a bar to a similar action for the same offense by the mortgagor. James v. Worcester, 141 Mass. 361. The mortgagor's widow has dower in the equity, if she has released her dower in the land, and may redeem the land from the mortgagee. Titus v. Neilson, 5 Johns. Ch. 452; Van Duyn v. Thayer, 14 Wend. 233; Hawley v. Bradford, 9 Paige Ch. 200; Snow v. Stevens, 15 Mass. 278; Eaton v. Simonds, 14 Pick. 98; McCabe v. Bellows, 7 Gray, 148; see *post*, § 334.

³ It is liable for debts. Cushing v. Hurd, 4 Pick. 253; Febeiger v. Craighead, 4 D. all. 151; Perrin v. Read, 35 Vt. 2; Dunbar v. Starkey, 19 N. H. 160; Dadmun v. Lamson, 9 Allen, 85; Smith v. Sweetser, 32 Me. 246; Clinton Nat. Bank v. Manwaring, 39 Iowa, 281; Fox v. Harding, 21 Me. 104; White v. Whitney, 3 Metc. 81; Curtis v. Root, 20 Ill. 53; Grace v. Mercer, 10 B. Mon. 157; Crow v. Tinsley, 16 Dana, 402; Waters v. Stewart, 1 Caines' Cas. 47; Cotten v. Blocker, 6 Fla. 1; Fernald v. Linscott, 6 Greenl. 234; Huntington v. Cotton, 31 Miss. 253; Wiggin v. Heyward, 118 Mass. 514; Hall v. Tunnell, 1 Houst. 320; Van Ness v. Hyatt, 13 Pet. 294; Penderson v. Brown, 1 Day, 93; Slate v. Laval, 4 McCord, 336; Jackson v. Willard, 4 Johns. 41; Bosse v. Johnson, 73 Tex. 608. At common law, it was not subject to levy and sale under execution, although perhaps always liable in equity. Plunkett v. Pension, 2 Atk. 290; Forth v. Norfolk, 5 Madd. 504; Van Ness v. Hyatt, 13 Pet. 294; Hill v. Smith, 2 McLean, 446. But in most of the states the courts have either by their adjudications assumed that it was a common law right, or the right has been expressly given by statute. Statutes have been passed in Alabama, Connecticut, Florida, Illinois, Massachusetts, Mississippi, Maine, North Carolina, South Carolina and several other states. 2 Washb. on Real Prop. 163. But the

§ 419. **The mortgagee's interest.**—Under the common law theory, the mortgagee has the freehold estate both before and after the breach of the condition. Before, it is a defeasible estate, and after, an absolute estate. His interest, therefore, was a legal estate, it descended to his heirs, and required the same formalities of conveyance.¹ But under the lien theory he is said to have only a chattel interest until foreclosure. The mortgage is not real estate, it is personal property, which descends with the debt to the personal representatives. And now the equity rule substantially prevails, whether the mortgagee's interest is considered real estate or personal property, and after his death the mortgagee's personal representatives exercise all his rights under the mortgage, a release or conveyance by the heir having no effect upon the rights of the personal representatives. The heir takes the mortgage as trustee for the personal representatives.² If a statute prohibits foreign corporations from lending money within the state, such corporations cannot acquire any valid interest in a mortgage, as a mortgagee. Such a mortgage would be void.³

§ 420. **Devise of the mortgage.**—It has been held that a general devise in terms of lands, tenements and hereditaments, in the absence of any other evidence of intention, will be construed to cover the mortgages owned by the devisor.⁴ But those decisions are from the English courts, which sustain the common law theory of mortgages, and it is to be supposed that in the states, in which the lien theory has been more or less followed, a different conclusion would be reached.⁵

§ 421. **Merger of interests.**—Inasmuch as the whole subject of merger, as it appears in the light of equity, is fully discussed else-

mortgagee cannot reduce the mortgage debt to judgment, and levy upon the equity of redemption. *Lyster v. Dolland*, 1 Ves. 431; *Washburn v. Goodwin*, 17 Pick. 137; *Atkins v. Sawyer*, 1 Pick. 351; *Palmer v. Foote*, 7 Paige Ch. 437; 2 N. Y. Rev. Stat. 368; *Goring v. Shreve*, 7 Dana, 67; *Deaver v. Parker*, 2 Ired. Eq. 40; *Camp v. Cox*, 1 Dev. & B. 52; *Tice v. Annin*, 2 Johns. Ch. 125; *Powell v. Williams*, 14 Ala. 476; *Parker v. Bell*, 37 Ala. 358; *Duck v. Sherman*, 2 Dougl. (Mich.) 176; *Thornton v. Pigg*, 24 Mo. 249; *Baldwin v. Jenkins*, 23 Miss. 206; *Waller v. Tate*, 4 B. Mon. 529; *Hill v. Smith*, 2 McLean, 446. *Contra*, *Porter v. King*, 1 Me. 297; *Trimm v. Marsh*, 58 N. Y. 599; 13 Am. Rep. 623; *Crooker v. Frazier*, 52 Me. 406; *Freeby v. Tupper*, 15 Ohio, 467; *Pierce v. Potter*, 7 Watts, 475. But if the mortgage debt has been assigned to a *bona fide* holder, without the mortgage, such assignee may levy upon the equity of redemption. *Crane v. Marsh*, 4 Pick. 131; *Andrews v. Fisk*, 101 Mass. 424; *Waller v. Tate*, 4 B. Mon. 529. And it has also been held that the first mortgagee may levy upon the equity of redemption from the second mortgage. *Johnson v. Stevens*, 1 Cush. 431.

¹ 2 Washb. on Real Prop. 96, 97; Co. Lit. 205 a, Butler's note, 96; Jones on Mortg., §§ 11-59; see *ante*, § 411; Williams on Real Prop. 422.

² *Connor v. Whitmore*, 52 Me. 185; *Collamer v. Langdon*, 29 Vt. 32; *Taft v. Stevens*, 3 Gray, 504; *Wilkins v. French*, 20 Me. 11; *Burt v. Kicker*, 6 Allen, 78; *Douglas v. Darin*, 57 Me. 121; *Kinna v. Smith*, 2 Green Ch. 14; *Dewey v. Van Deusen*, 4 Pick. 19; *Jackson v. De Lancey*, 11 Johns. 365; s. c., 13 Johns. 535; *Great Falls Co. v. Worster*, 15 N. H. 412; *Chase v. Lockerman*, 11 Gill & J. 185; *Barnes v. Lee*, 1 Bibb, 526; *White v. Rittenmeyer*, 30 Iowa, 272; *Norwick v. Hubbard*, 22 Conn. 587; *Richardson v. Hildreth*, 8 Cush. 225; *Webster v. Calden*, 56 Me. 204.

³ *Farrior v. New Eng. Mortgage, &c. Co.*, 88 Ala. 275.

⁴ *Jackson v. Delancey*, 13 Johns. 553, 559; *Winn v. Littleton*, 1 Vern. 4; *Galliers v. Moss*, 9 B. & C. 267; *Braybroke v. Inskip*, 8 Ves. 417 n; Co. Lit. 205 a, Butler's note, 96; *contra*, *Cashborne v. Scarfe*, 1 Atk. 605; *Atty.-Gen. v. Vigor*, 8 Ves. 276; *Strode v. Russell*, 2 Vern. 625; *Wilkins v. French*, 20 Me. 111.

⁵ *Moore v. Cornell*, 69 Pa. St. 3.

where,¹ and special reference is there given to the matter of merger of incumbrances,² it will be unnecessary in this connection to add anything more.

§ 422. **Possession of the mortgaged premises.**—It is a general custom in this country, for the mortgagor to retain possession until the breach of the condition, and even afterwards it is not usual for the mortgagee to enter into possession until the land has been decreed to him by foreclosure. But in those states where the common law theory prevails in its full force, the mortgagee may enter into possession at any time after the delivery of the mortgage. He possesses the freehold, and can exercise all the rights of ownership over the land. And if the mortgagor should resist his demand for possession he may bring an action of ejectment for its recovery.³ But in some of the states, where the common law has been modified in this respect by statute or judicial legislation, the mortgagor is entitled to possession until condition broken, but after condition broken the mortgagee has the right of possession, the same as at common law.⁴ In other states where the lien theory has met with more or less favor, the mortgagee is not entitled to possession until the mortgage is foreclosed and the estate made absolute in the mortgagee.⁵ And it has been

¹ See Chapt. VII.

² See §§ 119, 120.

³ *Ersine v. Townsend*, 2 Mass. 493; *Goodwin v. Richardson*, 11 Mass. 473; *Duval v. McCloskey*, 1 Ala. 708; *Knox v. Easton*, 38 Ala. 345; *Bradley v. Fuller*, 23 Pick. 1; *Page v. Robinson*, 10 Cush. 99; *Wales v. Miller*, 1 Gray, 512; *Chamberlain v. Thompson*, 10 Conn. 243; *Middletown Sav. Bk. v. Bates*, 11 Conn. 519; *Blaney v. Bearce*, 2 Greenl. 132; *Ferbish v. Goodwin*, 29 N. H. 321; *Harper v. Ely*, 10 Ill. 581; *Delahay v. Clement*, 3 Scam. 202; *Karnes v. Lloyd*, 52 Ill. 113; *Chellis v. Stearns*, 22 N. H. 312; *Howard v. Houghton*, 64 Me. 445; *Stewart v. Barrow*, 7 Bush, 368; *Sedman v. Sanders*, 2 Dana, 68; *Rev. Stat. Me. (1871) Ch. 90, § 2*; *Treat v. Pierce*, 53 Me. 77; *Brown v. Stewart*, 1 Md. Ch. 87; *Sumwalt v. Tucker*, 34 Md. 89; *Annapolis, &c. R. R. v. Gault*, 39 Md. 115; *Hemphill v. Ross*, 66 N. C. 477; *Jackson v. Dubois*, 4 Johns. 216; *Jackson v. Hull*, 10 Johns. 481; *Ellis v. Hussey*, 66 N. C. 501; *Tryon v. Munson*, 77 Pa. St. 250; *Youngman v. R. R. Co.*, 65 Pa. St. 278; *Den v. Stockton*, 12 N. J. L. 322; *Shute v. Grimes*, 7 Blackf. 1; *Ely v. McGuire*, 2 Ohio, 223; *Carpenter v. Casper*, 6 R. I. 542; *Waterman v. Matteson*, 4 R. I. 539; *Henshaw v. Wells*, 9 Humph. 568; *Vance v. Johnson*, 10 Humph. 214; *Faulkner v. Brokenborough*, 4 Rand. 245; *Tripe v. Marcey*, 39 N. H. 439; *Trustees v. Dickson*, 1 Freem. Ch. 474; *May v. Fletcher*, 14 Pick. 525; *Clark v. Beach*, 6 Conn. 142. And he may likewise have trespass against the mortgagor, even before condition broken, for waste, or for resisting his entry. *Smith v. Johns*, 3 Gray, 517; *Northampton Mills v. Ames*, 8 Mete. 1; *Page v. Robinson*, 10 Cush. 99; *Newall v. Wright*, 3 Mass. 138; *Fur-*

bish v. Goodwin, 29 N. H. 321; *Clark v. Bench*, *supra*.

⁴ *Cheever v. Rutland & B. R. R.*, 39 Vt. 653; *Wilson v. Hooper*, 13 Vt. 653; *Walcop v. McKinney*, 10 Mo. 229; *Sutton v. Mason*, 38 Mo. 120; *McIntyre v. Whitfield*, 13 Smed. & M. 88; *Kannady v. McCarron*, 18 Ark. 166; *Doe v. Pendleton*, 15 Ohio, 735; *Frische v. Cramer*, 16 Ohio, 125; *Watson v. Dickson*, 12 Smed. & M. 608; *Reynolds v. Canal & Banking Co. of N. O.*, 30 Ark. 520; *Hall v. Tennell*, 1 Houst. 320; *Newbold v. Newbold*, 1 Del. Ch. 310; *Hill v. Robertson*, 24 Miss. 368; *Johnson v. Houston*, 47 Mo. 227; *Reddick v. Gressman*, 49 Mo. 389; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Sanderson v. Price*, 1 Zab. 646; *Shields v. Lozear*, 34 N. J. L. 496; 3 Am. Rep. 256; *Hagar v. Brainerd*, 44 Vt. 294; *Walker v. King*, 44 Vt. 601; *Allen v. Everly*, 24 Ohio St. 602; *Rands v. Kendall*, 15 Ohio, 671.

⁵ *Civil Code Cal.*, § 2927; *Nagle v. Macy*, 9 Cal. 426; *Dutton v. Warschauer*, 21 Cal. 609; *Grattan v. Wiggins*, 23 Cal. 26; *Drake v. Root*, 2 Col. 685; *Bush Dig. of Stat. (Fla.)*, 1872, p. 611; *Vason v. Ball*, 56 Ga. 268; *Elfe v. Cole*, 26 Ga. 197; *Davis v. Anderson*, 1 Ga. 176; *Iowa Code*, (1873) 357; 2 G. & H. Stat. 335 (Ind.); *Smith v. Parks*, 22 Ind. 61; *Chase v. Abbott*, 20 Iowa, 158; *Dassler's Stat. Kans. (1876) Ch. 68, § 1*; *Ducland v. Rousseau*, 2 La. An. 168; *Comp. Laws Mich. (1871) 1775*; *Gorham v. Arnold*, 22 Mich. 247; *Adams v. Corriston*, 7 Minn. 456; *Berthold v. Fox*, 13 Minn. 501; *Kyger v. Ryley*, 2 Neb. 20; *Webb v. Hoselton*, 4 Neb. 308; 2 *Rev. Stat. N. Y.*, p. 312, § 57; *Murray v. Walker*, 31 N. Y. 396; *Trimm v. Marsh*, 54 N. Y. 604; *Besser v. Hawthorne*, 3 Oreg. 129; *Thayer v. Crammer*, 1 McCord Ch. 395; *Nixon v. Bynum*, 1 Bailey, 148; *Hughes v. Edwards*, 9

held in some of the last class of cases, that although the mortgagor is lawfully in possession, and cannot be ejected even after the condition has been broken, yet if he delivers the possession to the mortgagee, he cannot by any action regain it as long as the mortgage is not satisfied. His only remedy is to redeem the mortgage.¹

§ 423. **Special agreements in respect to possession.**—But the right to possession before foreclosure may be changed by agreement of the parties. If, according to the law, the mortgagor is entitled to possession, by agreement the mortgagee may be given a right of entry at any time before foreclosure; and if the mortgagee has by law the right of possession, his right of entry may be restrained until condition broken, or taken away altogether. If the purposes and the object of the mortgage require the possession to be given to the party not entitled thereto by law, the agreement to vest it in him will be implied from those circumstances. The implication must, however, be a necessary one; otherwise nothing but an express agreement will have that effect.² The mortgagor may also agree to pay rent for his occupation of the land during the continuance of the mortgage. In which case the relation of landlord and tenant arises between the mortgagee and mortgagor, and on default in the payment of the rent, the mortgagee could recover the possession.³

§ 424. **Rents and profits.**—Whoever is in actual possession is entitled to the rents and profits issuing from the mortgaged premises. If it be the mortgagor, he takes them free from any claim on the part of the mortgagee, even where he is in possession by sufferance only, and where the property is not sufficient to satisfy the mortgage debt.⁴

Wheat, 489; *Durand v. Isaacks*, 4 McCord, 54; *Wright v. Henderson*, 12 Texas, 43; *Walker v. Johnson*, 37 Texas, 127; *Word v. Trask*, 7 Wis. 566. But where the common law rule has been changed by statute, the statute will not affect the mortgagee's right of possession under the mortgages already in existence. The statute will only apply to future mortgages. *Blackwood v. Van Fleet*, 11 Mich. 252; *Morgan v. Woodward*, 1 Ind. 321; *Shaw v. Hoadley*, 8 Blackf. 165.

¹ *Hubbell v. Moulson*, 53 N. Y. 225; *Mickles v. Townsend*, 18 N. Y. 584; *Watson v. Spence*, 20 Wend. 260; *Den v. Wright*, 7 N. J. L. 175; *Mitchell v. Bogan*, 11 Rich. L. 681; *Hennesy v. Farrell*, 20 Wis. 42; *Stark v. Brown*, 12 Wis. 572; *Roberts v. Sutherland*, 4 Oreg. 219; *Pace v. Chadderdon*, 4 Minn. 49; *Frink v. Le Roy*, 49 Cal. 314; *Dutton v. Warschauer*, 21 Cal. 609; *Eyster v. Gaff*, 2 Col. 228; *Avery v. Judd*, 22 Wis. 262; *Newton v. McKay*, 30 Mich. 380; *Cook v. Cooper*, 18 Oreg. 142; *Rodriguez v. Hayes*, 76 Tex. 235.

² *Flagg v. Flagg*, 11 Pick. 475; *Hartshorn v. Hubbard*, 2 N. H. 453; *Smith v. Parks*, 22 Ind. 61; *Brown v. Cram*, 1 N. H. 169; *Chase v. Abbott*, 20 Iowa, 158; *Wales v. Mellen*, 1 Gray, 512; *Dearborn v. Dearborn*, 9 N. H. 117; *Clay v. Wren*, 34 Me. 187; *Norton v. Webb*, 35 Me. 218;

Brown v. Leach, 35 Me. 39; *Duval v. McLoskey*, 1 Ala. 708; *Knox v. Easton*, 38 Ala. 345; *Fogarty v. Sawyer*, 17 Cal. 589; *Carroll v. Balance*, 26 Ill. 9; *Chicks v. Willetts*, 2 Kans. 384; *Stewart v. Barrow*, 7 Bush, 368; *Redman v. Sanders*, 2 Dana, 68; *Brown v. Stewart*, 1 Md. Ch. 87; *Leighton v. Preston*, 9 Gill, 201; *George's Creed Coal, &c. Co. v. Detmold*, 1 Md. 237; *O'Neill v. Gray*, 39 Hun, 566; *Bryson v. June*, 55 N. J. Super. Ct. 374. But the right will not be implied from a silent acquiescence in the mortgagor's possession, or inferred from a clause in the mortgage that the mortgagee shall take possession upon default. *Stowell v. Pike*, 2 Greenl. 387; *Brown v. Cram*, 1 N. H. 169; *Rogers v. Grazebrook*, Q. B. 898; but see *Jackson v. Hopkins*, 18 Johns. 487. Nor would a parol agreement change the law in reference to the right of possession. *Colman v. Packard*, 16 Mass. 39.

³ *Murray v. Riley*, 140 Mass. 490.

⁴ *Boston Bk. v. Reed*, 8 Pick. 459; *Mayo v. Fletcher*, 14 Pick. 525; *Kunkle v. Wolfersberger*, 6 Watts, 131; *Noyes v. Rich*, 52 Me. 115; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Johnson v. Miller*, 1 Wills, 416; *Gelston v. Burr*, 11 Johns. 482; *Astor v. Turner*, 11 Paige, 436; *Mitchell v. Bartlett*, 52 Barb. 319; *Clason v. Corley*, 5 Sandf.

And even where the mortgagor is in possession by lawful right, if the property is an insufficient security, the mortgagee may apply for the appointment of a receiver, and the rents and profits accruing thereafter will be applied to the liquidation of the debt.¹ But to entitle the mortgagee to the appointment of a receiver, special equitable grounds must be alleged; for example, that the mortgagor is insolvent, and the security insufficient. If the mortgagor is insolvent, or the mortgagee possesses other means of protecting himself, the insufficiency of the mortgage security will not support an application for a receiver.² The mortgagee is entitled to a judgment for rents and profits from the date of the decree of foreclosure, or if he has a right to possession before foreclosure, from his demand for possession, when he follows up such demand either by foreclosure or an action of ejectment.³ If the mortgagee is in possession he is entitled to the rents and profits accruing after his entry. And where the land has been leased by the mortgagor, the entry of the mortgagee vests in him the right to call upon the lessee to pay the rent to him.⁴ If, however, the lease be subject to the mortgage, *i. e.*, executed subsequently, since there is no privity of estate between the mortgagee and the lessee, either party may consider the lease defeated by the entry, and no rent will become due thereon, if either party should so elect. And any agreement between the parties looking to a continuance of the lease, is in fact a new lease.⁵ But where the lease takes precedence to the

417; *Wilder v. Houghton*, 1 Pick. 87; *Pullan v. C. & C. Air Line R. R.*, 5 Biss. 237; *Childs v. Hurd*, 32 W. Va. 66. It is held in Massachusetts, that if the mortgaged property is not sufficient in value to satisfy the debt, after entry to foreclose, the mortgagee may recover of the mortgagor for past use and occupation. *Merrill v. Bullock*, 105 Mass. 486; *Morse v. Merritt*, 110 Mass. 458.

¹ *Post v. Door*, 4 Edw. Ch. 412; *Lofsky v. Maujer*, 3 Sandf. Ch. 69; *Astor v. Turner*, 11 Paige, 436; *Clason v. Corley*, 5 Sandf. Ch. 447; *Mitchell v. Bartlett*, 51 N. Y. 442; *Myers v. Estell*, 48 Miss. 372; *Douglass v. Cline*, 12 Bush, 608; *Child v. Hurd*, 32 W. Va. 66.

² *Bk. of Ogdensburg v. Arnold*, 5 Paige, 40; *Williams v. Robinson*, 16 Conn. 517; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Corttey v. Hathaway*, 11 N. J. Eq. 39; *Hackett v. Snow*, 10 Ired. 230; *Oliver v. Decatur*, 4 Cranch C. Ct. 458; *Fribbie v. Bateman*, 24 N. J. Eq. 28; *Williamson v. New Albany R. Co.*, 1 Biss. 201; *Whitehead v. Wooten*, 43 Miss. 523; *Pullan v. C. & C. R. R.*, 4 Biss. 35; *First Nat. Bank v. Cage*, 79 Ill. 206; *Callanan v. Shaw*, 19 Iowa, 183; *Morrison v. Buckner*, 1 Hempst. 442; *Syracuse Bk. v. Tallman*, 31 Barb. 201.

³ *Wilder v. Houghton*, 1 Pick. 87; *Mayo v. Fletcher*, 14 Pick. 525; *Haven v. Adams*, 8 Allen, 368; *Northampton Mills v. Ames*, 8 Metc. 1; *Hill v. Jordan*, 30 Me. 367; *Bk. of Washington v. Hupp*, 10 Gratt. 23; *Forlough v. Bowlin*,

29 Ill. App. 471; *Jones on Mort.* 670. This rule naturally can apply only to strict foreclosure, where the mortgagee is not entitled to possession after default. And where in strict foreclosure a certain time is given after the decree, within which the land might still be redeemed, the judgments for rents and profits can only be had after this period of redemption. And where the property is sold under foreclosure, the rents and profits do not accrue to the purchaser until the delivery of the deed to him, and perhaps not until he has made a demand for possession under his deed. *Clason v. Corley*, 5 Sandf. Ch. 447; *Mitchell v. Bartlett*, 52 Barb. 319; *Astor v. Turner*, 11 Paige, 436.

⁴ *Smith v. Shepherd*, 15 Pick. 147; *Stone v. Patterson*, 19 Pick. 476; *Kimball v. Lockwood*, 6 R. I. 139; *Russell v. Allen*, 2 Allen, 42; *Welch v. Adams*, 1 Metc. 494; *Hill v. Jordan*, 30 Me. 367; *Northampton Mills v. Ames*, 8 Metc. 1; *Turner v. Cameron*, 5 Exch. 932; *Pope v. Biggs*, 9 B. & C. 245; *Bk. of Washington v. Hupp*, 10 Gratt. 23.

⁵ *Russell v. Allen*, 2 Allen, 44; *Smith v. Shepherd*, 15 Pick. 147; *Mayo v. Fletcher*, 14 Pick. 525; *Watts v. Coffin*, 11 Johns. 495; *Jones v. Clark*, 20 Johns. 51; *Johnson v. Delancey*, 11 Johns. 365; *Kimball v. Lockwood*, 6 R. I. 138; *Syracuse City Bk. v. Tallman*, 31 Barb. 207; *Magill v. Hinsdale*, 6 Conn. 464; *McKircher v. Hawley*, 16 Johns. 289; *Hemphill v. Giles*, 66 N. C. 512; *Sanders v. Vansickles*, 8 N. J. L. 315; *Pope v. Biggs*, 9 B. & C. 245; *Peters v. Elkins*,

mortgage, the entry of the mortgagee will not defeat the lease in any event. The mortgagee may, however, compel the lessee to pay to him all rent accruing after entry, which has not been paid over to the mortgagor before the lessee received notice of the execution of the mortgage. But payment to the mortgagor before such notice even of rent in advance which falls due afterwards, if *bona fide*, will constitute a good defense to any action by the mortgagee.¹

§ 425. **Mortgagee's liability for rents received.**—The mortgagee receives the rents and profits, not in his own right, but as trustee or agent for himself and the mortgagor. After deducting the necessary expenses of managing the estate, he must apply them, first, to the liquidation of the accruing interest, and then of the principal of the debt. Whatever surplus remains he holds in trust for the mortgagor, and all others claiming under him.² The mortgagee in possession cannot apply such surplus to the liquidation of any other debts due to him from the mortgagor, except with the latter's consent.³ But where

14 Ohio, 344; *Doe v. Hales*, 7 Bing. 322; *Knox v. Easton*, 38 Ala. 345; *Branch Bk. v. Fry*, 23 Ala. 770; *Lane v. King*, 8 Wend. 584; *Lynde v. Rowe*, 12 Allen, 110; *McDermott v. Burke*, 10 Cal. 580; *Gartside v. Outley*, 58 Ill. 210; 11 Am. Rep. 59; *Weaver v. Belcher*, 3 East, 449; *Rogers v. Humphreys*, 4 A. & E. 299; *Higginbotham v. Barton*, 11 Ad. & El. 307; *Henshaw v. Wells*, 8 Humph. 568; *Morse v. Goddard*, 13 Metc. 177; *Field v. Swan*, 10 Metc. 177. See *Hogsett v. Ellis*, 17 Mich. 351: The lessees in a subsequent lease must attorn in order to be liable to the mortgagee. A mere notice to pay rent will not render them liable. But judgment for *mesne* profits may be had if they continue in possession after demand. *Kimball v. Lockwood*, 6 R. I. 138; *Hill v. Jordan*, 35 Me. 387; *Northampton Mills v. Ames*, 8 Metc. 1; *Morse v. Goddard*, *supra*; *Field v. Swan*, *supra*; *Rogers v. Humphreys*, *supra*; *Evans v. Elliott*, 9 A. & E. 342. But without special agreement the acceptance of rent from the lessee will not bind the mortgagee to the terms and duration of the original lease. It creates only a tenancy from year to year. *Hughes v. Bucknell*, 8 C. & P. 566.

¹ *Rogers v. Humphreys*, 4 Ad. & E. 299; *Moss v. Gallimore*, Dougl. 279; *Fitchburg Cotton Co. v. Melvin*, 15 Mass. 268; *Burden v. Thayer*, 3 Me. 79; *Mirick v. Hoppin*, 118 Mass. 582; *Babcock v. Kennedy*, 1 Vt. 457; *McKiroher v. Hawley*, 16 Johns. 289; *Russell v. Allen*, 2 Allen, 42; *Demarest v. Willard*, 8 Cow. 206; *Kimball v. Lockwood*, 6 R. I. 138; *Baldwin v. Walker*, 21 Conn. 168; *Coker v. Pearsall*, 6 Ala. 542; *Henshaw v. Wells*, 8 Humph. 568; *Myers v. White*, 1 Rawle, 353; *Weidner v. Foster*, 2 Penn. 23; *Hemphill v. Giles*, 66 N. C. 512; see *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Castleman v. Belt*, 2 B. Mon. 157.

² *Bailey v. Myrick*, 52 Me. 136; *King v. Ins. Co.*, 7 Cush. 7; *Ten Eyck v. Craig*, 62 N. C. 406; *Clark v. Bush*, 3 Cow. 151; *Harrison v. Wyse*,

24 Conn. 1; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Seaver v. Durant*, 39 Vt. 105; *Kellogg v. Rockwell*, 19 Conn. 446; *Hunt v. Maynard*, 6 Pick. 489; *Thorp v. Feltz*, 6 B. Mon. 6; *Breckenridge v. Brook*, 2 A. K. Marsh. 335; *Gibson v. Crehore*, 5 Pick. 146; *Davis v. Lassiter*, 20 Ala. 561; *Walton v. Wittington*, 9 Mo. 545; *Anthony v. Rogers*, 20 Mo. 281; *McConnell v. Holobush*, 11 Ill. 61; *Brayton v. Jones*, 5 Wis. 117; *Ten Eyck v. Casad*, 15 Iowa, 524; *Hill v. Hewitt*, 35 Iowa, 563; *Freytag v. Hoeland*, 23 N. J. Eq. 36; *Anderson v. Lanterman*, 27 Ohio St. 104; *Chapman v. Smith*, 9 Vt. 153; *Strang v. Allen*, 44 Ill. 428; *Gilman v. Wills*, 66 Me. 273; *Rouilhac v. Jones*, 78 Ala. 398; *Murdock v. Clarke*, (Cal. 1890) 24 Pac. 272; *Caldwell v. Hall*, 49 Ark. 508. But the mortgagee is only accountable for the rents and profits in equity, and then only as an incident to an action for foreclosure, or for the redemption of the mortgaged premises. *Farrall v. Lovel*, 3 Atk. 723; *Gordon v. Hobart*, 2 Story, 243; *Hubbell v. Moulson*, 53 N. Y. 225; *Boston Iron Co. v. King*, 2 Cush. 400; *Seaver v. Durant*, 39 Vt. 103; *Weeks v. Thomas*, 24 Me. 465; *Givens v. McCalmott*, 4 Watts, 464; *Bell v. Mayor N. Y.*, 10 Paige, 49. And where the rents and profits collected by the mortgagee are more than sufficient to satisfy the mortgage debt, and the mortgagee is irresponsible, a receiver may be appointed, pending the action to redeem, to take charge of subsequently accruing rents. *Bolles v. Duff*, 35 How. Pr. 481; *Quinn v. Brithalge*, 3 Edw. Ch. 314. Until applied by judgment of the court to the payment of the debt, there is no legal satisfaction of the mortgage by the receipt of rents and profits to the full amount of the mortgage debt. *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519.

³ *Caldwell v. Hall*, 49 Ark. 508; *Demick v. Cuddily*, 72 Cal. 110; but see, *contra*, *Borel v. Kappeler*, 79 Cal. 342.

the mortgagor consents, a judgment creditor cannot interpose his objection.¹ If the mortgagee in possession holds under a second mortgage, it has been held that he must apply the rents first to the liquidation of the first mortgage debt.² But it would seem that the first mortgagee would in that case have no more claim to the rents than he would when the mortgagor is in possession.

Although the mortgagee does not, by taking possession of the land, assume the responsibilities of a guarantor of the rents, in the collection of the rent he is under an obligation to use that care which might be expected from a reasonably prudent man. And if, by reason of his negligence in respect thereto, any portion of the rents and profits was lost, he would be held responsible for them to the same extent as if he had actually received them. Where he enters into possession before the breach of the condition, a much greater degree of care is required of him than after the breach.³ And as a corollary to this rule, if the mortgagee fails to obtain as high a rent as he might have secured—as where he refuses to let to the tenant offering the highest rent—he will be liable for this loss. But a clear case of negligence or willful disregard of the mortgagor's interest must be established, in order to hold him to account on this ground. The mere failure to obtain the highest rent possible is not a sufficient ground of liability.⁴ Where the rents and profits have been increased by permanent improvements made by himself, whether he is accountable for such increase to the mortgagor depends upon the character of the improvements. If they be in the nature of accessions to the land, or, in other words, fixtures, the erection of costly buildings, etc., he need not account for the increased rents and profits, unless the mortgagor has

¹ *Whitney v. Paynor*, 74 Wis. 289.

² *Crawford v. Munford*, 29 Ill. App. 445.

³ *Hood v. Easton*, 2 Giff. 692; *Robertson v. Campbell*, 2 Call, 421; *Hughes v. Williams*, 12 Ves. 493; *Sparhawk v. Willis*, 5 Gray, 429; *Strong v. Blanchard*, 4 Allen, 538; *Richardson v. Wallis*, 5 Allen, 78; *Saunders v. Frost*, 5 Pick. 259; *Bernard v. Jennison*, 27 Mich. 230; *Shaef-fer v. Chambers*, 5 Halst. 548; *Milliken v. Bailey*, 61 Me. 316; *Van Buren v. Olmstead*, 5 Paige, Ch. 9; *Walsh v. Rutgers Ins. Co.*, 13 Abb. Pr. 33; *Barron v. Paulling*, 38 Ala. 292; *Hogan v. Stone*, 1 Ala. 496; *Moore v. Titman*, 44 Ill. 367; *Strong v. Allen*, 44 Ill. 428; *Bainbridge v. Owen*, 2 J. J. Marsh. 463; *Benham v. Rowe*, 2 Cal. 387; *Harper v. Ely*, 70 Ill. 581; *George v. Wood*, 11 Allen, 42; *Hubbard v. Shaw*, 12 Allen, 122; *Givens v. McCalmont*, 4 Watts, 460; *Lupton v. Almy*, 4 Wis. 242; *Ackermann v. Lyman*, 20 Wis. 454; *Guthrie v. Kahle*, 46 Penn. 333; *Gerish v. Black*, 104 Mass. 400; *Miller v. Lincoln*, 6 Gray, 556; *Brandon v. Brandon*, 10 W. R. 287; *Hagthorp v. Hook*, 1 Gill & J. 270; *Reynolds v. Canal B'k'g Co.*, 30 Ark. 520; *Murdoch v. Clarke*, (Cal. 1890) 24 Pac. 272. If he has kept no account of the rents and profits received, the

mortgagee will be charged with a reasonable rent, *i. e.*, what might be had with proper diligence. *Dexter v. Arnold*, 2 Sumn. 108; *Gordon v. Lewis*, *Id.* 150; *Van Buren v. Olmstead*, 5 Paige, 9; *Clark v. Smith*, 1 N. J. Eq. 121; *Montgomery v. Chadwick*, 7 Iowa, 114. And if the mortgagee remains in possession himself, he will be charged for rent to the full value of the land, the amount being determined by expert testimony. *Gordon v. Lewis*, *supra*; *Montgomery v. Chadwick*, *supra*; *Holabird v. Burr*, 17 Conn. 556; *Kellogg v. Rockwell*, 19 Conn. 446; *Moore v. Cable*, 1 Johns. Ch. 385; *Chase v. Palmer*, 25 Me. 341; *Trulock v. Robey*, 15 Sim. 265; *Van Buren v. Olmstead*, *supra*; *Moore v. Degraw*, 5 N. J. Eq. 346; *Powell v. Williams*, 14 Ala. 476; *Johnson v. Miller*, 1 Wils. 416; *Saunders v. Wilson*, 34 Vt. 318; *Barrett v. Neilson*, 54 Iowa, 41; 37 Am. Rep. 183; *Clark v. Clark*, 62 N. H. 267.

⁴ *Hughes v. Williams*, 12 Ves. 493; *Hubbard v. Shaw*, 12 Allen, 123; *Rowe v. Wood*, 2 J. & W. 553; *Anon.*, 1 Vern. 45; *Jones on Mort.*, § 1123; *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

indemnified him for the cost of their erection, or he has been so paid by the use of them. But where the improvement is the result of his labor upon the land, or where wild lands have been cleared, he must make returns of such improved rents.¹

§ 426. **Insurance of the mortgaged premises.**—Both the mortgagor and the mortgagee have insurable interests in the premises, and they may insure their respective interests at the same time. The mortgagee can only insure to the amount of his debt. Where he takes out a policy in his own name, pays the premium, and cannot, by the terms of the mortgage, call upon the mortgagor to refund such payments, he takes the insurance money, in case of loss by fire, free from any right of the mortgagor to have it applied to the liquidation of the mortgage debt. He can recover the insurance, and then proceed to collect the debt.² But if he insures the premises at the request of the mortgagor, or does so in consequence of the neglect of the mortgagor, and at his expense, as he may do if the mortgage contains a covenant providing for the insurance of the premises by the mortgagor, the mortgagor will be subrogated to the benefit of the insurance, and the insurance money must be applied to the debt.³ Under such circumstances, the mortgagee would have a claim against the mortgagor and against the mortgaged property of reimbursement for the premiums paid by him.⁴ But, although the mortgagee is entitled, as against the mortgagor, to the full benefit of the insurance, where there is no covenant of insurance, it is not so certain that he will, as against the insurance company, be permitted to recover to his own use both the debt and the insurance money. Some of the courts hold that

¹ *Moore v. Cable*, 1 Johns. Ch. 385; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Morrison v. McLeod*, 2 Ired. 108; *Montgomery v. Chadwick*, 7 Iowa, 134; *Clark v. Smith*, 1 N. J. Eq. 121; *Givens v. McCalmont*, 4 Watts, 460; see 2 Washb. on Real Prop. 224, 225; but see *Merriam v. Barton*, 14 Vt. 501; *Stoney v. Shultz*, 1 Hill, 464.

² *Ring v. State Ins. Co.*, 7 Cush. 1; *Sussex Mut. Ins. Co. v. Woodruff*, 2 Dutch. 541; *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 271; *Kernschan v. Bowery Ins. Co.*, 17 N. Y. 428; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Carpenter v. Ins. Co.*, 16 Pet. 495; *Russell v. Southard*, 12 How. 139; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Springfield Fire Ins. Co. v. Allen*, 43 N. Y. 389; 3 Am. Rep. 711; *White v. Brown*, 2 Cush. 412; *Harding v. Townsend*, 43 Vt. 536; *Dobson v. Land*, 8 Hare, 216; *Fowler v. Palmer*, 5 Gray, 549; *Clark v. Wilson*, 103 Mass. 219; *Williams v. Ins. Co.*, 107 Mass. 377; 9 Am. Rep. 41; *Bellamy v. Brickenden*, 2 Johns. & H. 137; *Ely v. Ely*, 80 Ill. 532; *Cushing v. Thompson*, 34 Me. 496; *Bean v. A. & St. L. R. R.*, 58 Me. 82; *King v. Mut. Ins. Co.*, 7 Cush. 1; *Brant v. Gallup*, 111 Ill. 487.

³ *Concord, &c. Ins. Co. v. Woodbury*, 45 Me. 447; *Graves v. Hampden Ins. Co.*, 10 Allen. 285;

Callahan v. Linthicum, 43 Md. 97; 20 Am. Rep. 106; *Gordon v. Ware Sav. Co.*, 115 Mass. 588; *King v. Mut. Ins. Co.*, 7 Cush. 1; *Clark v. Wilson*, 103 Mass. 221; *Larrabell v. Lumbert*, 32 Me. 97; *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Waring v. Loder*, 53 N. Y. 581; *Mix v. Hotchkiss*, 14 Conn. 32; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Fowler v. Palmer*, 5 Gray, 549; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. L. 140; 20 Am. Rep. 372; *Nicholas v. Baxter*, 5 R. I. 491. And when the mortgage contains an insurance clause, and an insurance policy is taken out by the mortgagee upon the default of the mortgagor to do so, the policy is presumed to be taken out for the benefit of both parties, and the mortgagee cannot refuse to apply it to the debt. *Foster v. Van Reed*, 5 Hun, 321; *Buffalo Steam Engine Works v. Ins. Co.*, 17 N. Y. 406; *Blinton v. Hope Ins. Co.*, 45 N. Y. 454; *Waring v. Loder*, 53 N. Y. 581; *Honore v. Lamar Ins. Co.*, 51 Ill. 409. And in such cases, the fact that the debt has been paid will not prevent a recovery of the insurance money. The mortgagor's interest in the policy keeps it alive. *Norwich Ins. Co. v. Boomer*, *supra*; *Concord Ins. Co. v. Woodbury*, *supra*; *Waring v. Loder*, *supra*.

⁴ *McLean v. Burr*, 16 Mo. App. 240.

the insurance company will be subrogated to the rights of the mortgagee under the mortgage in the proportion that the insurance paid bears to the mortgage debt;¹ while the courts of Massachusetts sustain the doctrine that he may recover both the insurance and the debt, discharged of any right of subrogation in the insurance company, on the ground that the premiums paid on the policy are a good and adequate consideration for the risk assumed, and prevent any claim on the part of the company to the equitable right of subrogation.² The mortgagor may insure to the full value of the premises, irrespective of the mortgagee's interest. A mortgage is not such an alienation as will defeat the policy of insurance—not even so far as to reduce the mortgagor's insurable interest to the equity of redemption.³ And in the

¹ *Concord Ins. Co. v. Woodbury*, 45 Me. 447; *Ætna Ins. Co. v. Tyler*, 16 Wend. 397; *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541; *Kernochan v. N. Y. Bowery Ins. Co.*, 17 N. Y. 428; *Ulster Co. Sav. Inst. v. Leake*, 73 N. Y. 161; 29 Am. Rep. 115; *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Callanan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106.

² *King v. Ins. Co.* 7 Cush. 1; *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Clark v. Wilson*, 103 Mass. 221; *Foster v. Equitable Ins. Co.*, 2 Gray, 216; *Dobson v. Land*, 8 Hare, 216. In *King v. Ins. Co.*, *supra*, Chief Justice Shaw said: "He (the mortgagee) surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity of contract between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee." * * * "What, then, is there inequitable, on the part of the mortgagee, towards either party in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally secured in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgage a full and satisfactory equivalent." Perhaps the true theory lies between these opposite positions of the courts. The Massachusetts court is undoubtedly correct in its position, that there is no equitable ground for the application of the doctrine of subrogation. But it is incorrect to go farther and hold that the mortgagee may recover both sums to his own use. A mortgagee insures only his interest in the mortgaged premises, and that interest is exhausted when the debt is paid.

Graves v. Hampden Ins. Co., 10 Allen, 283; *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541. From this position it is an easy step to say, that when the mortgage property after the loss by fire is sufficient to satisfy the mortgage debt, and it is *actually* satisfied, either by foreclosure or by payment by the mortgagor, the mortgagee has sustained no loss. See *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 423; *Carpenter v. Providence, &c. Ins. Co.*, 16 Pet. 495; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253. *Contra*, *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343. The mortgage may proceed either against the insurance company on the policy, or against the mortgagor on the mortgage, and neither of them can object, or compel him to proceed against both. Nor has either a claim against the other. But if the mortgagee does recover from both, the position of the mortgage, in respect to the insurance company, is the same as if the mortgagor had paid the debt, before application had been made for the insurance money. In the latter case, he could not recover of the insurance company, for he had suffered no loss. And it would seem but natural, that the insurance company may be permitted to institute a suit against the mortgagee for money had and received, if after the payment of the insurance money the mortgagor satisfied the mortgage. The position does not conflict with the rules of equity in reference to subrogation, while it is at the same time more consonant with the general principles underlying the laws of insurance.

³ *Strong v. Ins. Co.*, 10 Pick. 40; *Tuck v. Hartford Ins. Co.*, 56 N. H. 326; *Nichols v. Baxter*, 5 R. I. 494; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; 27 Am. Rep. 582; *Fame v. Wenans*, 1 Hopk. Ch. 283; *Stephens v. Mut. Ins. Co.*, 43 Ill. 325; *Dyers v. Ins. Co.*, 35 Ohio St. 606; 35 Am. Rep. 623; *Manhattan Ins. Co. v. Weill*, 23 Gratt. 382; 26 Am. Rep. 364; *Ill. Ins. Co. v. Stanton*, 57 Ill. 354; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; *Am. Rep.* 115. And the mortgagor continues to have an insurable interest in the property, as long as his right of redemption is not completely barred. *Gordon v. Ins. Co.*, 2 Pick. 249; *Buf-*

absence of the covenant requiring the mortgagor to keep the premises insured, the mortgagee has not the right to demand the appropriation of the insurance money to the payment of the mortgage debt.¹ But where the mortgage calls for the insurance of the premises, and the mortgagor performs the covenant, the mortgagee acquires therein a beneficial interest, and is entitled to have the insurance money applied to the debt.² And so, also, if the insurance covers one of two or more pieces of property included in the same mortgage, the owners of the other pieces of property have the right to require the application of the insurance money to the payment of the debt.³ But where the loss is made payable to the mortgagor, or is assigned to the mortgagee without the consent of the company, alienation by the mortgagor of his interest will defeat the policy, even as to the mortgagee. For the complete protection of the mortgagee, the policy should be assigned to him with the consent of the company, and the assignment should be made to appear on the company's books as well as on the face of the policy. When the policy is in this shape, the mortgagee, in case of loss, receives the insurance money in trust to apply it to the debt, and such application may be enforced, not only by the mortgagor, but by every one claiming through him and subject to the mortgage. The surplus, if any, goes to the mortgagor and those in privity with him.⁴

falo Steam Engine Co. v. Ins. Co., 17 N. Y. 401; *Cheney v. Woodruff*, 54 N. Y. 98; *Strong v. Ins. Co.*, *supra*; *Waring v. Loder*, 53 N. Y. 581. Although the existence of a mortgage does not reduce the insurable interest of the mortgagor, still it is held in some of the states that, if inquiry is made as to them, it becomes a material fact, and misrepresentations, concerning their existence or the amount secured by them, will vitiate the policy. *Davenport v. Ins. Co.*, 6 Cush. 349; *Brown v. People's Ins. Co.*, 11 Cush. 280; *Bowditch Ins. Co. v. Winslow*, 8 Gray, 38; *Packard v. Agawan Ins. Co.*, 2 Gray, 334; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 353; *contra*, *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618.

¹ *Carter v. Rockett*, 8 Paige Ch. 437; *Nichols v. Baxter*, 5 R. I. 491; *Hancock v. Fishing Ins. Co.*, 3 Sumn. 132; *Stearnes v. Quincy Mut. Ins. Co.*, 124 Mass. 61; 26 Am. Rep. 647; *Wilson v. Hill*, 3 Metc. 66; *Vandegraff v. Medlock*, 3 Port. 389; *Plimpton v. Ins. Co.*, 43 Vt. 497; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Foster v. Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544; *Carpenter v. Providence, &c. Ins. Co.*, 66 Pet. 495; *Thomas v. Vonkapff*, 6 Gill & J. 372; *McDonald v. Black*, 20 Ohio, 185; *Powles v. Innes*, 11 M. & W. 10; *Vernon v. Smith*, 5 B. & A. 1; *De Forest v. Fulton Ins. Co.*, 1 Hall, 108; *Faure v. Winans*, 1 Hopk. Ch. 283; *Neale v. Reed*, 3 Dowl. & Ry. 158.

² *Concord, &c. Ins. Co. v. Woodbury*, 45 Me. 447; *Gordon v. Ware Savings Ins. Co.*, 115 Mass. 588; *Cromwell v. Brooklyn Ins. Co.*, 44 N. Y. 42; *Carter v. Rockett*, 8 Paige, 437; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *In re Sands Ale Brewing*

Co., 3 Biss. 175; *Miller v. Aldrich*, 31 Mich. 408; *Giddings v. Seevers*, 24 Md. 363; *Burns v. Collins* 64 Md. 215; *Thomas v. Vonkapff*, 6 Gill & J. 372; *Nichols v. Baxter*, 5 R. I. 491; *Brant v. Gallup*, 111 Ill. 487.

³ *Conn. Mut. Life Ins. Co. v. Scammon*, 117 U. S. 634.

⁴ *Macomber v. Cambridge Ins. Co.*, 8 Cush. 133; *Grosvenor v. Atlantic Ins. Co.*, 17 N. H. 391; *Luckey v. Gannon*, 37 How. Pr. 134; *Boyd v. Cudderback*, 31 Ill. 119; *King v. State Ins. Co.*, 7 Cush. 1; *Fowley v. Palmer*, 5 Gray, 549; *Graves v. Hampden Ins. Co.*, 19 Allen, 382; *Concord, &c. Ins. Co. v. Woodbury*, 45 Me. 447; *Larrabee v. Lambert*, 32 Me. 97; *Waring v. Loder*, 53 N. Y. 581; *Clark v. Wilson*, 103 Mass. 221; *Mix v. Hotchkiss*, 14 Conn. 32. Where the insurance is obtained in the name of the mortgagor, but the policy contains a provision, that the loss, if any, is to be paid to the mortgagee; generally it is required that suit on the policy must be instituted in the mortgagee's name, or jointly with the mortgagor. *Ennis v. Harmony Ins. Co.*, 3 Bosw. 516; *Concord Mut. Ins. Co. v. Woodbury*, 45 Me. 447; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Frink v. Hampden Ins. Co.*, 45 Barb. 384; *Martin v. Franklin Ins. Co.*, 38 N. J. L. 140. But with the consent of the mortgagee, the mortgagor may bring the suit alone in his own name. *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Farrow v. Ins. Co.*, 18 Pick. 53; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52; *Turner v. Quincy Ins. Co.*, 109 Mass. 568; *Illinois Ins. Co. v. Stanton*, 67 Ill. 354.

§ 427. **Assignment of the mortgage.**—Whether the mortgagee's interest be considered a legal estate or only a lien, it is clear, since the mortgage is in form a conveyance, and is required to be recorded like all other conveyances, that the proper mode of assigning it is by deed or instrument of the same character as the mortgage itself, either separate from or written on the back of the mortgage, together with the assignment and delivery of the instrument of indebtedness, if there be any. Such an assignment would vest the entire legal interest of the mortgagee in the assignee.¹ Whether a deed is absolutely required to assign the legal interest of the mortgagee depends upon the construction placed upon mortgages in the state in which the question arises. And, in determining this question, it must be observed that, although the assignment of the mortgage debt, irrespective of its effect upon the mortgage, will be governed by the *lex loci contractus*, the assignment of the mortgage itself must conform to the law of the place where the mortgaged land is situated.²

§ 428. **Assignment under the lien theory.**—Although it is still held in those states which have, to a greater or less degree, discarded the common law theory, that an effectual *legal* assignment of the mortgage requires a deed proved and acknowledged like all other deeds of conveyance, it is there held that, the debt being the principal thing and the mortgage only a security or lien, an assignment of the debt will operate as an equitable assignment of the mortgage, binding upon all persons having notice, and giving to the assignee the power in equity to exercise all the rights of the mortgagee.³ Under

¹ Jones on Mort., § 736; 2 Washb. on Real Prop. 113-118.

² Story on Confl., §§ 363, 364; Goddard v. Sawyer, 9 Allen, 78. But this is not the case in regard to the equitable assignment of the mortgage, effected by the transfer of the debt. The equitable rights of the parties are governed by the *lex loci contractus*. See Hoyt v. Thompson, 19 N. Y. 207; Dundas v. Bowler, 3 McLean, 397; Murrell v. Jones, 40 Miss. 565.

³ Wolcott v. Winchester, 15 Gray, 461; Vose v. Handy, 2 Greenl. 322; Southerin v. Mendum, 5 N. H. 420; Northy v. Northy, 45 N. H. 144; Blake v. Williams, 36 N. H. 39; Langdon v. Keith, 9 Vt. 299; Keys v. Wood, 21 Vt. 331; Lawrence v. Knap, 1 Root, 248; Dudley v. Caldwell, 19 Conn. 218; Neilson v. Blight, 1 Johns. Cas. 205; Everett v. Booth, 19 Johns. 491; Parmelee v. Daun, 23 Barb. 461; Kortright v. Cady, 21 N. Y. 261; Wilson v. Troup, 2 Cow. 242; Craft v. Webster, 4 Rayl. 242; Danley v. Hays, 17 Serg. & R. 400; Partridge v. Partridge, 38 Pa. St. 78; Hyman v. Devereux, 63 N. C. 624; Muller v. Wadlington, 5 S. C. 242; Wright v. Eaves, 10 Rich. Eq. 585; Scott v. Turner, 15 La. An. 346; Wilson v. Heyward, 2 Fla. 27; s. c., 6 Fla. 191; Emanuel v. Hunt, 2 Ala. 190; Graham v. Newman, 21 Ala. 497; Dick v. Mawry, 17 Miss. 448; Holmes v. McGinty, 44 Miss. 94; Martin v. McReynolds, 6 Mich. 70;

Ladue v. R. R. Co., 13 Mich. 396; U. S. Bank v. Covert, 13 Ohio, 240; Paine v. French, 4 Ohio, 318; Mills v. Gray, 4 B. Mon. 117; Burdett v. Clay, 8 Ib. 287; Lucas v. Harris, 20 Ill. 165; Mapps v. Sharpe, 32 Ill. 165; Laberge v. Chauvin, 2 Mo. 179; Anderson v. Baumgartner, 27 Mo. 80; Potter v. Stevens, 40 Mo. 229; Burton v. Baxter, 7 Blackf. 297; French v. Turner, 15 Ind. 59; Crow v. Vance, 4 Iowa, 434; Bank of Indiana v. Anderson, 14 Iowa, 544; Fisher v. Otis, 3 Chand. 83; Andrews v. Hart, 17 Wis. 297; Ord v. McKee, 5 Cal. 575; Willis v. Farley, 24 Cal. 397; Kurtz v. Sponable, 6 Kans. 395; Chilton v. Brooks, 71 Md. 445; Lee v. Clark, 89 Mo. 553. But as a general proposition, such an assignee acquires no legal interest, and can therefore exercise none of the rights of a legal owner, such as the maintenance of an action of ejectment or a writ of entry. Cottrell v. Adams, 2 Biss. 351; Young v. Miller, 6 Gray, 152; Dwinel v. Perley, 32 Me. 197; Edgerton v. Young, 43 Ill. 464; Graham v. Newman, 21 Ala. 497; Partridge v. Partridge, 38 Pa. St. 78; Warden v. Adams, 15 Mass. 232. But in the code states where all actions are instituted in the name of the party beneficially interested, the equitable assignee may enforce the mortgage in his own name. Gower v. Howe, 20 Ind. 396; Sangster v. Love, 11 Iowa, 580; Rankin v. Major, 9 Iowa, 297; Clearwater v. Rose, 1 Blackf. 138; Paine v.

this theory, whatever constitutes in the law of commercial paper a good assignment of the debt, will operate as an equitable assignment of the mortgage. Thus a parol sale and transfer of the debt is a good equitable assignment of the mortgage.¹ Where the mortgage is given to secure two or more debts, the assignment of one of them will operate as an assignment of *pro rata* share in the mortgage, unless it is the expressed intention of the parties that the entire mortgage security should be retained for the benefit of the remaining debts.² This is always the case, in the absence of an express contract, where the debts secured by the same mortgage fall due at the same time. But where they fall due at different periods, in very many of the states one is generally held to have priority over the other in the order in which they fall due. The effect is the same as if there had been successive and independent mortgages, one for each debt.³ But it is always competent for the parties to control the priority of the debts secured by the same mortgage, and they may altogether exclude one or more from the enjoyment of the security.⁴ It has also been held that the mortgage debts in the hands of assignees will have priority in the order of their assignment.⁵ Inasmuch as under the lien theory the mortgagee has very few, if any, rights which are enforceable only in law, the equitable assignment of the mortgage affords sufficient protection for the assignee. This is particularly the case in those states where the mortgagee is prohibited from assigning the mortgage without the debt.

§ 429. Assignment of the mortgagor's interest.—The mort-

French, 4 Ohio, 320; *Garland v. Richeson*, 4 Rand. 266; *Kurtz v. Sponable*, 6 Kans. 395; see, also, to the same effect, *Kinney v. Smith*, 2 Green Ch. 14; *Mulford v. Peterson*, 35 N. J. Eq. 127; *Williams v. Morancy*, 3 La. An. 227; *Southerin v. Memum*, 35 N. H. 420; *Rigney v. Lovejoy*, 13 N. H. 247; *Austin v. Burbank*, 2 Day, 396; *Clarkson v. Doddridge*, 14 Gratt. 44; *Runyan v. Mersereau*, 11 Johns. 534. And in those states where the legal title of the mortgage does not pass with the assignment of the debt, equity may compel the holder of the legal title to transfer it to the assignee of the debt, or to maintain the suits necessary for the protection of the assignee. *Wolcott v. Winchester*, 15 Gray, 461; *Crane v. March*, 4 Pick. 131; *Mount v. Suydam*, 4 Sandf. Ch. 399; *Lyon's App.*, 61 Pa. St. 15; *Baker v. Terrell*, 8 Minn. 195.

¹ *Lane v. Duchac*, 73 Wis. 646; *Tiedeman Com. Paper*, § 250.

² *Donley v. Hays*, 17 Serg. & R. 400; *Belding v. Manly*, 21 Vt. 550; *Miller v. Rutherford, &c.* R. R., 40 Vt. 39; *Keyes v. Woods*, 21 Vt. 331; *Cooper v. Ulman, Walk.* (Mich.) 251; *Warden v. Adams*, 15 Mass. 233; *Lane v. Davis*, 14 Allen, 225; *Blair v. White*, 61 Vt. 110; *Pauzel v. Brookmire*, 51 Ark. 105; *In re Preston*, 54 Hun, 10.

³ *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Os-*

borne, 7 Ind. 140; *McVay v. Bloodgood*, 9 Port. 547; *U. S. Bk. v. Covert*, 13 Ohio, 240; *Wood v. Trask*, 7 Wis. 566; *Preston v. Hodges*, 50 Ill. 56; *Funk v. McReynolds*, 33 Ill. 497; *Mitchell v. Laden*, 36 Mo. 532; *Thompson v. Field*, 38 Mo. 325; *Sangster v. Love*, 11 Iowa, 580; *Reeder v. Carey*, 13 Iowa, 274; *Issett v. Lucas*, 17 Iowa, 506; *G. Wathmeys v. Ragland*, 1 Rand. 466; *Wilson v. Hayward*, 6 Fla. 171; *Hunt v. Styles*, 10 N. H. 466; *Larrabee v. Lambert*, 32 Me. 97; *contra*, *Darby v. Hays*, 17 Serg. & R. 400; *Henderson v. Herrod*, 10 Smed. & M. 631; *English v. Carney*, 25 Mich. 178; *Grattan v. Wiggins*, 23 Cal. 30; *Gordon v. Hazzard*, (S. C. 1890) 11 S. E. 100.

⁴ *Bryant v. Damon*, 6 Gray, 165; *Langdon v. Keith*, 9 Vt. 299; *Mechanic's Bk. v. Bk. of Niagara*, 9 Wend. 410; *Eastman v. Foster*, 8 Metc. 19; *Stevenson v. Black*, 1 N. J. Eq. 338; *Wright v. Parker*, 2 Aik. 212; *Collum v. Erwin*, 4 Ala. 452; *Walker v. Dement*, 42 Ill. 272; *Bk. of England v. Tarleton*, 23 Miss. 178; *Cooper v. Ulman, Walk.* (Mich.) 251; *Grattan v. Wiggins*, 23 Cal. 30; *Willett v. Johnson*, 84 Ky. 411; *Morgan v. Kline*, 77 Iowa, 681.

⁵ *Eastman v. Foster*, 8 Metc. 19; *Noyes v. White*, 9 Minn. 640; *contra*, *Page v. Pierce*, 26 N. H. 317; *Stevenson v. Black*, 1 N. J. Eq. 338; *Betz v. Heebner*, 1 Penn. 280; *Henderson v. Herrod*, 18 Miss. 631.

gagor's interest, whether before or after condition broken, at common law or under the lien theory, can only be assigned by deed, for in any case and under all circumstances the mortgagor is considered, as against all the world, except the mortgagee, as the owner of the legal estate, which he can convey as long as his equity of redemption has not been barred or foreclosed.¹ As against the mortgagee, the mortgagor's assignee has merely the rights of the mortgagor under the mortgage; he takes the estate subject to the mortgage. And this is the case with a second mortgagee, as well as with the absolute purchaser.²

§ 430. **The effect of a discharge.**—Where the mortgage is discharged by the mortgagor's payment of the debt, it is extinguished altogether; particularly, where there are junior incumbrances. The mortgagor cannot keep it alive, even though he goes through the formality of an assignment. A merger results from the union of the two interests in one person.³ This is, however, not the rule where the assignee of the mortgagor has assumed the payment of the debt. Payment by the mortgagor in that case operates as an equitable assignment.⁴ And so, also, will there be a merger, where the payment is made by an assignee of the mortgagor who has assumed the payment of the debt.⁵ It has, also, been held that if there are no junior incumbrancers, a satisfied mortgage may be revived, and be made a good and effectual security for a new debt between new parties. But the position is not without doubt as to its soundness.⁶ And it is certainly

¹ Co. Lit. 205 a, *Butler's note*, 96; *White v. Whitney*, 3 Metc. 81; *White v. Rittenmyer*, 30 Iowa, 272; *Bigelow v. Wilson*, 1 Pick. 485; *Buchanan v. Monroe*, 22 Texas, 537; *Newell v. Wright*, 3 Mass. 138; *Hodson v. Treat*, 7 Wis. 263.

² *Hartley v. Harrison*, 24 N. Y. 170; *Andrews v. Fisk*, 101 Mass. 424; *Flanagan v. Westcott*, 11 N. J. Eq. 264; *Kruse v. Scripps*, 11 Ill. 98; *Frost v. Shaw*, 10 Iowa, 491; *First National Bank v. Honeyman*, (Dak. 1839), 42 Mo. 771.

³ *Wadsworth v. Williams*, 100 Mass. 126; *Wade v. Beldmeier*, 40 Mo. 486; *McGiven v. Wheelock*, 7 Barb. 22; *Mead v. York*, 6 N. Y. 449; *Thomas' Appeal*, 30 Pa. St. 378; *Richard v. Talbird*, Rich. Ch. 158; *Swift v. Kraemer*, 13 Cal. 526; *Ledyard v. Chapin*, 6 Ind. 320; *Pelton v. Knapp*, 21 Wis. 63; *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Peckham v. Haddock*, 36 Ill. 38; *Fewell v. Kessler*, 30 Ind. 195; *Perkins v. Steame*, 23 Texas, 561; *Gardner v. James*, 7 R. I. 396; *Champney v. Coope*, 32 N. Y. 543; *Bowman v. Manter*, 33 N. H. 530; *Large v. Van Doren*, 14 N. J. Eq. 208; *Carlton v. Jackson*, 12 Mass. 592; *Kemerer v. Bloom*, 65 Iowa, 363; *Shipley v. Fox*, 69 Md. 572; *Eaton v. Simmonds*, 14 Pick. 98; *Crafts v. Crafts*, 13 Gray, 360; *Cherry v. Monro*, 2 Barb. Ch. 618; *Brown v. Lapham*, 3 Cush. 551, 554; *Wedge v. Moore*, 6 Id. 8; *Comm. v. Chesapeake, & Co.*, 32 Md. 501; *Kilborn v. Robbins*, 8 Allen, 466, 471; *Strong v. Converse*, 8 Id. 557; *Butler v. Seward*, 10 Id. 466; *Bemis v. Call*, 10 Id. 512.

⁴ *Baker v. N. W. Guaranty Loan Co.*, 36 Minn.; *Robinson v. Leavitt*, 7 N. H. 73, 100; *Funk v. McReynold*, 33 Ill. 481, 495; *Baker v. Terrill*, 8 Minn. 195, 199; *Halsey v. Reed*, 9 N. J. Eq. 446; *Kinnear v. Lowell*, 34 Me. 299; *Fletcher v. Chase*, 16 N. H. 38, 42; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Jumel v. Jumel*, 7 Paige, 591; *Cox v. Wheeler*, 7 Id. 248, 257.

⁵ *Mickles v. Townsend*, 18 N. Y. 575; *Stoddard v. Rotton*, 5 Bosw. 378; *Butler v. Seward*, 10 Allen, 466; *Mickles v. Dillaye*, 15 Hun, 296; *Pike v. Goodnow*, 12 Allen, 472; *Strong v. Converse*, 8 Id. 557; *Campbell v. Knights*, 24 Me. 332; *Weed, & Co. v. Emerson*, 115 Mass. 554; *Belmont v. Coman*, 22 N. Y. 438; *Trotter v. Hughes*, 12 Id. 74; *Fowler v. Fay*, 62 Ill. 375; *Hull v. Alexander*, 26 Iowa, 569; *Russell v. Pistor*, 7 N. Y. 171; *Fitch v. Cotheal*, 2 Sandf. Ch. 29; *Lilly v. Palmer*, 51 Ill. 331; *Fry v. Vanderhoof*, 15 Wis. 397; see *Kellogg v. Ames*, 41 N. Y. 250.

⁶ *Marvin v. Vedder*, 5 Cow. 671; *Beardsley v. Tuttle*, 11 Wis. 74; *Walker v. Snediker*, 1 Hoffm. Ch. 145; *Star v. Ellis*, 6 Johns. Ch. 392; *Whiting v. Beebe*, 12 Ark. 498; *Johnson v. Anderson*, 30 Ark. 745; *Hurser v. Anderson*, 4 Edw. Ch. 17; *International Bk. v. Bowen*, 80 Ill. 541; *Jordon v. Furlong*, 19 Ohio St. 89. And it seems the objection to this principle is greatly lessened, if not altogether removed, if the assignment is made at the mortgagor's request to a third person. Although lifeless in this

not recognized as valid against junior incumbrancers.¹ If the mortgage has been delivered up and cancelled through fraud, accident or mistake, the court of equity will revive it and enforce it, at least against the mortgagor and all parties claiming under him, who have notice of the equity. And a subsequent purchaser will be bound by the equity if the mortgage has not been satisfied on the records; for he is compelled to take notice of that fact, and it is sufficient to put him on his inquiry.²

§ 431. **When payment will work an assignment.**—Payment of the debt by the mortgagor, as has been explained, always discharges the mortgage, though the satisfaction by the mortgagee be in form an assignment to himself or to one in trust for him.³ And where the debt is paid by a volunteer—a stranger who is not interested in the mortgaged premises—the mortgage will be discharged and extinguished, unless an assignment has actually been made to him. He cannot set up the claim to an equitable assignment, although he may have paid the debt at the mortgagor's request.⁴ On the other hand, if there is an actual assignment to the volunteer payor, no additional circumstances can make the transaction work a discharge of the mortgage.⁵ But when the payment is made by one who is not under a primary personal obligation to pay, who is secondarily liable as surety or indorser, or who has an interest in the mortgaged property, and, consequently, a right to redeem, payment does not always operate as a discharge. And the question is not determined so much by the form of the acknowledgement of payment as the intention of the party paying. That intention may be derived from the facts connected with the transaction and established by parol evidence. And where it is, beyond a doubt, to the interest of the one paying that the mortgage should be kept alive, equity will look upon the transaction

third person's hands, it will be a good and binding security when assigned to a new creditor upon a new or different consideration. *Bolles v. Wade*, 4 N. J. Eq. 458; *Sheddy v. Gervan*, 113 Mass. 378; *Hoy v. Bramhall*, 11 N. J. Eq. 563; *Goulding v. Bunster*, 9 Wis. 513; *Wilson v. Schoenlamb*, 99 Mo. 96.

¹ *Man v. Elkins*, 10 N. Y. S. 488.

² *Grimes v. Kimball*, 4 Allen, 578; *Joselyn v. Wyman*, 5 Allen, 63; *Howe v. Wilder*, 11 Gray, 267; *Lawrence v. Stratton*, 6 Cush. 163; *Stover v. Wood*, 26 N. J. Eq. 417; *Fassett v. Smith*, 23 N. Y. 252; *Middlesex v. Thomas*, 20 N. J. Eq. 39; *Weir v. Mosher*, 19 Wis. 311; *Vannice v. Bergen*, 16 Iowa, 555; *De Yampert v. Brown*, 28 Ark. 166; *Stanley v. Valentine*, 79 Ill. 544; *Mallet v. Paige*, 8 Ind. 364; *Robinson v. Sampson*, 23 Me. 388. And such relief will also be afforded where mortgage has been satisfied, instead of being assigned. *Dudley v. Bergen*, 23 N. J. Eq. 397; *Champlin v. Laytin*, 18 Wend. 407; *Russell v. Mixer*, 42 Cal. 475; *Bruce v. Bonney*, 12 Gray, 107; *Hughes v. Torrence*, 11 Pa. St. 611; *Charleston City Council v. Ryan*,

23 S. C. 339; 53 Am. Rep. 713; *Crippen v. Chappel*, 35 Kans. 495; *Stiger v. Bent*, 111 Ill. 328. But it must be a mistake of fact. If the satisfaction is obtained through a mistake of law, no relief will be granted, unless, from the tender age or weak mind of the person injured, the charge of undue influence may be established. *Peters v. Florence*, 38 Pa. St. 194; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Bentley v. Whitmore*, 1 Id. 366; *Smith v. Smith*, 15 N. H. 55.

³ See *ante*, § 430, and *Tiedeman Real Prop.* § 333.

⁴ *Downer v. Wilson*, 33 Vt. 1; see *Guy v. De Uprey*, 16 Cal. 196. But see *Crippen v. Chappel*, 35 Kans. 495, where it has been held that one paying the debt at the request of the deceased mortgagor's administrator, in reliance upon the validity of a new mortgage given by the administrator, can claim the rights of an assignee of the old mortgage, although it has been duly cancelled.

⁵ *Brown v. Scott*, 87 Ala. 453.

as an assignment, and not a discharge. Especially is this the case where the person paying has only a part interest in the premises, or is a surety, and by paying becomes entitled to contribution or satisfaction from the mortgagor and others interested in the property. Payment in such cases never works a discharge; the mortgage survives, and may afterwards be enforced against all parties affected with notice.¹ But when such a person pays a mortgage debt, he can insist upon the transfer to him of the notes or other evidences of indebtedness and the mortgage.² It has, however, been held that he cannot require them to be assigned to him.³

§ 432. **Actions for waste.**—If the party in possession—whether mortgagor or mortgagee, or their respective assignees—does anything in respect to the mortgage property which constitutes waste, and as such essentially impairs the value of the inheritance, he will be responsible in damage to the other parties who are interested in the property. But a mortgagor is not guilty of waste, on account of acts of omission. In the absence of an express covenant to repair, he is not guilty of waste, as against the mortgagee, if he fails to keep the premises in repair.⁴ The action is not the technical legal action, but is one in the nature of waste, and in the code pleading would be simply an action for damages.⁵ But the most effective remedy for the

¹ *Hinds v. Ballou*, 44 N. H. 619; *Stantons v. Thompson*, 49 N. H. 272; *Butler v. Seward*, 10 Allen, 466; *Mickles v. Townsend*, 18 N. Y. 575; *Leavitt v. Pratt*, 53 Me. 14; *Kellogg v. Ames*, 41 N. Y. 259; *Abbott v. Kasson*, 72 Pa. St. 185; *Walker v. King*, 44 Vt. 601; *Wadsworth v. Williams*, 100 Mass. 126; *Wade v. Balmier*, 40 Mo. 486; *Champlin v. Laytin*, 18 Wend. 407; *Skillman v. Teeple*, 1 N. J. Eq. 232; *Dudley v. Bergen*, 23 N. J. Eq. 397; *Russell v. Mixer*, 42 Cal. 475; *Baker v. Flood*, 103 Mass. 47; *Ebert v. Gerdling*, 116 Ill. 216; *Stelzich v. Weidel*, 27 Ill. App. 177; *Averill v. Taylor*, 8 N. Y. 44; *Loud v. Lane*, 8 Met. 517; *Bacon v. Bowdoin*, 22 Pick. 401; *McCabe v. Bellows*, 7 Gray, 148; *Gibson v. Crebore*, 3 Pick. 475; *Houghton v. Hapgood*, 13 Pick. 158; *Carli v. Butman*, 7 Me. 102, 105; *Spencer v. Waterman*, 36 Conn. 342; *Foster v. Hilliard*, 1 Story, 77; *Swaine v. Perine*, 5 Johns. Ch. 490; *Bell v. Mayor, &c.*, 10 Paige, 49; *Lamson v. Drake*, 105 Mass. 567; *Davis v. Wetherell*, 13 Allen, 63; *McCabe v. Swap*, 14 Allen, 191; *Newhall v. Savings Bank*, 101 Mass. 431. And payment by a purchaser of the equity of redemption will not operate in equity as an extinguishment of the mortgage, as against the mortgagor, sureties and junior incumbrancers, although the mortgage is formally satisfied and cancelled, unless he has become primarily liable by his assumption of the payment of the mortgage, as the consideration of the conveyance to him. *Savage v. Hall*, 12 Gray, 363; *Pitts v. Aldrich*, 11 Allen, 39; *Abbott v. Kasson*, 72 Pa. St. 183; *Pool v. Hathaway*, 22 Me. 65; *Hatch v. Kimball*, 16 Ib. 146; *Skeel v. Spraker*, 8 Paige Ch. 182; *Millspaugh v. Mc-*

Bride, 7 Paige Ch. 509; *Shin v. Fredericks*, 56 Ill. 443; *Mobile Branch Bank v. Hunt*, 8 Ala. 876; *Lyon v. McIlvaine*, 24 Iowa, 12; *Fitch v. Cotheal*, 2 Sandf. Ch. 23; *Lilly v. Palmer*, 51 Ill. 331; *Mickels v. Townsend*, 18 N. Y. 575; *Frey v. Vanderhoof*, 15 Wis. 397; *Carpenter v. Gleason*, 58 Vt. 244; *Georgia Chemical Works v. Cartledge*, 77 Ga. 547; *Gerdine v. Menage*, 141 Minn. 417. But in law, an actual formal assignment is required to keep the mortgage alive. *Den v. Dimon*, 10 N. J. L. 156; *Kinna v. Smith*, 17 N. J. Eq. 14; *Wade v. Howard*, 11 Pick. 289. And a part owner, who pays the debt may require a formal assignment to him. *Bayles v. Hunted*, 40 Hun. 376. But if the mortgage is paid off by such part owner with funds, in which all the owners are interested, as where the widow pays the debt with the proceeds of the growing crop, she cannot enforce the mortgage against the deceased mortgagor's heirs and distributees. *Skinner v. Chapman*, 78 Ala. 376.

² *Stiger v. Bent*, 111 Ill. 328.

³ *Holland v. Citizen's Sav. Bank*, (R. I. 1890) 19 Atl. 654; *McCulla v. Beadleston*, (R. I. 1890) 20 Atl. 11; but see *contra*, *Nelson v. Loder*, 55 Hun. 173.

⁴ *Union Mut., &c. Ins. Co. v. Union Mills, &c.*, 37 Fed. Rep. 298.

⁵ *Stowell v. Pike*, 2 Greenl. 387; *Smith v. Goodwin*, *Id.* 173; *Frothingham v. McKusick*, 24 Me. 403; *Hagar v. Brainard*, 44 Vt. 302; *Sanders v. Reed*, 12 N. H. 558; *Burnside v. Twitchell*, 42 N. H. 390; *Mayo v. Fletcher*, 14 Pick. 525; *Wilmarth v. Bancroft*, 10 Allen, 348; *Page v. Robinson*, 10 Cush. 99; *Waterman v.*

prevention of waste by the parties to a mortgage is a bill in equity for an injunction, or the appointment of a receiver to take charge of the mortgaged property. Anyone who has an interest, either in the mortgaged premises or in the mortgage debt, may avail himself of these remedies.¹

§ 433. **Process to redeem.**—In those states where the payment or tender of payment after condition broken extinguishes the mortgage, and enables the mortgagor to recover the possession by an action of ejectment, no further process is needed to restore him to the complete title in the land. But where payment or tender of payment, *i. e.*, after breach of the condition, does not have that effect—as is the case under the common law theory—the mortgagor is obliged to resort to a bill in equity to enforce a redemption and cancellation of the mortgage. This equitable remedy may be instituted by the mortgagor or anyone claiming under him. The bill must be accompanied with a tender of payment into the court or with the statement of a willingness to pay if a balance is found to be due after an accounting,² and the decree orders the mortgagee to cancel and deliver up the mortgage and the instrument of indebtedness.³ The action for redemption must be instituted within the period of limitation prescribed for such actions.⁴ Where there are several parties before the court claiming the right to redeem, the court will grant the right of redemption to them in the order of their priority, the one who is last in point of priority being required to redeem all the preceding mort-

Matteson, 4 R. I. 539; Mitchell v. Bogan, 11 Rich. Eq. 686; Lane v. Hitchcock, 14 Johns. 205; Haskin v. Woodward, 45 Pa. St. 44; Van Pett v. McGraw, 4 Comst. 110; Gardner v. Heatt, 3 Denio, 232; Barnett v. Nelson, 54 Iowa, 41; 37 Am. Rep. 183; Moriarty v. Ashworth, 43 Minn. 1. And after condition broken, in the common law states, the mortgagee may have trover or replevin for the timber cut by the mortgagor, against the purchaser of the mortgagor, as well as against the mortgagor himself. Langdon v. Paul, 22 Vt. 205; Gore v. Jennison, 19 Me. 53; Waterman v. Matteson, 4 R. I. 539; Frothingham v. McKusick, 24 Me. 403; Adams v. Corrington, 7 Minn. 456; Kennedy v. Burgess, 38 Mo. 440; Kimball v. Lewiston, &c. Co., 55 Me. 494; *contra*, Peterson v. Clark, 14 Johns. 205; Wilson v. Malthy, 59 N. Y. 126; Cooper v. Davis, 15 Conn. 556; Clark v. Reyburn, 1 Kans. 281.

¹ Brady v. Waldron, 2 Johns. 148; Johnson v. White, 11 Barb. 194; Cooper v. Davis, 15 Conn. 556; Salmon v. Claggett, 3 Bland Ch. 126; Capner v. Farmington Co., 2 Green Ch. 467; Brick v. Getsinger, 1 Halst. Ch. 391; Ensign v. Colburn, 11 Paige, 503; Scott v. Wharton, 2 Hen. & M. 25; Parsons v. Hughes, 12 Md. 1; Gray v. Baldwin, 8 Blackf. 164; McCaslin v. The State, 44 Ind. 151; Nelson v. Pinegar, 30 Ill. 473; Mooney v. Brinkley, 17 Ark. 340; Morrison v. Buckner, Hempst. 442; Adams v. Corrington, 7

Minn. 456; Bunker v. Locke, 15 Wis. 635; Fairbanks v. Cudworth, 33 Wis. 358; Robinson v. Russell, 24 Cal. 467; Hampton v. Hodges, 8 Ves. 105; Robinson v. Litton, 3 Atk. 210; Goodman v. Kine, 8 Beav. 379. But the mortgagee is under no obligation to enjoin, or bring action for waste; and a subsequent incumbrancer or purchaser cannot hold him liable for failing thus to protect the inheritance, and reduce the debt. Knarr v. Conaway, 42 Ind. 260.

² Pryor v. Hollinger, 88 Ala. 405; Franklin v. Ayer, 22 Fla. 654.

³ Beekman v. Frost, 18 Johns. 544; Silsbee v. Smith, 41 How. Pr. 418; Barton v. May, 3 Sandf. Ch. 450; Perry v. Carr, 41 N. H. 371; Edgerton v. McRea, 6 Miss. 183; Daughdrill v. Sweeney, 41 Ala. 310; Anson v. Anson, 20 Iowa, 55; Pitman v. Thornton, 66 Me. 469; Gerrish v. Black, 122 Mass. 76; Halt v. Rees, 46 Ill. 181; Brobst v. Brock, 10 Wall. 536; Manning v. Elliott, 92 N. C. 48; Washburn v. Hammond, (Mass. 1890) 24 N. E. 33; Hazard v. Robinson, 15 R. I. 226; Payor v. Hallinger, 88 Ala. 405. In Pennsylvania, redemption may be asked for in an action of ejectment. Mellon v. Lemmon, 111 Pa. St. 56; Franklin v. Ayer, 22 Fla. 654; but see *contra*, Casserly v. Witherbee, 119 N. Y. 522.

⁴ See *ante*, § 326; see, also, Schlawig v. Fleckenstein, (Iowa, 1890) 45 N. W. 770.

gages, in order that he may acquire the first lien or absolute title.¹ All persons who are interested in the mortgage, either as privies of the mortgagor or mortgagee, are proper parties to an action for redemption. The mortgagee and his assigns are necessary parties. And where there are several parcels of land covered by the mortgage, and the owner of the equity of one wishes to redeem, the owners of the other parcels must be made parties. But this rule does not apply where there are separate mortgages over each for the same debt.²

§ 434. **Who may redeem.**—If the mortgage debt is actually paid, the payment will, as against the mortgagee, extinguish the mortgage and the mortgagee's rights thereunder, whoever pays the debt. But in order that a tender of payment may have that effect, it must be made by someone who is entitled to redeem.³ Anyone who has an interest in the mortgaged premises, claiming under the mortgagor, has this right. And this is the case, whether his interest be legal or equitable, an estate or a lien. The only requisite is a privity of estate with the mortgagor. Among such may be enumerated grantees, subsequent incumbrancers, whether they be junior mortgagees or judgment-creditors, heirs, devisees, personal representatives, tenants for years, the husband for his curtesy, and the widow for her dower or jointure.⁴

¹ *Moore v. Beasom*, 44 N. H. 215; *Brewer v. Hyndman*, 18 N. H. 9; *Archedchare v. Bowes*, 3 Meriv. 216; *Raymond v. Holborn*, 23 Wis. 57; *Buchanan v. Reid*, 43 Minn. 172; *Pamperin v. Scanlan*, 28 Minn. 345; *Parke v. Hush*, 29 Minn. 434. See *ante*, § 334, for a discussion of the persons who may redeem.

² 1 Dan. Ch. Pr. 306, 307; *Winslow v. Clark*, 47 N. Y. 261; *Dias v. Merle*, 4 Paige, 259; *Hilton v. Lathrop*, 46 Me. 297; *Brown v. Johnson*, 53 Me. 246; *Wigg v. Davis*, 8 Greenl. 31; *McCabe v. Bellows*, 1 Allen, 269; *Barker v. Wood*, 9 Mass. 419; *Elliot v. Patton*, 4 Verg. 10; *Wolcott v. Sullivan*, 6 Paige Ch. 117; *Enos v. Southerland*, 11 Mich. 538; *Shaw v. Hoadley*, 8 Blackf. 165; *Woodward v. Wood*, 19 Ala. 213; *Beals v. Cobb*, 51 Me. 348; *Doddy v. Pierce*, 9 Allen, 141; *Boyd v. Allen*, 15 Lea. 81; *Perkins v. Brierfield & Co.*, 77 Ala. 403. Upon the death of the mortgagor, either his heir or the personal representatives may bring the suit, because both are interested in the liquidation of the mortgage. *Enos v. Southerland*, 11 Mich. 538; *Guthrie v. Sorrell*, 6 Ired. Eq. 13; *Gen. Stat. Mass.* (1860) §§ 32, 33. And at common law, upon the death of the mortgagee, both the heirs and personal representatives had to be made parties. *Anon.*, 2 Freem. 52; *Osbourn v. Fallows*, 1 Russ. & M. 741; *Story's Eq. Pl.*, § 188; *Haskins v. Hawkes*, 108 Mass. 379. But under the lien theory of mortgages, the personal representatives of the mortgagee are the only necessary parties. *Copeland v. Yaakum*, 38 Mo. 349. And where a junior mortgagee redeems, he must make the mortgagor, as well as the prior mortgagee, parties

defendant. *Farmer v. Curtis*, 2 Sim. 466; *Caddick v. Cook*, 32 Beav. 70; *Rhodes v. Buckland*, 16 Beav. 212; *Palk v. Clinton*, 12 Ves. 48.

³ *McCulla v. Beadleston*, (R. I. 1890) 20 Atl. 11.

⁴ *Lomax v. Bird*, 1 Vern. 182; *Gibson v. Crehore*, 5 Pick. 146; *Grant v. Duane*, 9 Johns. 591; *Ex parte Willard*, 5 Wend. 94; *Averill v. Taylor*, 8 N. Y. 44; *Manning v. Markel*, 19 Iowa, 104; *Boarman v. Catlett*, 13 Smed. & M. 149; *Scott v. Henry*, 13 Ark. 113; *Moore v. Beasom*, 44 N. H. 215; *Merriam v. Barton*, 14 Vt. 501; *Smith v. Manning*, 9 Mass. 422; *Fray v. Drew*, 11 Jur., n. s., 130; *Burnett v. Dennistor*, 5 Johns. Ch. 35; *Thompson v. Chandler*, 7 Greenl. 377; *Saunders v. Frost*, 5 Pick. 259; *Bacon v. Bowdoin*, 22 Pick. 401; *Goodman v. White*, 27 Conn. 317; *Newhall v. Savings Bank*, 101 Mass. 431; *Brainard v. Cooper*, 10 N. Y. 356; *Hoyt v. Martense*, 16 N. Y. 231; *Dunlap v. Wilson*, 33 Ill. 517; *Melish v. Robertson*, 25 Vt. 603; *Rogers v. Myers*, 68 Ill. 92; *Kimmel v. Willard*, 1 Dougl. (Mich.) 217; *Wiley v. Ewing*, 47 Ala. 418; *Calkins v. Munsell*, 2 Root, 333; *Young v. Williams*, 17 Conn. 393; *McLaughlin v. Curtis*, 27 Wis. 644; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *McArthur v. Franklin*, 16 Ohio St. 193; *Hitt v. Holiday*, 2 Litt. 332; *Van Buren v. Olmstead*, 5 Paige Ch. 9; *Stainback v. Geddy*, 1 Dev. & B. Eq. 479; *Chandler v. Dyer*, 37 Vt. 345; *Bridgeport v. Blinn*, 43 Conn. 274; *Kingsbury v. Buckner*, 70 Ill. 514; *Casserly v. Witherbee*, 119 N. Y. 522; *Buchanan v. Reid*, 43 Minn. 172; *Sanford v. Kane*, 24 Ill. App. 504; s. c., reversed, 127 Ill. 591; *Ryan v. Newcomb*, 23 Ill. App. 113; s. c., reversed, 25 Ill. 91; *Willard v. Finnegan*, 43 Minn. 476; *Barr v. Van Alstine*, 120 Ind. 590.

And in tendering payment the mortgagee or assignee may be required to deliver up the notes or other evidences of indebtedness before actual payment, such a demand would not affect the effectiveness of the tender.¹ But, in order that tender of payment may have the effect of extinguishing the mortgage, the whole debt must be tendered, together with all the interest and costs that have accrued thereon to the date of the tender. Therefore, if the widow, for example, desires to redeem for the preservation of her dower right, she must offer to pay the whole debt. The mortgagee can refuse to accept only her share of it. And this is true of anyone who owns only a portion of the mortgaged premises.²

§ 435. **Accounting by the mortgagee.**—In the action for redemption, in order to determine the amount then due on the mortgage, it is sometimes necessary to have an accounting. An accounting may be ordered whenever the mortgage debt involves a long and tedious account of charges and counter-charges, but it is particularly necessary when the mortgagee has been in possession of the premises, has received the rents and profits of the land, and expended sums of money in keeping the premises in repair. The mortgagor, or other person, praying for redemption, asks for an accounting by the mortgagee. An accounting is an equitable remedy which may be instituted independently of, or in conjunction with, another and the principal suit. The mortgagor and his assigns may ask for an accounting without filing a bill to redeem, or they may request it in connection with the action for redemption. The case is referred to a master in chancery, if there be one, or to a special referee, who ascertains and determines the proper debits and credits of the account between the parties, and reports to the court the balance found due.³ The approval by a court of competent jurisdiction of the mortgagee's account fixes his liability thereon definitely, and the account cannot thereafter be attacked collaterally.⁴

§ 436. **Continued—What are lawful debits?**—In the first place the mortgagee will be charged with whatever rents he may have

¹ *Stiger v. Bent*, 111 Ill. 328.

² *McCabe v. Bellows*, 7 Gray, 148; *McCabe v. Swap*, 14 Allen, 191; *Gibson v. Crehore*, 5 Pick. 146; *Smith v. Kelly*, 27 Me. 237; *Chittenden v. Barney*, 5 Vt. 28; *Bell v. Mayor, &c.*, 10 Paige Ch. 49; *Fletcher v. Chase*, 16 N. H. 42; *Norris v. Moulton*, 34 N. H. 392; *Downer v. Wilson*, 38 Vt. 1; *Seymour v. Davis*, 35 Conn. 264; *Mullanphy v. Simpson*, 4 Mo. 319; *Douglass v. Bishop*, 27 Iowa, 216; *Gliddon v. Andrew*, 14 Ala. 733; *Knowles v. Rablin*, 20 Iowa, 101; *Lamb v. Montague*, 112 Mass. 352; *Franklin v. Gorham*, 2 Day, 142; *Hunter v. Dennis*, 112 Ill. 568; *Watts v. Bonner*, 66 Mich. 629; *Detweiler v. Breckenkamp*, 83 Mo. 45.

³ *Hunt v. Maynard*, 6 Pick. 439; *Gibson v. Crehore*, 5 Pick. 146; *Bailley v. Myrick*, 52 Me.

136; *Davis v. Lassiter*, 20 Ala. 561; *Doody v. Pierce*, 9 Allen, 141; *Harper's Appeal*, 64 Pa. St. 315; 5 *Walt's Prac.* 288; *Barnard v. Jennison*, 27 Mich. 230; *Adams v. Brown*, 7 Cush. 220; *Hubbell v. Moulson*, 53 N. Y. 225; *Farris v. Houston*, 78 Ala. 250; *Pryor v. Hollinger*, 88 Ala. 405; *Shuler v. Bonander*, (Mich. 1890) 45 N. W. 437. The mortgagee's assigns, as well as the mortgagee, are liable to be called to account, and the mortgagor's assigns have a right to demand an account. *Brayton v. Jones*, 5 Wis. 117; *Harrison v. Wise*, 24 Conn. 1; *Strang v. Allen*, 44 Ill. 428; *Ruckman v. Astor*, 9 Paige Ch. 517; *Gelston v. Thompson*, 29 Md. 595.

⁴ *In re Helfenstein's Estate*, (Pa. 1890) 20 Atl. 151.

received, or which he could have received but for his negligence in the management of the estate. This matter has been already discussed in a previous section, and a complete statement of the mortgagee's liability in this connection need not here be repeated.¹ The mortgagee is also chargeable with all damage done to the inheritance by himself, or by others with his authority or permission, whether the acts constitute affirmative or negative waste. Thus he is liable for damages resulting from the opening and working of a mine, as well as from letting the premises fall into decay.²

§ 437. **Continued—What are lawful credits?**—Since the mortgagee in possession is under an obligation to keep the premises in repair, he is entitled to credit himself with all sums expended for that purpose. But he will not be allowed the expenses incurred in making costly improvements—such as the erection of new buildings, or for any repairs which are not of permanent benefit to the inheritance. The true rule seems to be, that he will be allowed only such expenses as he incurred in making repairs, which were necessary to keep the premises in the same condition as he received them, and for such improvements beyond that limit which were necessary to the ordinary and reasonable enjoyment of the premises. For any other expenses of repair he can be credited only when he has incurred them by and with the consent of the mortgagor.³ But it has been held in some of the states that where lasting and permanent improvements of a truly beneficial character were made by the mortgagee in possession, or by a purchaser, under the mistaken belief that he had, by foreclosure, acquired the absolute title, he will be allowed the value of them.⁴ This, probably, is but a deduction from the general betterment laws, which have been enacted in several of the states.⁵ Although the mortgagee is not obliged to purchase a superior or paramount title held by a third person, or to pay the taxes due upon the estate, or to effect an insurance where the mortgage requires the mortgagor to insure, yet if he does any of these acts and incurs expenses for the protection of their joint interests against such forfeiture or loss, he will be permitted to charge them against the mortgagor.⁶ But in all

¹ See *ante*, § 425.

² See *ante*, § 432.

³ *Russell v. Blake*, 2 Pick. 505; *Reed v. Reed*, 10 Pick. 398; *Crafts v. Crafts*, 13 Gray. 303; *Mickles v. Dillaye*, 17 N. Y. 80; *Moore v. Cable*, 1 Johns. Ch. 385; *Gordon v. Lewis*, 2 Sumn. 143; *Clark v. Smith*, 1 N. J. Eq. 121; *Norton v. Cooper*, 39 Eng. Law & Eq. 130; *Sparhawk v. Willis*, 5 Gray, 423; *Daugherty v. McColgan*, 6 Gill & J. 275; *Harper's Appeal*, 64 Pa. St. 315; *Lowndes v. Chisolm*, 2 McCord Ch. 455; *Hopkinson v. Stephenson*, 1 J. J. Marsh. 341; *McConnel v. Holsbush*, 11 Ill. 61; *McCumber v. Gilman*, 15 Ill. 381; *McCarron v. Cassidy*, 18 Ark. 34; *Tharpe v. Feltz*, 6 B. Mon. 15; *Hidden v. Jordan*, 28 Cal. 301; *Neale v. Hagthorp*, 3 Bland Ch. 590; *Montgomery v. Chadwick*, 7

Iowa, 114; *Adkins v. Lewis*, 5 Oreg. 292; *Ballinger v. Choulton*, 20 Mo. 80; *Ford v. Philpot*, 5 Har. & J. 312; *Miller v. Curry*, (Ind. 1890) 24 N. E. 219, 374.

⁴ *Miner v. Beekman*, 50 N. Y. 337; *Putnam v. Ritchie*, 6 Paige Ch. 390; *Vanderhaise v. Hughes*, 2 Beas. 410; *Harper's Appeal*, 64 Pa. St. 315; *Barnard v. Jennison*, 37 Mich. 230; *Neale v. Hagthorp*, 3 Bland, 590; *Gillis v. Martin*, 2 Dev. Eq. 470; *Troost v. Davis*, 31 Ind. 34; *Roberts v. Fleming*, 53 Ill. 198; *McLorley v. Larissa*, 100 Mass. 270; *Greene v. Westcott*, 13 Wis. 606; *Bacon v. Cottrell*, 13 Minn. 194.

⁵ See *Tiedeman Real Prop.*, § 702, and *ante* § 395.

⁶ *Clark v. Smith*, 1 N. J. Eq. 421; *Riddle v. Bowman*, 27 N. H. 236; *Muller v. Whittier*, 36

of these cases the claim for reimbursement is against the mortgaged property, and not a personal one which may be enforced against the mortgagor in a personal action.¹ The mortgagee, however, cannot charge for his personal services in the management of the estate; but if it is necessary to employ others—as, for example, a person to collect the rents—he will be allowed such expenses. And, in some of the states, notably Massachusetts, he is allowed a commission where he collects them himself. But the general rule is that he will not be permitted to make any charge for his own services, whatever may be their nature.²

§ 438. **Making rests.**—In applying the rents and profits received from the estate the mortgagee may first deduct therefrom the expenses incurred in the management of the mortgaged premises, and then he must apply the remainder to the liquidation of the interest and principal of the debt in that order. If, in making the account, it is ascertained that in any one period—determined by the time when the interest falls due—the rents and profits received are more than sufficient to cover the expenses and the accrued interest, the balance is applied to the principal; and the interest subsequently accruing is computed on the reduced principal. This is called *making a rest*. And rents will be made under such circumstances as often as the interest falls due.³

§ 439. **Balance due.**—If, when the account is stated, it is found that there is a balance still due on the mortgage to the mortgagee, a decree for redemption will be granted upon the payment of that sum. And the report of the referee or master, when confirmed by the court, is conclusive as to the amount still owing. On the other hand, if the report shows that the rents and profits received by the mortgagee exceed the expenses and the amount of the mortgage combined,

Me. 577; Hubbard v. Shaw, 12 Allen, 122; Williams v. Hilton, 35 Me. 547; Robinson v. Ryan, 25 N. Y. 320; Mix v. Hotchkiss, 14 Conn. 32; Harvie v. Banks, 1 Rand. 408; Slee v. Manhattan Co., 1 Paige Ch. 81; Folny v. Palmer, 5 Gray, 649; Nichols v. Baxter, 5 R. I. 494; Hagthorpe v. Hook, 1 Gill & J. 270; McCumber v. Gilman, 15 Ill. 381; Weatherby v. Smith, 30 Iowa, 131; Davis v. Bean, 114 Mass. 360; Harper v. Ely, 70 Ill. 581; Rowan v. Sharpe Rifle Co., 29 Conn. 282; Burr v. Veeder, 3 Wend. 412; Miller v. Curry, (Ind. 1890) 24 N. E. 219, 374; Young v. Omohundro, 69 Md. 424; West v. Hayes, 117 Ind. 290; McCreery v. Shaffer, (Neb. 1889) 41 N. W. 996.

¹ Kersenbrock v. Muff, (Neb. 1890) 45 N. W. 778; Zabriskie v. Bandistel, (N. J. 1890) 20 Atl. 263.

² And any agreement that he shall be permitted to charge for such services will not be binding upon the mortgagor. French v. Barron, 2 Atk. 120; Gilbert v. Dyneley, 3 Man. & G. 12; Eaton v. Simonds, 14 Pick. 98; Moore v. Cable, 1 Johns. Ch. 385; Elmer v. Loper, 25 N.

J. Eq. 475; Breckenridge v. Brooks, 2 A. K. Marsh. 335; Benham v. Rowe, 2 Cal. 387; Harper v. Ely, 70 Ill. 381; Snow v. Warwick Institution of Savings, (R. I. 1890) 20 Atl. 94. In Massachusetts, Connecticut, Pennsylvania and Virginia, the mortgagee may charge a reasonable percentage, usually 5 per cent., for the collection of the rents. Gerrish v. Black, 104 Mass. 400; Waterman v. Curtis, 26 Conn. 241; Wilson v. Wilson, 3 Binn. 557; Granberry v. Granberry, 1 Wash. (Va.) 246; Brown v. South Boston Sav. Bk., 148 Mass. 300.

³ Reed v. Reed, 10 Pick. 398; Shaffer v. Chambers, 6 N. J. Eq. 548; Van Vronker v. Eastman, 7 Metc. 538; Connecticut v. Jackson, 1 Johns. Ch. 13; Stone v. Seymour, 15 Wend. 16; Jencks v. Alexander, 11 Paige Ch. 619; Gordon v. Lewis, 2 Sumn. 147; Green v. Westcott, 13 Wis. 606; Saunders v. Frost, 5 Pick. 259; Patch v. Wilde, 30 Beav. 100; Gladding v. Warner, 36 Vt. 54; Mahone v. Williams, 39 Ala. 202; Johnson v. Miller, 1 Wils. 416; Knight v. Houghtaling, 91 N. C. 246.

redemption will be decreed, together with an order, directing the mortgagee to pay over to the mortgagor whatever balance is found due to him.¹

§ 440. **Foreclosure.—Nature and kinds of.**—In order to bar the mortgagor's equity of redemption, and acquire the absolute title to the property, or to satisfy his debt by a sale of the premises, the mortgagee must bring an action for foreclosure. And the action lies on a deed which is absolute on its face, as soon as it is shown that it was intended to operate as a mortgage, as well as on one which has been executed in proper form.² The decree in such a case bars completely the right to redeem. There are two principal kinds of foreclosure, although the details in both are different in different states, and are governed more or less by local statutes. The more ancient kind is what is called *strict foreclosure*. This is an action in which a decree is rendered barring the mortgagor's equity, and vesting the absolute estate in the mortgagee if the debt is not paid within a certain time after the rendition of the decree. This kind of foreclosure is generally resorted to in the New England States, although in some of them—particularly Massachusetts—the form of the proceeding has been somewhat changed from the old common law foreclosure. But the decree is essentially the same.³ But strict foreclosure, if the mortgagee is out of possession, he may recover the possession in action of ejectment.⁴ The other so-called *equitable foreclosure* is effected by a decree ordering the property to be sold; and the proceeds of sale applied to the payment of the expense of the foreclosure suit and sale of the property,⁵ and the liquidation of the mortgage debt. If any surplus remains, it is paid over to the mortgagor and his assigns,⁶ and the junior incumbrancers will be entitled to share in the surplus in the order of their equities.⁷ This mode of foreclosure is juster and fairer to all parties, and, very probably, everywhere in this country, except the New England States, fore-

¹ *Pitman v. Thornton*, 66 Me. 469; *Holt v. Rees*, 46 Ill. 181; *Gerrish v. Black*, 122 Mass. 76; *Seaver v. Durant*, 39 Vt. 103; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Freytag v. Hoeland*, 23 N. J. Eq. 36; see *Wood v. Felton*, 9 Pick. 171.

² *Lyon v. Powell*, 78 Ala. 351.

³ In Massachusetts, Maine and New Hampshire, the action for strict foreclosure is called a writ of entry; in form, an action at law, but in effect an equitable proceeding. Gen. Stat. Mass., Ch. 140, §§ 1-11; Me. Rev. Stat., Ch. 90; Gen. Stat. N. H., Ch. 112, 213; *Bartlett v. Sanborn*, 64 N. H. 70; *Snow v. Piessey*, 82 Me. 552. But in addition to this action, a strict foreclosure may be effected in the New England States, by entry into possession after condition broken, with a formal notice to the mortgagor, attested by witness, that the entry is for the purpose of foreclosure. Generally this notice is also required to be published in the newspapers, and a certificate of entry recorded in the general recording office. And after the lapse of a certain time, fixed by the statute,

usually three years, the equity of redemption is foreclosed without any resort to the courts. 2 Jones on Mort., §§ 1237-1275.

⁴ *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Schenck v. Conover*, 13 N. J. L. 220; *Montgomery v. Middlemiss*, 21 Cal. 106; *Sutton v. Stone*, 2 Atk. 101. But the decree in strict foreclosure may include an order to the mortgagor to vacate the premises, and then it will not be necessary for the mortgagee to resort to his legal remedies. *Kendall v. Treadwell*, 5 Abb. Pr. 76; *Landon v. Burke*, 36 Wis. 378; *Buswell v. Peterson*, 41 Wis. 82.

⁵ *Castle v. Castle*, (Mich. 1890) 44 N. W. 378; *Snow v. Warwick Institution for Savings*, (R. I. 1890) 20 Atl. 94; *Barry v. Guild*, 25 Ill. App. 39; *Moran v. Gardemeyer*, 82 Cal. 96; *Tefford v. Garnell*, (Ill. 1890) 24 N. E. 573; *Casler v. Byers*, 28 Ill. App. 128; s. c., 129 Ill. 657; *Balfour v. Davis*, 14 Oreg. 47; *Schallard v. Eel River, &c. Co.*, 70 Cal. 144.

⁶ *Mitchell v. Weaver*, 118 Ind. 55.

⁷ *Armstrong v. Warrington*, 111 Ill. 430.

closure is always made by a sale of the premises, even though the right to a strict foreclosure may still exist. Courts of equity will exercise their ordinary power of discretion, and will order a sale of the premises whenever a strict foreclosure would be manifestly to the detriment of the mortgagor.¹ A bill for foreclosure may be filed at any time after the breach of the condition, provided the action has not been barred by the Statute of Limitations, the same time being given for actions of foreclosure, as for actions of ejectment.² The condition is broken when the debt falls due. In other words, suit for foreclosure can be brought as soon as an action at law will lie on the debt.³ The mortgage may be made to fall due upon the default in the payment of an installment of interest or principal, and the mortgage may then be foreclosed for the entire debt, although the time for payment has not yet arrived, unless it is expressly provided that the default in payment of interest or installment of principal will not give the right to foreclosure.⁴ But where it is not provided that the entire debt shall fall due upon the default in interest, or in installments of principal, there may yet be given the right of foreclosure for the purpose of enforcing payment of the interest or installment of principal which is due, by the sale of so much property as is necessary, and a subsequent sale of the remaining property when the rest of the debt falls due.⁵ The mort-

¹ In most of the states there are statutes authorizing foreclosure by sale of the premises, but they are only confirmatory of the power which a court of equity always possessed. *Lansing v. Goelet*, 9 Cow. 352; *Mills v. Dennis*, 3 Johns. Ch. 367; *Williams' Case*, 3 Bland Ch. 193; *Packer v. Rochester, &c. R. R.*, 17 N. Y. 287; *De Haven v. Landell*, 31 Pa. St. 124; *Hinds v. Allen*, 34 Conn. 193; *McCurdy's Appeal*, 65 Pa. St. 290; *Shaw v. Norfolk Co. R. R.*, 5 Gray, 162; *Green v. Crockett*, 2 Dev. & B. Eq. 393; *Belloc v. Rogers*, 9 Cal. 123; *Fox v. Wharton*, 5 Del. Ch. 200. Strict foreclosure is recognized now in Alabama, Florida, Illinois, Maryland, Minnesota, New York, but it is only used in special cases, and is generally looked upon as a severe remedy. *Hitchcock v. U. S. Bank of Pa.*, 7 Ala. 386; *R. S. Ill.* (1877) pp. 120, 540; *Dorsey v. Dorsey*, 30 Md. 522; *Wilder v. Haughey*, 21 Minn. 101; *Bolles v. Duff*, 43 N. Y. 474; *Griesbaum v. Baum*, 18 Ill. App. 614; *Ellis v. Leek*, 127 Ill. 60. In the other states it does not seem to be at all applicable. *O'Fallon v. Clopton*, 98 Mo. 284. In all the states the foreclosure of mortgages is regulated by statute in the different states, and they differ widely as to details. See 2 Jones on Mort., §§ 1317-1368, where the distinguishing features of the statutory remedies are fully and accurately presented.

² *Smith v. Woolfolk*, 115 U. S. 143; *McLaughlin v. Cecconi*, 141 Mass. 252; *Palmer v. Snell*, 111 Ill. 161; but see *contra*, *Clough v. Rowe*, 63 N. H. 562.

³ *Gladwyn v. Hitchman*, 2 Vern. 134; *Harding v. Mill River Co.*, 34 Conn. 458; *Giles v. Bare-*

more, 5 Johns. Ch. 545; *Hughes v. Edwards*, 9 Wheat. 489; *Blethen v. Dwindal*, 35 Me. 556; *Inches v. Leonard*, 12 Mass. 379; *Tripe v. Marcy*, 39 N. H. 439; *Gillett v. Balcom*, 6 Barb. 370; *Williams v. Townsend*, 31 N. Y. 411; *Trayser v. Trustees of Indiana, &c. University*, 39 Ind. 556; *Nevitt v. Bacon*, 32 Miss. 212; *Roberts v. Welch*, 8 Ired. Eq. 287; *Fetrow v. Merriwether*, 53 Ill. 275; *Pope v. Durant*, 26 Iowa, 233; *Brown v. Miller*, 63 Mich. 413; *Ohio Cent. R. R. Co. v. Central Trust Co.*, 133 U. S. 83; *Leonard v. Binford*, 122 Ind. 200; 23 N. E. 704; *Orr v. Rode*, (Mo. 1890) 13 S. W. 1066.

⁴ *Stanhope v. Manners*, 2 Eden, 197; *West Branch Bank v. Chester*, 11 Pa. St. 282; *Richards v. Holmes*, 18 How. 143; *Seaton v. Twyford*, L. R. 11 Eq. 591; *Burrowes v. Malloy*, 2 Jones & Lat. 521; *Sire v. Wrightman*, 25 N. J. Eq. 102; *De Grott v. McCotter*, 19 N. J. Eq. 531; *Terry v. Eureka College*, 70 Ill. 236; *Harshaw v. McKesson*, 66 N. C. 266; *Cecil v. Dynes*, 2 Ind. 266; *Magruden v. Eggleston*, 41 Miss. 284; *Schooley v. Romain*, 31 Md. 574; *Jones v. Lawrence*, 18 Ga. 277; *Hosie v. Gray*, 71 Pa. St. 198; *Adams v. Essex*, 1 Bibb, 149; *Goodman v. Cin. & C. C. R. R.*, 2 Disney, 176; *Morgenstern v. Klees*, 30 Ill. 422; see *Poweshiek Co. v. Dennison*, 36 Iowa, 352; 19 Am. Rep. 521; *Hoodless v. Reid*, 112 Ill. 105; *Scheibe v. Kennedy*, 64 Wis. 564.

⁵ *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Peyton v. Ayers*, 2 Md. Ch. 64; *Cauffman v. Sayre*, 2 B. Mon. 202; *Buford v. Smith*, 7 Mo. 489; *Magruder v. Eggleston*, 41 Miss. 284; *Poweshiek Co. v. Dennison*, 36 Iowa, 244; *Johnson v. Buckhaults*, 77 Ala. 276; *Cleveland v. Booth*, 43 Minn. 16; *Fox v. Wharton*, 5 Del. Ch. 200; *Ba-*

gage may also provide that the default in payment of the interest or installment of principal, may cause the entire debt to fall due, "at the election of the mortgagee."¹ In such a case the mortgagee is not obliged to make his election immediately after the default.² And like the action of the debt, it is not dependent upon any previous demand of payment or notice of intention to bring the action.³ The time for foreclosure may be postponed by an agreement for forbearance, if the agreement is supported by a valuable consideration. The foreclosure can under these circumstances only be brought at the close of the time for forbearance.⁴

§ 441. **Continued—Who should be made parties?**—Generally all persons should be made parties to a suit for foreclosure who are interested in the mortgage or mortgaged property. The holder of the equity of redemption, subsequent purchasers, and junior mortgagees, must always be made parties, including anyone in possession, whatever may be his title.⁵ But a vendee, under an executory contract of sale, is not a necessary party; he becomes a necessary party only when he receives a deed of conveyance.⁶ So, also, is it unnecessary to make a contingent remainder-man, who takes subject to the mortgage, a party to the foreclosure suit.⁷ The assignee of a junior incumbrance must be made a party in the place of the original junior mortgagee, and a decree of foreclosure against the latter would not have any effect upon the right of redemption of the assignee, who has not been made a party to the suit for foreclosure.⁸ But one who purchases the equity during the pendency of the suit takes the mortgagor's interest subject to the decree, and need not be made a party, unless this is required by statute, as is the case in some of the states.⁹ It has also been held in some states that a prior

con v. N. W., &c. Ins. Co., 131 U. S. 258; *Anderson v. Pilgram*, 30 S. C. 499; *Kempner v. C. mer*, 73 Tex. 196; *Bank of Napa v. Godfrey*, 77 Cal. 612.

¹ *Randolph v. Middleton*, 26 N. J. Eq. 543; *English v. Carney*, 25 Mich. 178; *Harper v. Ely*, 56 Ill. 179; *Princeton, &c. Co. v. Munson*, 60 Ill. 371; *Schoonmaker v. Taylor*, 14 Wis. 313; *Bosse v. Gallagher*, 7 Wis. 442.

² *Wheeler & Wilson, &c. Co. v. Howard*, 28 Fed. Rep. 741.

³ *Manning v. Elliott*, 92 N. C. 48; *Maxwell v. Newton*, 65 Wis. 261.

⁴ *Chiles v. Wallace*, 83 Mo. 84.

⁵ *Ruyter v. Reid*, (N. Y. 1890) 24 N. E. 791; *Finley v. U. S. Bank*, 11 Wheat. 304; *Caldwell v. Taggart*, 4 Pet. 190; *McCall v. Yard*, 9 N. J. Eq. 358; *Goodrich v. Staples*, 2 Cush. 258; *Webster v. Vandeventer*, 6 Gray, 428; *Williamson v. Field*, 2 Sandf. Ch. 533; *Vanderkamp v. Shelton* 11 Paige Ch. 28; *Goodman v. White*, 26 Conn. 317; *Winslow v. Clark*, 47 N. Y. 261; *Haines v. Beach*, 3 Johns. Ch. 459; *Valentine v. Havenor*, 20 Mo. 133; *Bates v. Miller*, 48 Mo. 403; *Colter v. Jones*, 52 Ill. 84, *Ohling v. Luit-*

jens, 32 Ill. 23; *Hunt v. Acre*, 28 Ala. 580; *White v. Watts*, 18 Iowa, 76; *Newcomb v. Dewey*, 27 Iowa, 388; *McArthur v. Franklin*, 15 Ohio St. 509; *Porter v. Clements*, 3 Ark. 364; *Webb v. Maxan*, 11 Tex. 678; *Carpentier v. Williamson*, 25 Cal. 161; *Skinner v. Buck*, 29 Cal. 257; *Lyon v. Powell*, 98 Ala. 351; *Berlach v. Hale*, 22 Fla. 236; *Bobbles v. Munnerlyn*, 83 Ga. 727; *Johnston v. McDuffee*, 83 Cal. 30; *Ostrander v. Hart*, 8 N. Y. S. 809; *Watts v. Julian*, 122 Ind. 124; *Armstrong v. Warrington*, 111 Ill. 430; *Mendenhall v. Hall*, 134 U. S. 559; *Richards v. Thompson*, 43 Kans. 209; but see *Cooper v. Loughlin*, 75 Tex. 524, where it is held that beneficiaries of a trust property need not be joined, if the trustee is. To same effect, see *Harlem Co-op. Bldg. & Loan Assn. v. Quinn*, 10 N. Y. S. 682; *United States Trust Co. v. Roache*, 116 N. Y. 120; see *Douthitt v. Hipp*, 23 S. C. 205.

⁶ *Stanbrough v. Daniels*, 77 Iowa, 561.

⁷ *Townshend v. Frommer*, 125 N. Y. 446.

⁸ *Bigelow v. Stringfellow*, 25 Fla. 366.

⁹ *Smith v. Davis*, (N. J. 1890) 19 Atl. 541; *Lloyd v. Passingham*, 16 Ves. 66; *Parkes v. White*, 11 Ves. 236; *Watt v. Watt*, 2 Barb. Ch. 271; *Jack-*

mortgagee should be made a party. Making a prior mortgagee party is equivalent to instituting an action for redemption.¹ But by the weight of authority prior mortgagees and grantees are not necessary, and hardly proper parties.² But it may be stated that wherever the mortgage is to be foreclosed by a sale of the premises, the prior mortgagee may be joined in the suit, though he is not a necessary party; it is also advisable to do so, since without him the property can only be sold subject to his outstanding mortgage. Although in some of the states the wife of the holder of the equity is not held to be a necessary party, it is best always to make her one, and in the cases cited below it has been held to be necessary.⁴ Whether judgment creditors should be made parties has been differently decided in different states.⁵ Where the mortgagor has parted with his entire interest in the premises he is not a necessary party, but he may be

son *v.* Losse, 4 Sandf. Ch. 387; *Ostrom v. McCann*, 21 How. Pr. 431; *McPherson v. Honsel*, 13 N. J. Eq. 299; *Loomis v. Stuyvesant*, 10 Paige Ch. 490; *Lyon v. Sandford*, 5 Conn. 548; *Cleveland v. Boerum*, 23 N. Y. 201; *Crooker v. Crooker*, 57 Me. 396; *Snowman v. Hartford*, 10. 400; *Haven v. Adams*, 8 Allen, 387; *Poston v. Eubank*, 3 J. J. Marsh. 43; *Bennett v. Calhoun Assn.*, 9 Rich. Eq. 163; *Hull v. Lyon*, 27 Mo. 570; *Jackson v. Warren*, 32 Ill. 340; *Dickson v. Todd*, 43 Ill. 507; *Hayes v. Shuttuck*, 21 Cal. 51; *Montgomery v. Middlemiss*, 21 Cal. 106; *Abadie v. Lobers*, 36 Cal. 390; *Gordon v. Lee*, 102 Ind. 125; *Tierney v. Spiva*, 97 Mo. 98; *Wise v. Griffith*, 78 Cal. 152.

¹ *Hudnit v. Nash*, 16 N. J. Eq. 550; *Roll v. Smalley*, 6 N. J. Eq. 464; *Finley v. U. S. Bk.*, 11 Wheat. 306; *Wylie v. McMakin*, 2 Md. Ch. 413; *Stanish v. Dow*, 21 Iowa, 363; *Person v. Merrick*, 5 Wis. 231; *Shively v. Jones*, 6 Mon. 274; *Persons v. Alsip*, 2 Ind. 67; *Redin v. Branhan*, 43 Mich. 283.

² *Jerome v. Carter*, 94 U. S. 734; *Weed v. Beebe*, 21 Vt. 499; *Kay v. Whittaker*, 44 N. Y. 505; *Hancock v. Hancock*, 22 N. Y. 568; but see *Morris v. Wheeler*, 45 N. Y. 708; *Tome v. Loan Co.*, 34 Md. 12; *Bogey v. Shute*, 4 Jones Eq. 174; *Walker v. Jarvis*, 16 Wis. 28; *Wright v. Bundy*, 11 Ind. 398; *Summers v. Bromley*, 28 Mich. 125; *Hall v. Hall*, 11 Texas, 537; *Crawford v. Munford*, 29 Ill. App. 445; *Hague v. Jackson*, 71 Tex. 761.

³ *Holcomb v. Holcomb*, 2 Barb. 20; *Vanderkemp v. Shelton*, 11 Paige Ch. 28; *Howard v. Handy*, 35 N. H. 315; *Wood v. Oakley*, 11 Paige Ch. 400; *Weed v. Beebe*, 21 Vt. 494; *Ducker v. Belt*, 34 Md. Ch. 13; *Hagan v. Walker*, 14 How. 37; *Chaplin v. Foster*, 7 B. Mon. 104; *Clark v. Prentice*, 3 Dana, 468; *Troth v. Hunt*, 8 Blackf. 580; *Mack v. Grover*, 12 Ind. 254; *Rucks v. Taylor*, 49 Miss. 552; *Brown v. Nevitt*, 27 Miss. 801; *Mims v. Mims*, 1 Humph. 425; *Rowan v. Mercer*, 10 Humph. 359; *Downer v. Clement*, 11 N. H. 40; *Hague v. Jackson*, 71 Tex. 761.

⁴ That is necessary when her dower right is

subject to the mortgage. *Mills v. Van Voorhies*, 28 Barb. 125; s. c., 20 N. Y. 412; *Merchants' Bk. v. Thomson*, 55 N. Y. 7; *Johns v. Beardon*, 3 Md. Ch. 57; *Watt v. Alvord*, 25 Ind. 533; *Chambers v. Nichols*, 30 Ind. 349; *Leonard v. Villars*, 23 Ill. 377; *Wright v. Langley*, 36 Ill. 381; *Mooney v. Maas*, 22 Iowa, 380; *Burnap v. Cook*, 16 Iowa, 149; *McArthur v. Franklin*, 16 Ohio St. 193; *Byrne v. Taylor*, 46 Miss. 95; *Foster v. Hickox*, 38 Wis. 408; *Wisner v. Farnham*, 2 Mich. 472; *Tadlock v. Eccles*, 20 Texas, 783; *Revalk v. Kraemer*, 8 Cal. 66; *Anthony v. Nye*, 30 Cal. 401; but see *Eslana v. Le Petre*, 21 Ala. 504; *Fletcher v. Holmes*, 32 Ind. 497; *Thornton v. Pigg*, 24 Mo. 249; *Riddick v. Walsh*, 15 Mo. 538; *Amphlett v. Hibbard*, 29 Mich. 298; *Etheridge v. Vernoy*, 71 N. C. 184; *Kursheedt v. Union Dime Sav. Inst.*, 118 N. Y. 358; *Barr v. Van Alstine*, 130 Ind. 590. But where she has not joined in the execution of the mortgage, she cannot be made a party, so as to bar her dower right, unless there is some special defense to her claim. *Brackett v. Baum*, 50 N. Y. 8; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Mills v. Van Voorhies*, 20 N. Y. 415; *Merchants' Bk. v. Thomson*, 55 N. Y. 7; *Baker v. Scott*, 62 Ill. 86; *Heth v. Cocke*, 1 Rand. 344; *Mooney v. Maas*, 22 Iowa, 380; *Foster v. Hickox*, 38 Wis. 408; *Sheldon v. Patterson*, 55 Ill. 507.

⁵ That they must be, in order to extinguish their equity of redemption, see *Adams v. Paynter*, 1 Coll. 530; *Sharpe v. Scarborough*, 4 Ves. 538; *Brainard v. Cooper*, 10 N. Y. 356; *Gage v. Brewster*, 31 N. Y. 225; *Lyon v. Sanford*, 5 Conn. 544; *Proctor v. Baker*, 15 Ind. 178; *Gaines v. Walker*, 16 Ind. 361. So, also, a subsequently attaching creditor. *Lyon v. Sanford*, 5 Conn. 544; *Carter v. Champion*, 8 Conn. 549; *Bullard v. Leach*, 27 Vt. 491. But in the following cases, judgment creditors are held not to be necessary parties. *Downer v. Fox*, 20 Vt. 338; *Felder v. Murphy*, 2 Rich. Eq. 58; *Person v. Merrick*, 5 Wis. 231; *Mims v. Mims*, 1 Humph. 425; *Van Dyne v. Shaun*, 41 N. J. L. 311.

joined, and must be, if the mortgagee wishes to obtain a personal judgment against him in the same suit for the balance of the debt left unsatisfied by a sale of the mortgaged property.¹ If, however, the assignment has not been recorded, and the mortgagee does not know of the assignment of the equity of redemption, it is not necessary to make the assignee a party. His interest is barred by foreclosure.² But the mortgagor's surety or guarantor is not a proper party to an action for foreclosure. A personal judgment against him can only be obtained in a suit at law.³ Where the mortgagor is dead, his heirs and his widow must be made parties, and his personal representatives need be, only when a judgment against the mortgagor's estate for the balance is desired, except in Missouri, where they are by statute required to be parties in every case.⁴

§ 442. **Parties to foreclosure—Continued.**—All persons—such as joint mortgagees, assignees, etc., whether their interest be legal or equitable—who are interested in the mortgage or mortgage debt, should join in the suit as parties plaintiff. But if any should refuse they must be made defendants.⁵ One not interested in the mortgage which is to be foreclosed cannot be a party plaintiff. A junior judgment creditor cannot compel the foreclosure of the senior mortgage. His only remedy is the redemption of the mortgage.⁶ Where the mortgagee has assigned the mortgage and debt absolutely, the assignee is the proper party to bring the suit, and the mortgagee need not join;

¹ *Lockwood v. Benedict*, 3 Edw. Ch. 472; *Drury v. Clark*, 16 How. Pr. 424; *Soule v. Albee*, 31 Vt. 142; *Heyer v. Pruyn*, 7 Paige Ch. 465; *Swift v. Edson*, 5 Conn. 153; *Andrews v. Steele*, 22 N. J. Eq. 478; *Delaplaine v. Lewis*, 19 Wis. 476; *Wilkins v. Wilkins*, 4 Port. 245; *Cord v. Hirsch*, 17 Wis. 532; *Stevens v. Campbell*, 21 Ind. 471; *Shaw v. Hoadley*, 8 Blackf. 165; *Moore v. Sparks*, 1 Ohio St. 369; *Jackson v. Monell*, 13 Iowa, 300; *Heyman v. Lowell*, 23 Cal. 106; *Bellse v. Rogers*, 9 Cal. 123; *Mich. Ins. Co. v. Brown*, 11 Mich. 265; *Jones v. Lapham*, 15 Kans. 450; *Dickerman v. Lust*, 66 Iowa, 444; but see *Bigelow v. Bush*, 6 Paige Ch. 343; *Buchanan v. Munroe*, 22 Tex. 557. Nor are purchasers of the equity of redemption necessary or proper parties after they have assigned it. *Soule v. Albee*, 31 Vt. 142; *Lockwood v. Benedict*, 3 Edw. Ch. 472; *Hall v. Yoell*, 45 Cal. 584.

² *Dickerman v. Lust*, 56 Iowa, 444.

³ *Walsh v. Vanhorn*, 22 Ill. App. 170.

⁴ *Farmer v. Curtis*, 2 Sim. 466; *Bradshaw v. Outram*, 13 Ves. 234; *Wood v. Moorhouse*, 1 Lans. 405; *Graham v. Carter*, 2 Hen. & M. 6; *Worthington v. Lee*, 2 Bland Eq. 678; *Mayo v. Tomkins*, 6 Munf. 52; *Boyce v. Bowers*, 11 Rich. Eq. 41; *Averett v. Ward*, Busb. Eq. 192; *Erwin v. Ferguson*, 5 Ala. 158; *Hunt v. Acre*, 28 Ala. 580; *Bollinger v. Chouteau*, 20 Mo. 89; *McIver v. Cherry*, 8 Humph. 713; *Moore v. Stark*, 1 Ohio St. 369; *Bissell v. Marine Co.*, 55 Ill. 165; *Stark v. Brown*, 12 Wis. 572; *Shively v. Jones*, 6 B. Mon. 274; *Byrne v. Taylor*, 46 Miss. 95; *Abbott*

v. Godfroy, 1 Mich. 178; *Slaughter v. Foust*, 4 Blackf. 379; *Britton v. Hunt*, 9 Kans. 228; *Burton v. Lies*, 21 Cal. 87; *Hogden v. Heidman*, 66 Iowa, 645; *Richards v. Thompson*, 43 Kans. 299; *Weir v. Field*, (Miss. 1890) 7 So. 355. But in Georgia and Missouri the personal representatives are necessary parties. *Dixon v. Cuyler*, 77 Ga. 248; *Magruder v. Offut*, *Dudley*, 227; *Miles v. Smith*, 23 Mo. 502; *Perkins v. Woods*, 27 Mo. 547; *Hall v. Klepzig*, 99 Mo. 83.

⁵ *Carpenter v. O'Dougherty*, 58 N. Y. 681; *Noyes v. Sawyer*, 3 Vt. 100; *Rankin v. Major*, 9 Iowa, 297; *Thayer v. Campbell*, 9 Mo. 280; *Pogue v. Clark*, 25 Ill. 351; *Stucker v. Stucker*, 3 J. J. Marsh. 301; *Shirkey v. Hanna*, 3 Blackf. 403; *Woodward v. Wood*, 19 Ala. 213; *Goodall v. Mopley*, 45 Ind. 355; *Johnson v. Brown*, 31 N. H. 405; *Jenkins v. Smith*, 4 Metc. (Ky.) 380; *Bell v. Shrock*, 2 B. Mon. 29; *Wilson v. Heyward*, 2 Fla. 27; *Myers v. Wright*, 33 Ill. 284; *Pettibone v. Edwards*, 15 Wis. 95; *Hartwell v. Blocker*, 6 Ala. 581; *Graydon v. Church*, 7 Mich. 51; *Saunders v. Frost*, 5 Pick. 259; *Wiley v. Pierson*, 23 Tex. 486; *Webster v. Vandeventer*, 6 Gray, 428; *Hopkins v. Ward*, 12 B. Mon. 185; *Beals v. Cobb*, 51 Me. 349; *Davis v. Hemingway*, 29 Vt. 438; *Somes v. Skinner*, 16 Mass. 348; *Lambert v. Hyers*, 22 Ill. App. 616. But in *Rankin v. Major*, *supra*, and *Thayer v. Campbell*, *supra*, it was held that the holder of one of two notes secured by the same mortgage may sue alone.

⁶ *Kelly v. Longshore*, 78 Ala. 203.

but he is a necessary party, if the assignment is only conditional.¹ But if the mortgagee has only assigned one of two or more debts, secured by the same mortgage, he can institute the action, making the assignee a party defendant, if he refuses to join as party plaintiff.² But whether the assignee of the debt can bring the suit independently of the mortgagee or legal holder of the mortgage, depends upon the construction given by the courts to the effect of such an assignment. At common law the holder of the legal title to the mortgage must institute the suit as trustee for the assignee of the debt, while under the lien theory in those states, where the assignment of the debt is held to work an equitable assignment of the mortgage, the assignee may maintain the suit in equity without joining the legal owner of the mortgage. In other states, where the assignment of the debt is held to transfer the legal as well as the equitable title to the mortgage, the assignee may maintain all suits, both in law and equity.³ It is now the general rule in this country, that upon the death of the mortgagee the mortgage descends with the debt to the personal representatives, and they must, consequently, be the plaintiffs in a suit for foreclosure.⁴ If the mortgage be given to two jointly to secure a joint debt, the survivor is the proper party plaintiff, and the deceased mortgagee's representatives are not necessary parties. But if the joint mortgage is given for two separate debts, the rule is different; both the survivor and the representatives of the deceased, must join in the suit, and either may institute the proceedings.⁵

§ 443. **Effect of decree in foreclosure upon the land.**—A decree in foreclosure bars the interests in the land of the mortgagor, and all claiming under him who have been made parties to the suit. It will

¹ *Whitney v. McKinney*, 7 Johns. Ch. 144; *Miller v. Henderson*, 10 N. J. Eq. 320; *Newman v. Chapman*, 2 Rand. 93; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Hoyt v. Martense*, 16 N. Y. 231; *McGuffey v. Finley*, 20 Ohio, 474; *Garrett v. Packett*, 15 Ind. 485; *Bolles v. Carl*, 12 Minn. 113; *Ward v. Sharp*, 15 Vt. 115; *Overall v. Ellis*, 32 Mo. 322; *Walker v. Bk. of Mobile*, 6 Ala. 452; *Chambers v. Goldwin*, 9 Ves. 264; *Gage v. Stafford*, 1 Ves. Sr. 544; *Sowles' Trustee v. Buck*, (Vt. 1890) 20 Atl. 146; *Smythe v. Brown*, 25 S. C. 89; *Haaven v. Lyons*, 9 N. Y. S. 211; *Stiger v. Bent*, 111 Ill. 328.

² *Boone v. Clarke*, 129 Ill. 466.

³ *Austin v. Burbank*, 2 Day, 476; *Stone v. Locke*, 46 Me. 445; *Moore v. Ware*, 38 Me. 496; *Calhoun v. Tullass*, 35 Ga. 119; *Holdridge v. Sweet*, 23 Ind. 118; *Story Eq. Pl.*, §§ 201-209; *Martin v. Reynolds*, 6 Mich. 70; see *ante*, §§ 329, 330. And in the code states it is expressly provided that all actions should be prosecuted in the name of the real party in interest. Under this provision, whether the assignee be considered a legal or only an equitable owner of the mortgage, in either case he is the proper party to institute the suit for foreclosure. 2 Jones on Mort., § 1370.

⁴ *Kinna v. Smith*, 3 N. J. Eq. 14; *Roath v. Smith*, 5 Conn. 133; *Smith v. Dyer*, 16 Mass. 18; *Dewey v. Van Dusen*, 4 Pick. 19; *Maryland Code*, (1860) 94; *Maine Rev. Stat.*, (1857) Ch. 1890, § 10; *Gen. Stat. Vt.*, (1870) 393; *Worthington v. Lee*, 2 Bland, 678; *Mo. Rev. Stat.*, (1855) Ch. 113, § 4; *Riley v. McCord*, 24 Mo. 265; *Perkins v. Woods*, 27 Mo. 547; *Ratliff v. Davis*, 38 Miss. 107; *Buck v. Fischer*, 2 Col. 182; *Grattan v. Wiggins*, 23 Cal. 16; *Comp. Laws Mich.*, (1871) 1393; *Rev. Stat. Wis.*, (1871) 1223; *Rev. Stat. Ohio*, Ch. 43, § 66; *Citizens' Bank v. Dayton*, 116 Ill. 267; *contra*, *Etheridge v. Verney*, 71 N. C. 174; *McIver v. Cherry*, 8 Humph. 713. But if the mortgagee's heir is in possession, he must be made a party. *Osborne v. Tunis*, 25 N. J. L. 633; *Huggins v. Hall*, 10 Ala. 283.

⁵ *Blade v. Sanborn*, 8 Gray, 184; *Williams v. Hilton*, 35 Me. 547; *Martin v. McReynolds*, 6 Mich. 70; *Lannay v. Wilson*, 30 Md. 536; *Erwin v. Ferguson*, 5 Ala. 159; *M Iroy v. Stockwell*, 1 Cart. (Ind.) 35; *Minor v. Hill*, 58 Ind. 176; 26 Am. Rep. 71. *Contra*, if the debt is several or there are conflicting claims. *Freeman v. Scofield*, 16 N. J. Eq. 28; *Vickers v. Cowell*, 1 Beav. 529; *Mitchell v. Burnham*, 44 Me. 305; *Burnett v. Pratt*, 22 Pick. 556.

have no effect upon the interest of anyone who is not a party, and as to him the equity of redemption continues to exist.¹ A mortgagee in possession under a defective foreclosure is not in any sense a trespasser, but he holds the possession in the character of a mortgagee.² And if the foreclosure is defective because one who had a right to redeem had not been made a party, the only remedy for such a person against the purchaser is an action for redemption. He cannot maintain an action for possession before redemption.³ So, also, if a junior incumbrancer, non-resident, has been made a party by service by publication, without receiving actual knowledge of the pendency of the suit, the court may in its discretion re-open the foreclosure to enable him to redeem.⁴ In equitable foreclosure by sale, some of the statutes require that a certain time be given to the mortgagor after the sale to redeem the estate, and a court of equity, in the exercise of its discretion, may, in the absence of statute, provide for such a period of redemption before sale.⁵ In such a case, however, it is held that the mortgagor can redeem the land on paying, not the amount of the mortgage debt, but the amount of the bid, for which the property was sold under foreclosure.⁶ And where there is a time for redemption after the sale, the decree must not direct a delivery of the deed until this period for redemption has expired. But a certificate is generally given to the purchaser.⁷ Until delivery of the deed, the mortgagor is entitled to the rents and profits of the land. And if a mortgagee is permitted to enter into possession before the expiration of the period of redemption, he takes possession in his character as mortgagee.⁸ But when the deed is delivered, it operates *nunc pro tunc* from the date of the sale, and bars any intervening attaching rights. And although the decree be erroneous for some irregularity, it cannot be attacked collaterally, and the title of a *bona fide* purchaser, in a sale during the pendency of the suit, cannot thereby be avoided, notwithstanding the decree has subsequently been reversed.⁹

¹ Packer v. Rochester, &c. R. R., 17 N. Y. 287; Kershaw v. Thompson, 4 Johns. Ch. 609; DeHaven v. Landell, 31 Pa. St. 124; Hindo v. Allen, 34 Conn. 193; Ritger v. Parker, 8 Cush. 149; Kraemer v. Rehman, 9 Iowa, 114; Tallman v. Ely, 6 Wis. 244; Burton v. Lies, 21 Cal. 91; Montgomery v. Tutt, 11 Cal. 192; Hodson v. Treat, 7 Wis. 263; Watts v. Julian, 122 Ind. 124; Steinhart v. Cunningham, 55 Hun, 375; France v. Armbruster, (Neb. 1890) 44 N. W. 481; Glide v. Dwyer 83 Cal. 477; Barr v. Van Alstine, 120 Ind. 590.

² Blair v. Rivard, 19 Ill. App. 477; Cook v. Cooper, 18 Oreg. 142.

³ Evans v. Pike, 118 U. S. 241.

⁴ Russell v. Gunn, 40 Minn. 463.

⁵ Perine v. Dunn, 4 Johns. Ch. 140; Durrett v. Whiting, 7 B. Mon. 547; Richardson v. Parrott, 7 B. Mon. 379; Smith v. Hoyt, 14 Wis. 252; Stockton v. Dundee Manfg. Co., 22 N. J. Eq. 56; Harkins v. Forsyth, 11 Leigh, 294; Parker v. Dacres, 2 Wash. 439; Gaskell v. Viquesney, 122

Ind. 244; Nelms v. Kennon, 88 Ala. 329; Willard v. Finnegan, 42 Minn. 476; Buchanan v. Reid, 43 Minn. 172; Pamperin v. Scanlan, 28 Minn. 345; Parke v. Hush, 29 Minn. 434; Wood v. Holland, (Ark. 1890) 13 S. W. 739; Emmons v. Sowden, (Mich. 1890) 43 N. W. 1100; Johnson v. Golder, 9 N. Y. S. 739.

⁶ Williamson v. Dickerson, 66 Iowa, 105. In Alabama, California, Oregon, Michigan, Minnesota, Wisconsin, Tennessee, Iowa, Illinois, there are statutes regulating the right of redemption. 2 Washb. on Real Prop. 261-269, note.

⁷ Boester v. Byrne, 72 Ill. 466; Rhinehart v. Stevenson, 23 Ill. 524; Jones v. Gilman, 14 Wis. 450; Walker v. Jarvis, 16 Wis. 28; Harlan v. Smith, 6 Cal. 173.

⁸ Jones v. Rigby, 41 Minn. 530; Clason v. Corley, 5 Sandf. Ch. 447; Whalin v. White, 25 N. Y. 464; Whitney v. Allen, 21 Cal. 233.

⁹ Graham v. Bleakie, 2 Daly, 55; Horner v. Zimmerman 45 Ill. 14; Burford v. Rosenfeld,

In strict foreclosure, the decree makes the estate absolute in the mortgagee. His title, whatever it is held to be before foreclosure, becomes afterwards a legal estate in lands and descends to the heirs, instead of to the personal representatives.¹ But, in some of the states, if the mortgagee dies before a suit for strict foreclosure has been instituted, and it is brought by the personal representatives, the estate, for the purpose of distribution, partakes of the character of personality, and the title vests in those who became, by the death of the mortgagee, entitled to the mortgage debt.² The decree in a foreclosure suit is binding upon infant holders of the equity to the same extent as adults, except that if the foreclosure is irregular on account of some defect in the proceeding, he may take advantage of such error within a reasonable time after arriving at his majority. And this is the rule, whether the foreclosure is in equity or at law; but for the protection of his interests, it is generally required that the infant be represented in the suit by a guardian *ad litem*.³ So, also, is the decree binding upon married women, if their husbands are joined with them as parties to the suit. And the failure of the husband to defend will not constitute a ground for setting aside the decree; at least, where the foreclosure is by a sale of the premises.⁴ But the decree only transfers whatever interest is claimed by or through the mortgagor. It vests that interest in the mortgagee or purchaser, but cannot bar the interests held by persons who are not privies to the mortgagor. The decree, therefore, does not affect any paramount title which is held or claimed by such persons, even though they have been made parties to the suit.⁵ Nor does the decree determine the priorities of the junior mortgagees and their relative claims to a share in the surplus of the proceeds of sale.⁶ Where, however, the foreclosed mortgage covers only one undivided interest in a joint estate, the plaintiff

37 Texas, 42; *Torroms v. Hicks*, 32 Mich. 307; *Ogden v. Walters*, 12 Kans. 282; *Markel v. Evans*, 47 Ind. 326; *Miller v. Sharp*, 49 Cal. 233; but see *Brindernagle v. German Ref. Church*, 1 Barb. Ch. 15.

¹ *Brainard v. Cooper*, 10 N. Y. 359; *Goodman v. White*, 26 Conn. 322; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 150; *Kendall v. Treadwell*, 14 How. Pr. 165; *Farrell v. Parlier*, 50 Ill. 274; *Osborne v. Tunis*, 25 N. J. L. 63; *Swift v. Edson*, 5 Conn. 531.

² Mass. Gen. Stat., Ch. 96, §§ 10, 1 B, 14; *Fifield v. Sperry*, 20 N. H. 338.

³ If it be a strict foreclosure, the infant would be bound by the decree, if he does not show some defect in the foreclosure proceeding within a reasonable time after his arrival at majority. 2 Cruise Dig. 199; *Mills v. Dennis*, 3 Johns. Ch. 367. But the infant is bound by a sale under the decree, if he has been properly made a party to the action, notwithstanding the irregularity. *Mills v. Dennis*, *supra*; 2 Washb. on Real Prop. 259.

⁴ *Mallack v. Galton*, 3 P. Wms. 352; *Mooney*

v. Maas, 22 Iowa, 380; *Wolf v. Banning*, 3 Minn. 202; *Mavrick v. Grier*, 3 Nev. 52. But in the states where married women hold their property independent of their husbands, it seems unnecessary to make the husband a party. *Somerset, &c. Assn. v. Camman*, 11 N. J. Eq. 382; *Thornton v. Pigg*, 24 Mo. 249. And the same rule now prevails in Massachusetts for a different reason. *Davis v. Wetherell*, 13 Allen, 62; *Newhall v. Sav. Bk.*, 101 Mass. 430.

⁵ *Concord, &c. Ins. Co. v. Woodbury*, 45 Me. 447; *Broome v. Beers*, 6 Conn. 198; *Corning v. Smith*, 6 N. Y. 82; *Lewis v. Smith*, 9 N. Y. 514; *Eagle, F. Ins. Co. v. Lent*, 6 Paige Ch. 635; *Mooney v. Muas*, 22 Iowa, 22; *Strobe v. Downer*, 13 Wis. 10; *Pelton v. Farmin*, 18 Wis. 227; *Palmer v. Yager*, 20 Wis. 103; *Banning v. Bradford*, 21 Minn. 308; 18 Am. Rep. 398; *Grattan v. Wiggins*, 23 Cal. 32; *Holcomb v. Holcomb*, 2 Barb. 20; *Brundage v. Missionary Society*, 60 Barb. 205; *Kinsley v. Scott*, 58 Vt. 470; *Weil v. Uzsett*, 92 N. C. 515; *Bozarth v. Sanders*, 113 Ill. 181; *Ord v. Bartlett*, 83 Cal. 428.

⁶ *Burchell v. Osborne*, 119 N. Y. 486.

may secure by the same judgment, a partition of the joint estate.¹

This statement of the effect of the decree in foreclosure is true in all technical suits for foreclosure; but where, as in Maine and Massachusetts, the suit for foreclosure is in the nature of an action at law for the recovery of possession, if the person in possession holds under a superior title it would be necessary, or at least proper to assert such title. But this is really not an exception to the rule above cited, since wherever the mortgagee may maintain the action of ejectment the question of a paramount title might be raised by the party in possession, if he is not the mortgagor.²

§ 444. **The effect of foreclosure upon the debt.**—If the suit be for strict foreclosure, all actions on the surplus of the debt remaining unsatisfied are barred as long as the foreclosure is upheld;³ but if the mortgagee—in the case that the value of the property is not sufficient to satisfy the entire debt—wishes to pursue his remedy for the unsatisfied balance, it will re-open the foreclosure, and the property will or may be sold under judicial decree, in order to ascertain its actual value, and the amount of the judgment to be entered up against the debtor.⁴ Where the decree directs a sale of the premises, the proceeds of sale are applied to the liquidation of the debt, and if they are not sufficient to pay the whole debt, the mortgagee has his remedies for the balance, which are the ordinary actions at law for the recovery of a debt. It is usual, however, for the court of equity, in rendering a decree in foreclosure for the sale of the mortgaged premises, to give judgment for the unpaid surplus against the mortgagor and others who may be jointly liable with him.⁵ And the court may grant this judgment for the unsatisfied surplus, although the complaint or bill in foreclosure contains no such prayer.⁶ The remedies of the mortgagee are twofold: *First*, against the property mortgaged, and *Secondly*, on the personal liability of the mortgagor. These remedies are independent of each other, and although there can be but one payment of the debt, the prosecution of one of these remedies does not bar the

¹ Lyon v. Powell, 78 Ala. 351.

² Hunt v. Hunt, 17 Pick. 118; Keith v. Swan, 11 Mass. 216; Johnson v. Phillips, 13 Gray, 198; Churchill v. Loring, 19 Pick. 465; Wheelright v. Freeman, 12 Metc. 154; Whittier v. Dow, 14 Me. 298.

³ Griesbaum v. Baum, 18 Ill. App. 614.

⁴ Lovell v. Leland, 3 Vt. 581; Osborne v. Tunis, 25 N. J. L. 633; Spencer v. Harford, 4 Wend. 381; Morgan v. Plumb, 9 Wend. 287; Andrews v. Scotton, 2 Bland, 666; Paris v. Hulett, 26 Vt. 308; Edgerton v. Young, 43 Ill. 470; Bean v. Whitcomb, 13 Wis. 431; Bassett v. Mason, 18 Conn. 136; Porter v. Pillsbury, 36 Me. 278; Patten v. Pearson, 57 Me. 434; Hunt v. Stiles, 10 N. H. 466; Smith v. Packard, 19 N. H. 575; Armory v. Fairbanks, 3 Mass. 563; Leland v. Loring, 10 Metc. 122; Lansing v. Goelet, 9 Cow. 346.

⁵ Dunkley v. Van Buren, 3 Johns. Ch. 330; Deare v. Carr, N. J. Eq. 513; Pierce v. Potter, 7

Watts, 475; Mott v. Clark, 9 Pa. St. 399; Andrews v. Scotton, 2 Bland, 666; Hale v. Rider, 5 Cush. 231; Jones v. Conde, 6 Johns. Ch. 77; Payne v. Harrell, 40 Miss. 498; Stark v. Mercer, 3 How. (Miss.) 377; Marston v. Marston, 45 Me. 412; Gage v. Brewster, 31 N. Y. 220; Johnson v. Harmon, 19 Iowa, 58; Drayton v. Marshall, Rice Eq. 386; Rollins v. Forbes, 10 Cal. 299; Lee v. Kingsbury, 13 Texas, 69; Shepherd v. Pepper, 133 U. S. 626; Weir v. Field, (Miss. 1890) 7 So. 355; Hilton v. Otto Co. Bank, 29 Fed. Rep. 202; Shields v. Riopelle, 63 Mich. 458; Ohio Central R. R. Co. v. Central Trust Co., 133 U. S. 83. There are statutory provisions, for rendering a judgment for any unsatisfied balance in the foreclosure suit, in Arkansas, California, Indiana, Michigan, Minnesota, New York, Missouri, Texas and Iowa. See Washb. on Real Prop. 261-269, note.

⁶ Watkins v. Vrooman, 51 Hun, 175.

right to pursue the other, and they may be employed simultaneously in separate proceedings.¹ But in some of the states—notably, New York—judgment will not be rendered in an action at law on the debt, while a suit for foreclosure is pending, without leave of the court in which such suit is filed.² This rule of practice, no doubt, rests upon the ground that the entry of judgment in the proceeding at law would be useless, since in the foreclosure suit, judgment will be given for any balance remaining unsatisfied.

§ 445. **Mortgages with power of sale.**—In order to avoid the burdensome and expensive proceedings for foreclosure, the idea was conceived of giving to the mortgagee the power to sell the mortgaged premises upon the breach of the condition, and apply the proceeds of sale to the liquidation of the mortgage debt. It was at first doubted whether such a power was valid, when granted either in the mortgage or in a separate instrument. It was considered as a contemporaneous agreement, which, in its exercise, curtailed the mortgagor's right to redeem, and, therefore, was void. But the power of sale is now generally held to be good, since it does not abridge or take away the ordinary remedies for foreclosure, and is not in theory a means of foreclosing the mortgagor's equity of redemption.³ It is a power coupled with an interest, and is, therefore, irrevocable by the mortgagor. It operates as the appointment of a use, which under the Statute of Uses, becomes executed into a legal estate in the purchaser, and has all the characteristics that are met with in ordinary powers of appointment under that statute.⁴ It is not determined by the death of

¹ *Booth v. Booth*, 2 Atk. 343; *Hale v. Rider*, 5 Cush. 231; *Jones v. Conde*, 6 Johns. Ch. 77; *Burnell v. Martin*, 2 Dougl. 417; *Atty.-Gen. v. Winstanley*, 5 Bligh, 130; *Wiswell v. Baxter*, 20 Wis. 680; *Tappan v. Evans*, 11 N. H. 311; *Hughes v. Edwards*, 9 Wheat. 487; *McCall v. Lenox*, 9 Serg. & R. 302; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Thornton v. Pigg*, 24 Mo. 249; *Very v. Watkins*, 18 Ark. 546; *O'Leary v. Snediker*, 16 Ind. 404; *Riblett v. Davis*, 24 Ohio St. 114; *Slaughter v. Foust*, 4 Blackf. 379; *Payne v. Hanel*, 40 Miss. 498; *Delahay v. Clement*, 4 Ill. 201; *Longworth v. Flagg*, 10 Ohio, 300; *Downing v. Palmeteer*, 1 B. Mon. 64; *Christy v. Dyer*, 14 Iowa, 443; *Baum v. Tompin*, 110 Pa. St. 569; *Shepherd v. Pepper*, 133 U. S. 626.

² *Williamson v. Champlin*, 8 Paige Ch. 70; *Suydam v. Bartle*, 9 Paige Ch. 294; 3 Rev. St. N. Y. (1875) 198; *Mutual L. Ins. Co. v. Smith*, 54 N. Y. Super. Ct. 400; *Schultz v. Meade*, 8 N. Y. S. 663; *U. S. Life Ins. Co. v. Poillon*, 7 N. Y. S. 834. In Michigan, Iowa and Indiana the same statute rules prevail. *Mich. Comp. Laws*, (1871) 1549; *Code of Iowa*, (1873) § 3920; 2 *Ind. Rev. Stat.* (1876) 259; *Shields v. Riopelle*, 63 Mich. 458. In Minnesota, no suit at law on the debt may be instituted until the foreclosure suit is ended. *Johnson v. Lewis*, 13 Minn. 364; see, also, to the same effect, *Anderson v. Pilgam*, 30 S. C. 499.

³ *Wilson v. Troup*, 7 Johns. Ch. 25; *Smith v. Provin*, 4 Allen, 518; *Kinsley v. Ames*, 2 Metc. 29; *Calloway v. People's Bk.*, 54 Ga. 441; *Longworth v. Butler*, 3 Gilm. 32; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Fanning v. Keer*, 7 Iowa, 462; *Wing v. Cooper*, 37 Vt. 184; *Sims v. Hundley*, 3 Miss. 896; *Mann v. Best*, 62 Mo. 491; *Clark v. Condit*, 18 N. J. Eq. 358; *Hyman v. Devereux*, 63 N. C. 624; *Bradley v. Chester Valley R. R.*, 36 Pa. St. 141; *Walthall's Executors v. Rives*, 34 Ala. 91; *Mitchell v. Bogan*, 11 Rich. L. 686; *Crowning v. Cox*, 1 Rand. 306; *Morrison v. Bean*, 15 Texas, 267; *Turner v. Johnson*, 10 Ohio, 204; *Plum v. Studebaker*, 89 Mo. 162.

⁴ *Wilson v. Troup*, 2 Cow. 236. The difficulty of the courts at first, in determining the validity of a sale under the power, is, no doubt, traceable to a failure to apply to that case the doctrine of powers of appointment under the Statute of Uses. The ordinary mortgage is, in form and effect, a deed of bargain and sale, and the grant of a power of sale therein may be construed as the limitation of a use. See *Tiedeman Real Prop.*, Chapter XV., on Powers. But in most of the states, where mortgages with power of sale are in common use, they are expressly authorized by statute, and there is no need of this construction in order to establish their validity.

either party, as is the case with common law powers of attorney;¹ it descends to the mortgagee's heirs at his death,² and passes to the assignee of the mortgage, except where only a part of the mortgage debt is assigned. The power is indivisible, and, therefore, in a partial assignment, remains in the mortgagee, who must exercise it for the benefit of both parties.³ If the donee of the power is a corporation, the power may be exercised by its duly authorized agent.⁴ The power of the sale need not be limited to the estate of the mortgagee. While the mortgage may only cover a life estate, the power might authorize a sale of the fee.⁵ And the power of sale would be valid as a security although no estate in the mortgaged property be given to the creditor. The power of sale would in that case be a naked power.⁶

§ 446. **Character of the mortgagee in relation to the power.**—As donee of the power, the mortgagee assumes the character of trustee for himself and the mortgagor, and all other parties having interests in the mortgaged premises. In this capacity he is under the ordinary obligations of a trustee, and bound in his actions by the same rules of duty. In the execution of the power he must exercise the most scrupulous care to render the sale of the premises as beneficial as possible to all parties concerned. And he will be liable in damages for any loss to such parties resulting from his negligence in the conduct of the sale.⁷ In most of the states where mortgages with power of sale are in common use, the execution of the power is regulated by local statutes. But in the absence of statutory regulations, sales under the power are governed by the same rules as apply to the sale of other trust property.⁸ A failure to observe the statutory requirements, or

¹ *Ohnsburg v. Turner*, 87 Mo. 127; *Benneson v. Savage*, 130 Ill. 352.

² When it is stated in the text that the power of sale passes to the heirs of the mortgagee, reference itself is only had to those states where the mortgage itself descends to the heir. But in most of the states the power of sale descends with the mortgage to the personal representatives, and may be exercised by them, although the power is expressly limited to the "heirs and assigns." *Demarest v. Wynkoop*, 3 Johns. Ch. 125; *Johnson v. Turner*, 7 Ohio, 568; *Berry v. Skinner*, 30 Md. 573; *Harnickle v. Wells*, 50 Ala. 198; *Collins v. Hopkins*, 7 Iowa, 463. In Missouri and Illinois, and perhaps in other states, upon the death of the mortgagee the sheriff may be directed to execute the power, or a new trustee can be appointed upon the application of anyone interested therein. *Hackman v. Dill*, 32 Mo. App. 509.

³ *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Wilson v. Traup*, 2 Cow. 236; *Jencks v. Alexander*, 11 Paige Ch. 619; *Berger v. Bennett*, 1 Caine's Cas. 1; *Slee v. Manhattan Co.*, 1 Paige Ch. 48; *Harnickell v. Orndoff*, 35 Md. 341; *Pease v. Pilot Knob, &c. Co.*, 49 Mo. 124; *Pickett v. Jones*, 63 Mo. 195; *Niles v. Ransdorf*, 1 Mich. 338; *Strother v. Law*, 54 Ill. 413; *Bush v. Sher-*

man, 80 Ill. 160; *Solberg v. Wright*, 33 Minn. 224; *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; *Sanford v. Kane*, 24 Ill. App. 504; reversed 127 Ill. 591; but see *Dameron v. Eskridge*, 104 N. C. 621. And this is also true where the assignment of the debt works an assignment of the mortgage. Such an assignee may exercise the power in those states where such a transaction is looked upon as a legal assignment. See cases *supra*. And the assignee may exercise the power, although the assignment has not been recorded. *Montague v. Dawes*, 12 Allen, 397; s. c., 14 Allen, 373. But it has been held in Missouri, that the power must be expressly limited to the mortgagee and assigns, in order that the assignee may exercise the power. *Dolbear v. Worduff*, 84 Mo. 619.

⁴ *Chilton v. Brooks*, 71 Md. 445.

⁵ *Sedgwick v. Laffin*, 10 Allen, 430; *Butler v. Ladue*, 12 Mich. 173; *Torrey v. Cook*, 116 Mass. 165.

⁶ *Neidig v. Eiffer*, 18 Abb. Pr. 353; *Parshall v. Eggart*, 52 Barb. 367; *Holmes v. Hall*, 8 Mich. 66; *Bousey v. Amee*, 8 Pick. 236.

⁷ *Tomlin v. Luce*, 43 Ch. Div. 191.

⁸ *Howard v. Ames*, 3 Metc. 311; *Robertson v. Norris*, 1 Giff. 424; *Jencks v. Alexander*, 11

the terms of the power, will invalidate the deed of conveyance made in pursuance of the sale, even in the hands of a purchaser without actual notice. There must be a substantial compliance with such regulations, in order to pass a good title to the purchaser, the burden of proof being cast upon the purchaser unless the recitals show a compliance with the requirements of the law.¹ The sale will, however, under such circumstances, operate as an equitable assignment of the mortgage and pass to the purchaser, whatever title the mortgagee as such

Paige Ch. 624; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Leet v. McMaster*, 51 Barb. 236; *Montague v. Dawes*, 14 Allen, 369. Mere inadequacy of price will not vitiate the sale, but if the property has been so grossly sacrificed that the purchaser may be presumed to know of it, the sale will be avoided. *Vail v. Jacobs*, 62 Mo. 130; *King v. Bronson*, 122 Mass. 122; *Horsey v. Hough*, 38 Md. 130; *Landrum v. Union Bk. of Mo.*, 63 Mo. 48; *Hoodless v. Reid*, 112 Ill. 105; *Maxwell v. Newton*, 65 Wis. 261; *Gross v. Janesok*, 10 N. Y. S. 541; *Chilton v. Brooks*, 71 Md. 445; *Condon v. Maynard*, 71 Md. 601. And any fraudulent mismanagement or deception practiced upon the mortgagor will avoid the sale, if the purchaser participates in it, or is cognizant of it. *Banta v. Maxwell*, 12 How. Pr. 479; *Lee v. McMasters*, 51 Barb. 236; *Eucking v. Simmons*, 28 Wis. 272; *Bush v. Sherman*, 80 Ill. 160; *Hurd v. Case*, 32 Ill. 45; *Jackson v. Crafts*, 18 Johns. 110; *Mapps v. Sharp*, 32 Ill. 13; *Mann v. Best*, 62 Mo. 491. Notice of the sale to the parties interested in mortgaged premises is not necessary to validity of sale in absence of a statutory requirement. *Carver v. Brady*, 104 N. C. 219. The action to set aside a sale under a power is an equitable proceeding to redeem the property. A bill to set aside the sale, without offering to redeem, will not be entertained. *Candee v. Burke*, 1 Hun, 546; *Vroom v. Ditmas*, 7 Cow. 13; *Robinson v. Ryan*, 25 N. Y. 320; *Schwartz v. Sears*, Walk. (Mich.) 170. But the bill must be filed within a reasonable time after the discovery of the fraud or other equitable claim. Acquiescence is treated as a waiver of all irregularities in the sale. *Hamilton v. Lubukee*, 51 Ill. 415; *Bush v. Sherman*, 80 Ill. 160; *Hoffman v. Harrington*, 33 Mich. 392; *Landrum v. Union Bk. of Mo.*, 63 Mo. 48; *Alexander v. Hill*, 88 Ala. 487.

¹ *Smith v. Prodin*, 4 Allen, 518; *Roarty v. Mitchell*, 7 Gray, 243; *Bradley v. Chester Val. R.R.*, 36 Pa. St. 141; *Longwith v. Butler*, 3 Gilm. 32; *Cooper v. Crosby*, *Id.* 508; *John v. Bumpstead*, 17 Barb. 100; *Root v. Wheeler*, 12 Abb. Pr. 294; *Gibson v. Jones*, 5 Leigh, 370; *Ormsby v. Tarascon*, 3 Litt. 404; *Dana v. Farrington*, 4 Minn. 433; *Tyler v. Hierring*, (Miss. 1890) 6 So. 740; *Pierce v. Grimley*, (Mich. 1890) 43 N. W. 932. Among others, the following circumstances have been deemed sufficient to set aside the sale: Neglect to give the required notice to the parties interested. *Low v. Purdy*, 2 Lans. 422; *King v. Duntz*, 11 Barb. 191; *Ran-*

dall v. Hazleton, 12 Allen, 442; *Hull v. Cushman*, 14 N. H. 171; *Green v. Cross*, 45 N. H. 594; *Drinan v. Nichols*, 115 Mass. 353; *Carpenter v. Black Hawk, &c. Co.* 65 N. Y. 43; *Lee v. Mason*, 10 Mich. 403; *Rutherford v. Williams*, 42 Mo. 18. *Hoodless v. Reid*, 112 Ill. 105; *Clark v. Simmons*, 150 Mass. 357. An insufficient publication of notice. *Lawrence v. Farmers' Loan, &c. Co.*, 13 N. Y. 642; *Elliott v. Wood*, 45 N. Y. 71; *Gibson v. Jones*, 5 Leigh, 370; *Hoffman v. Anthony*, 6 R. I. 282; *Doyle v. Howard*, 16 Mich. 261; *Butterfield v. Farnham*, 19 Minn. 85; *Bush v. Sherman*, 80 Ill. 160; *Hubbell v. Sibley*, 50 N. Y. 468; *Calloway v. People's Bank*, 54 Ga. 441; *Fenner v. Tucker*, 6 R. I. 551; *Banning v. Armstrong*, 7 Minn. 46; *Dickerson v. Small*, 64 Md. 395; *Morse v. Byam*, 55 Mich. 594; *Bacon v. Kennedy*, 56 Mich. 329; *Magnason v. Williams*, 111 Ill. 450; *Lester v. Citizens' Sav. Bank*, (R. I. 1890) 20 Atl. 231; *Williamson v. Stone*, 27 Ill. App. 214; 128 Ill. 129. It is not usually necessary to sell the property in parcels, and unless it is essentially advantageous to the mortgagor, a failure to do so will not vitiate the sale. *Rowley v. Brown*, 4 Binn. 61; *Chesley v. Chesley*, 49 Mo. 540; s. c., 54 Mo. 347; *Sumrall v. Chaffin*, 48 Mo. 402; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Shannon v. Hay*, 106 Ind. 589; *Willard v. Finnegan*, 42 Minn. 476; *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; see statutes in New York, and several other states to the same effect. A sale on credit, when that is not expressly authorized, is invalid. *Olcut v. Bynum*, 17 Wall. 44; *Mead v. McLaughlin*, 42 Mo. 198; *Arnold v. Green*, 15 R. I. 348; see 2 Jones on Mort., §§ 1868, 1869. But he may give credit for what is coming to him, although not authorized. *Strother v. Law*, 54 Ill. 413. A sale is absolutely void only where there is a complete failure to comply with an essential requirement (*Bigler v. Waller*, 14 Wall. 297); and only voidable at the election of the parties, when the exercise of a discretion as to the manner of compliance is irregular or unwise. *Ingle v. Culbertson*, 43 Iowa, 265. And to avoid the sale in the hands of a purchaser for value, notice of the irregularity must be brought to him. *Beatie v. Butler*, 21 Mo. 320; *Mann v. Best*, 62 Mo. 461; *Sternberg v. Dominick*, 14 Johns. 435; *Montague v. Dawes*, 12 Allen, 397; *Holt v. Russel*, 56 N. H. 559; *Hamilton v. Lubukee*, 51 Ill. 415; *Jackson v. Henry*, 10 Johns. 185.

has in the land.¹ And whether the purchaser claims title as assignee of the mortgage or not, the subsequent exercise of the power of sale in foreclosure is in nowise affected by the illegal exercise of the power.²

§ 447. **Purchase by mortgagee at his own sale.**—Since the mortgagee as donee of the power is a trustee for all parties concerned, he will not be permitted to purchase at his own sale, directly or indirectly, unless he is authorized to do so by statute or by the terms of the mortgage. And such a purchase may be avoided at the instance of the mortgagor, even though the consideration be fair and adequate.³ The purchase by the mortgagee without express authority is, however, only voidable at the election of the mortgagor and his privies. And they cannot invalidate the sale, if the property in the meantime has passed into the hands of an innocent purchaser.⁴

§ 448. **Extinguishment of the power.**—The power is extinguished by any acts, which will discharge the mortgage, such as payment or tender of payment, and the exercise of the power afterwards will not vest a good title in any purchaser,⁵ unless the mortgagor by his own acts is estopped from denying the validity of the sale. Thus, for example, if the mortgagor is present at the sale and makes no protest,

¹ *Sawyers v. Baker*, 77 Ala. 461.

² *Ohnsburg v. Turner*, 87 Mo. 127.

³ *Downes v. Grazebrook*, 3 Meriv. 207; *Dayone v. Fanning*, 5 Johns. Ch. 257; *Jackson v. Walsh*, 14 Johns. 415; *Elliott v. Wood*, 45 N. Y. 71; *Patten v. Pearson*, 57 Me. 435; *Jennison v. Hapgood*, 7 Pick. 1; *Howard v. Ames*, 3 Metc. 308; *Dyer v. Shirlieff*, 112 Mass. 165; 17 Am. Rep. 77; *Hyndman v. Hyndman*, 19 Vt. 9; *Montague v. Dawes*, 12 Allen, 400; *Hall v. Bliss*, 118 Mass. 560; 19 Am. Rep. 475; *Waters v. Groom*, 11 Clark & F. 684; *Michaud v. Girod*, 4 How. 553; *Scott v. Freeland*, 7 Smed. & M. 418; *Hall v. Towne*, 45 Ill. 493; *Roberts v. Fleming*, 53 Ill. 196; *Rutherford v. Williams*, 42 Mo. 18; *Parmenter v. Walker*, 9 R. I. 235; *Whithead v. Hellen*, 76 N. C. 99; *Korns v. Shaffer*, 27 Md. 83; *Benham v. Rowe*, 2 Cal. 387; *Chilton v. Brooks*, 71 Md. 601; *Bohn v. Davis*, 75 Tex. 24; *Nichols v. Otto*, (Ill. 1890) 23 N. E. 411. Statutory provisions, authorizing the mortgagee to purchase at his own sale, are to be found in New York, Michigan, Wisconsin, Minnesota, Maryland. 2 Washb. on Real Prop. 74; 2 Jones on Mort., § 1740. It is not necessary to show fraud or unfair dealing in order to avoid purchase by the mortgagee. *Rutherford v. Williams*, 42 Mo. 18; *Thornton v. Irwin*, 43 Mo. 153; *Blockley v. Fowler*, 21 Cal. 326; *contra*, *Richards v. Holmes*, 18 How. 143; *Howard v. Davis*, 6 Tex. 174; *Hamilton v. Lubukee*, 51 Ill. 420. When the sale is made under a judicial decree, or by a public officer, when that is permitted, there is no restriction upon the right of the mortgagee to purchase. *Richards v. Holmes*, 18 How. 143; *Bloom v. Rensselaer*, 15 Ill. 503; *Allen v. Chatfield*, 8 Minn. 435; *Ramsey v. Merriam*, 6 Minn. 168; *Maxwell v. Newton*, 65

Wis. 261; *contra*, *Saines v. Allen*, 58 Mo. 537.

⁴ *Dexter v. Shepard*, 117 Mass. 480; *Burns v. Thayer*, 115 Mass. 89; *Robinson v. Cullom*, 41 Ala. 693; *Edmondson v. Welsh*, 27 Ala. 578; *Rutherford v. Williams*, 42 Mo. 18; *Thurston v. Prentiss*, 1 Mich. 193; *Benham v. Rowe*, 2 Cal. 387; *McCall v. Mash*, (Ala. 1890) 7 So. 770. And the right to avoid the sale is extinguished by ratification of the mortgagor, or his acquiescence therein for an unreasonably long time. *Dobson v. Racey*, 8 N. Y. 216; *Nichols v. Baxter*, 5 R. I. 491; *Patton v. Pearson*, 60 Me. 223; *Learned v. Foster*, 117 Mass. 365; *Bergen v. Bennett*, 1 Caine's Cas. 19; *Morgan v. Burgess*, 70 Ill. 604; *Medsker v. Swaney*, 45 Mo. 273; *Craddock v. Am. Freehold, & Co.*, 88 Ala. 281.

⁵ *Cameron v. Irwin*, 5 Hill, 272; *Charter v. Stevens*, 3 Denio, 33; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Warner v. Blakeman*, 36 Barb. 501; 2 Jones on Mort., §§ 886-893; *Jenkins v. Jones*, 2 Giff. 99; *Lowe v. Grinnan*, 19 Iowa, 192. Tender after condition broken does not at common law extinguish the power. *Cranston v. Crane*, 97 Mass. 459; *Montague v. Dawes*, 12 Allen, 397. But in most of the states, payment has the same effect after as well as before condition broken. *Jenkins v. Jones*, *supra*; *Cameron v. Irwin*, *supra*; *Flower v. Elwood*, 66 Ill. 438; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Whelom v. Reilly*, 61 Mo. 565; see 2 Jones on Mort., § 893; and *Tiedeman Real Prop.*, § 333. But as long as the mortgage remains unsatisfied on the records, a sale after payment would be upheld in favor of a purchaser for value and without notice. *Elliott v. Wood*, 53 Barb. 285; *Brown v. Cherry*, 56 Barb. 635; *Warner v. Blakeman*, 56 Barb. 501.

and gives no notice of his rights to the bystanders, he will be precluded under the doctrine of estoppel from setting aside the sale as against an innocent purchaser.¹ The power is, however, unaffected by the institution of an action for foreclosure, as long as the foreclosure has not been effected.²

§ 449. **Application of the purchase money.**—The mortgagee, on receiving the proceeds of sale, must apply it first to the expenses of the sale, and then to the satisfaction of the mortgage debt. And if there is a surplus remaining, he holds it in trust for the junior incumbrancers, and lastly, the mortgagor. Such surplus has in equity all the qualities of real estate, and, if the mortgagor has died, will be distributed among the widow and heirs, instead of going to his personal representatives.³ On the other hand, if the purchase money fell short of a settlement of the mortgage debt, the mortgagee may recover the balance of the debt in an action on the personal obligation.⁴

§ 450. **Deeds of trust.**—Somewhat similar in effect to mortgages with power of sale are deeds of trust, in which the property is conveyed to a trustee in trust to secure the creditor in his claim, and to sell the property for the satisfaction of the debt, if it is not paid at maturity. But inasmuch as this species of trust is already fully discussed in the preceding chapter on modern express trusts,⁵ it is not necessary to add anything more in this connection.

§ 451. **Contribution to redeem.**—**General statement.**⁶—When one of two or more persons jointly liable on a debt pays the whole debt, he has the right to call upon the others for contribution towards such payment in proportion to their several interests in the debt. This liability for contribution is an incident to all contractual obligations, and the same rules of construction apply, whatever may be the nature or origin of the debt. In the present discussion the liability for contribution arises out of the joint obligation of several persons to answer for the mortgage debt, either in their person or with their interests in the mortgaged premises. It has been explained that when

¹ *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr. 569; *Smith v. Newton*, 38 Ill. 230.

² *Jenkins v. International Bank*, 111 Ill. 462.

³ *Butterick v. Wentworth*, 6 Allen, 79; *Andrews v. Fisa*, 101 Mass. 422; *Dunning v. Dean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293; *Sweezy v. Thayer*, 1 Duer, 286; *Hawley v. Bradford*, 9 Paige, 200; *Pickett v. Buckner*, 45 Miss. 226; *Fox v. Pratt*, 27 Ohio St. 512; *Hinchman v. Stiles*, 9 N. J. Eq. 454; *Shaw v. Hoodley*, 8 Blackf. 165; *Poster v. Potter*, 37 Mo. 534; *Reid v. Mullins*, 43 Mo. 306. In Vermont and Michigan, the surplus is held to be personalty, and vests in the personal representatives instead of the widow and heirs. *Varnum v. Meserve*, 8 Allen, 158; *Smith v. Smith*, 13 Mich. 258. The surplus is distributed among the claimants according to the priority of their respective interests, and their rights in case of a dispute may be settled by a suit against the mortgagee

for the recovery of their alleged share in the surplus. *Bevier v. Schoonmaker*, 29 How. Pr. 411; *Cope v. Wheeler*, 41 N. Y. 303; *Stoever v. Stoever*, 9 Serg. & R. 434; *Matthews v. Duryea*, 45 Barb. 69; *Reynolds v. Hennessey*, 15 R. I. 215. Or the mortgagee may file a bill of interpleader, and compel the adverse claimants to settle their disputes. *Bleeker v. Graham*, 2 Edw. Ch. 647; *The People v. Ulster Com. Pleas*, 18 Wend. 628; *Bailey v. Merritt*, 7 Minn. 159. But without the consent of the mortgagor the mortgagee has no power to appropriate the money to any debt of the mortgagor which is not secured by the mortgage. *Johnson v. Thomas*, 77 Ala. 367.

⁴ *Shepherd v. May*, 115 U. S. 505.

⁵ *Ante*, Chapt. XVII, § 305.

⁶ See *post*, § 530, for a further explanation of the general subject of contribution and exoneration.

a person is entitled to redeem, and is interested only in a part of the premises, he must pay the entire debt, and as against the others jointly interested with him, he becomes subrogated to the mortgagee, and is equitable assignee of the mortgage, even though the mortgage has been satisfied on the records. He can then, in turn, foreclose the mortgage against them if they refuse to pay their *pro rata* share of the debt. This liability constitutes the right to contribution, as applied to mortgages. It is not a personal liability resting upon the persons interested in the mortgaged premises; their interests are alone liable. Nor can they be compelled to contribute; they have the right to refuse and to surrender their interests to forfeiture under foreclosure.¹ This liability of their interests depends upon the equality or inequality of their respective equities in regard to the mortgage and the debt, and must, therefore, vary according to the relation of the parties between whom the question arises. But whatever may be the relation of these parties to each other, the mortgagee cannot be compelled to observe the equality or inequality of their equities in the enforcement. He can proceed against any one of them, against whom he has a claim for the satisfaction of the mortgage, whether his equity was inferior or superior.²

§ 452. **Mortgagor v. his assignees.**—Since the mortgagor is personally liable to pay the debt, as a general rule, he would have no right to call upon his assignees to contribute, nor could his heirs or devisees claim such a right.³ But if the purchaser assumed the mortgagor's liability as a part of the consideration of the conveyance, should the mortgagor be afterwards compelled by the mortgagee to pay the debt, the mortgagor would be subrogated to the rights of the mortgagee under the mortgage, and could enforce it against such purchaser.⁴ Where there is no agreement on the part of the purchaser to pay the debt, if the mortgage is foreclosed, the purchaser can claim from the mortgagor exoneration for the full amount lost by foreclosure.⁵ On the other hand, if the purchaser of the mortgagor's estate has assumed, in whole or in part, the payment of the mortgage debt, he cannot claim contribution of the mortgagor, as long as he is not forced to pay more than he has agreed to pay.⁶

¹ *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *Stevens v. Cooper*, *Id.* 425; *Lawrence v. Cornell*, 4 Johns. Ch. 542; *Salem v. Edgerly*, 33 N. H. 46; *Stroud v. Casey*, 27 Pa. St. 471; *Chase v. Woodbury*, 6 Cush. 143; *Gibson v. Crehore*, 5 Pick. 146; *Johnson v. Rice*, 8 Me. 167; *Briscoe v. Power*, 47 Ill. 449.

² *Palmer v. Snell*, 111 Ill. 161.

³ *Harbert's Case*, 3 Rep. 11; *Chase v. Woodbury*, 6 Cush. 143; *Allen v. Clark*, 17 Pick. 47; *Beard v. Fitzgerald*, 108 Mass. 134; *Cowles v. Dickinson*, 5 Johns. Ch. 235; *Lock v. Fulford*, 52 Ill. 166; *Johnson v. Williams*, 4 Minn. 268; 2 *Jones on Mort.*, § 1090.

⁴ *Cox v. Wheeler*, 7 Paige Ch. 257; *Jumel v. Jumel*, *Id.* 591; *Halsey v. Reed*, 9 Paige Ch. 446; *Morris v. Oakman*, 9 Pa. St. 498; *Kinnear v.*

Lowell, 34 Me. 299; *Fletcher v. Chase*, 16 N. H. 42; *Sweet v. Sherman*, 109 Mass. 231; *Funk v. McReynolds*, 33 Ill. 481; *Lily v. Palmer*, 51 Ill. 333; *Baker v. Terrell*, 8 Minn. 199; *Russell v. Pistor*, 7 N. Y. 171; *Krueger v. Ferry*, 41 N. J. Eq. 432; *Miller v. Fessler*, 42 Minn. 366; *Miller v. Eisele*, 42 Minn. 368; *Gerdine v. Menage*, 41 Minn. 417.

⁵ *Davis v. Winn*, 2 Allen, 111; *Downer v. Fox*, 20 Vt. 388; *Young v. Williams*, 17 Conn. 393; *Burnett v. Denniston*, 5 Johns. Ch. 35; *McLean v. Towle*, 3 Sandf. Ch. 119; *Brainard v. Cooper*, 10 N. Y. 356; *Flachs v. Kelly*, 30 Ill. 462; *Gunst v. Pelham*, 74 Tex. 586.

⁶ *Moore v. Shurtleff*, 128 Ill. 370; *Gunst v. Pelham*, 14 Tex. 586.

§ 453. **Contribution between the assignees of the mortgagor.—Effect of release of one of them.**—If the mortgaged property consists of two or more parcels of land, and they are *simultaneously* conveyed by the mortgagor to different persons, and one of the parcels is sold under foreclosure of the mortgage, the assignee or grantee of that parcel has the right to recover from the assignees of the other parcels their *pro rata* share of the debt; the debt being divided among them in proportion to the value of their respective parcels.¹ But where the assignments have been made *successively*, or at different times the courts have delivered contrary opinions in respect to their liability for contribution. In most of the states the rule prevails that their liability for contribution to each other is in the inverse order of alienation; in other words, that the equity of the prior purchaser or assignee is superior to that of the subsequent purchaser. So, if the prior purchaser is called upon to redeem, or his lot or parcel is foreclosed, he becomes an equitable assignee of the mortgage, and may enforce it against the subsequent purchasers of the other parcels, who, in order to redeem, must contribute to the full value of their estates in the inverse order of their alienation, the last being required to exhaust his entire interest in the mortgaged property before there can be any right of contribution against a prior purchaser. If, therefore, the last parcel conveyed is sufficient to satisfy the debt, the prior purchaser takes his estate free from any liability for contribution. The inequality of their equities rests upon the doctrine that inasmuch as, after the first assignment, the estate remaining in the mortgagor became the primary fund for the satisfaction of the debt, the second and other subsequent purchasers took, in respect to their relative liabilities under the mortgage, only such equities as the mortgagor had at the time of the successive conveyances to them.² In a few of the states it is held that the equities are equal between assignees of the mortgagor, whether the alienations are simultaneous or successive, and this opinion finds strong support in Judge Story.³ But it is

¹ Chase v. Woodbury, 6 Cush. 143; Bailey v. Myrick, 50 Me. 171; Aiken v. Gale, 37 N. H. 501; Stevens v. Cooper, 1 Johns. Ch. 425; Briscoe v. Power, 47 Ill. 448; Bates v. Ruddock, 2 Iowa, 423.

² Cushing v. Ayer, 25 Me. 383; Shepherd v. Adams, 32 Me. 64; Brown v. Simons, 44 N. H. 475; Aiken v. Gale, 37 N. H. 501; Lyman v. Lyman, 32 Vt. 79; Gates v. Adams, 24 Vt. 70; Bradley v. George, 2 Allen, 392; Gill v. Lyon, 1 Johns. Ch. 447; Jumel v. Jumel, 7 Paige Ch. 591; Patty v. Pease, 8 Paige Ch. 277; Nailer v. Stanley, 10 Serg. & R. 450; Cowden's Estate, 1 Pa. St. 267; Shannon v. Marselis, 1 N. J. Eq. 413; Galkill v. Sine, 13 Id. 400; Henkle v. Allstadt, 4 Gratt. 284; Jones v. Myrick, 8 Gratt. 179; Stoney v. Shultz, 1 Hill Ch. (S. C.) 500; Norton v. Lewis, 3 S. C. 25; Mobile Dock, &c. Co. v. Kuder, 35 Ala. 717; Aiken v. Brucey, 21 Ind.

139; Johnson v. Williams, 4 Minn. 268; Inglehart v. Crane, 42 Ill. 261; Niles v. Harmon, 80 Ill. 396; Ritch v. Eichelberger, 13 Fla. 169; Cumming v. Cumming, 3 Ga. 460; Beard v. Fitzgerald, 105 Mass. 134; Mason v. Payne, Walk. (Mich.) 459; McKinney v. Miller, 19 Mich. 142; McCullon v. Turpie, 32 Ind. 146; Worth v. Hill, 14 Wis. 559; Spence v. Aldrich, 15 Wis. 316; Mahagan v. Mead, 63 N. H. 570; Moore v. Shurtleff, 128 Ill. 370; Deavitt v. Judevine, 60 Vt. 695; Case Threshing Machine Co. v. Mitchell, (Mich. 1889) 42 N. W. 151; 74 Mich. 679.

³ Green v. Ramage, 18 Ohio, 428; Stanley v. Stocks, 1 Dev. Eq. 314; Barney v. Myers, 28 Iowa, 1; Bates v. Duddick, 2 Iowa, 423; Jobe v. O'Brien, 2 Humph. 34; Dickey v. Thompson, 8 B. Mon. 312; Story's Eq. Jur., § 1233 b, and note; Huff v. Farwell, 67 Iowa, 298.

believed that the preponderance of authority is in favor of the former theory, and it may be accepted as the prevailing rule in this country. This question of priority is, however, always subject to the agreement of the parties.¹ But if the mortgagee should release one of the assigned lots from the lien of the mortgage without the consent of the other assignees and after the assignment of the other lots to them, it would discharge the other lots from liability under the mortgage, on the ground that the rights of these other assignees had been injuriously affected by the consequent loss of their claim against the assignee who had been released for contribution or exonerations. But if the release was made before the assignment of the other lots, the release would have no effect on the lien of the mortgage over the other lots.² So, also, any agreement between the mortgagor and his assignees, in respect to the partition of the mortgage liability between them, will have no effect on the mortgage in the hands of the holder of the mortgage, unless he has assented to such partition.³

§ 454. **Contribution between the surety and the mortgagor.**—Where the surety, because of his personal liability, pays the mortgage debt, such payment will operate as an assignment of the mortgage to him, and he can enforce the mortgage to its full value against the mortgagor, his heirs, and even his assignees for value. He is only secondarily liable, the mortgagor, and with him the mortgaged premises, being treated as the primary fund out of which the debt is to be satisfied, and until they have been exhausted the surety can claim complete exoneration.⁴ The widow who releases the dower right in the mortgaged lands is so far considered a surety that she can make claim of exoneration against the estate of the deceased husband, and compel the enforcement of a chattel mortgage given for the same debt, in her own behalf.⁵ The same rule applies where the one debt is secured by two mortgages of separate pieces of property one of which only is given by the primary debtor, the other mortgage is in the nature of a collateral security, and the primary debtor's mortgage must exonerate the owners of the other mortgaged lands.⁶ But if the surety be also the mortgagor and the other co-debtor the principal, and the latter pays the debt, he will not be subrogated to the rights of the mortgagee. He is the principal, and can claim contribution or exoneration of no one.⁷

§ 455. **Between heirs, widow, and devisees of the mortgagor.**—If the mortgagor dies, and the mortgaged premises descend to his

¹ *Vogel v. Shurtleff*, 28 Ill. App. 516.

² *Libbey v. Tufts*, (N. Y. 1890) 24 N. E. 12; *Groesbeck v. Mattison*, 43 Minn. 547.

³ *De Haven v. Musselman*, (Ind. 1890) 24 N. E. 171; *Groesbeck v. Mattison*, 43 Minn. 547.

⁴ *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *Hayes v. Ward*, 4 Johns. Ch. 123; *Ottman v. Moak*, 3 Sandf. Ch. 431; *Root v. Bancroft*, 10 Metc. 48; *Mathews v. Aiken*, 1 Comst. 595; *Bk. of Albion v. Burns*, 45 N. Y. 170; *Dearborn v. Taylor*, 18 N. H. 153; *Ohio Life Ins. Co. v. Winn*,

4 Md. Ch. 253; *Burton v. Wheeler*, 7 Ired. Eq. 217; *Bk. of S. C. v. Campbell*, 2 Rich. Eq. 179; *Billings v. Sprague*, 49 Ill. 511; *McHenry v. Cooper*, 27 Iowa, 137; *Canaday v. Boliver*, 25 S. C. 507.

⁵ *Gore v. Townsend*, 105 N. D. 238.

⁶ *Canaday v. Boliver*, 25 S. C. 507.

⁷ *Crafts v. Crafts*, 13 Gray, 362; *Killborn v. Robins*, 8 Allen, 471; *Cherry v. Monro*, 2 Barb. Ch. 618; *Morris Adm'r v. Davis*, 83 Va. 297.

widow and heirs, or are devised by will to several parties, their equities being equal, if one of them redeems the mortgage will be assigned to him, and he may foreclose the same against the others unless they contribute their *pro rata* share towards redemption. They are all volunteers, whether they be heirs or devisees, and it is likely—if a part of the mortgaged premises were devised and a part descended to the heirs—there would be a right in favor of the devisee to contribution from the heir, and *vice versa*.¹

§ 456. **Between the mortgaged property and the mortgagor's personal estate.**—Upon the death of the mortgagor, leaving the mortgage unsatisfied, a claim for contribution or rather exoneration sometimes exists against the mortgagor's personal estate in favor of the real estate covered by the mortgage. The claim is founded upon the doctrine that the burden was imposed upon the real estate for the benefit of the personal estate, and as between the heirs and next of kin the latter should bear the loss.² Only the widow, heirs and devisees can claim this right of exoneration. Purchasers from the heirs, and voluntary purchasers from the mortgagor, cannot; nor can the heir or devisee exercise the right if they have parted with the equity of redemption, notwithstanding by the terms of their conveyance they are bound to see to the payment of the mortgage.³ This claim is more clearly conceded, where the same debt was secured also by a mortgage of the personalty.⁴ It can be enforced only against the personal representatives and residuary legatees. If, therefore, the personal estate has been bequeathed to others in the shape of general or specific legacies, the right to exoneration is lost.⁵ Nor can the right be exercised if the estate of the mortgagor is insolvent; and whether the estate is insolvent or not, it cannot be enforced against property which has been levied upon, nor will the right of exoneration in any case take precedence to liens held by creditors upon the personal property. In New York there will be no such claim for exoneration, unless the mortgagor has by will expressly made the payment of the debt a charge upon the personalty.⁷

§ 457. **Special agreements affecting the rights of contribution and exoneration.**—If in any case where the right of contribution or

¹ Carll v. Butman, 8 Me. 102; Gibson v. Crehore, 5 Pick. 146; Houghton v. Hapgood, 13 Pick. 158; Swaine v. Perine, 5 Johns. Ch. 490; Foster v. Hilliard, 1 Story, 77; Jones v. Sheward, 2 Dev. & B. Eq. 179; Merritt v. Hosmer, 11 Gray, 296; Bell v. Mayor of N. Y., 10 Paige Ch. 49; Drew v. Rust, 36 N. H. 343; Eaton v. Simonds, 14 Pick. 98.

² Cope v. Cope, 2 Salk. 449; Patton v. Page, 4 Hen. & M. 449; Henagan v. Harilee, 10 Rich. Eq. 285; Trustees, &c. v. Dickson, 1 Freem. Ch. 474. But this is not the case, where the mortgage was executed by a prior owner, and the ancestor purchased the property subject to the mortgage. The heir or devisee must, in such a case, pay the mortgage. Tweddle v. Tweddle,

2 Bro. Ch. 101; Cumberland v. Codrington, *supra*.

³ Goodburn v. Stevens, 1 Md. Ch. 42; Lupton v. Lupton, 2 Johns. Ch. 614; Cumberland v. Codrington, 3 Johns. Ch. 229; Lockhardt v. Hardy, 9 Beav. 379; Haven v. Foster, 9 Pick. 112.

⁴ Gore v. Townsend, 105 N. C. 228.

⁵ Cope v. Cope, 2 Salk. 449; Mansell's Estate, 1 Pars. Eq. Cas. 367; Mason's Estate, 4 Pa. St. 497; Gibson v. McCormick, 10 Gill & J. 65; Torr's Estate, 2 Rawle, 250.

⁶ Gibson v. Crehore, 3 Pick. 475; Church v. Savage, 7 Cush. 440.

⁷ Moseley v. Marshall, 27 Barb. 42; Rapalye v. Rapalye, 10. 610; Wright v. Holbrook, 32 N. Y. 587.

exoneration exists by law, the parties to the mortgage agree that one or more parcels covered by the mortgage should be released from the incumbrance, such agreement will be enforced between the parties and their subsequent assignees. But in no case will it be permitted to affect or alter the equities of parties who had previously become interested in the mortgaged property.¹ And if the mortgagee releases one part of the mortgaged premises, after the mortgagor had assigned another part, the mortgagee can only enforce the mortgage against the assignee to an amount determined by the proportion which the value of the entire mortgaged premises bears to the value of such assigned parcel.²

§ 458. **Marshalling of assets between successive mortgagees.**—When there are two mortgages upon one parcel of land, and the first mortgage covers another parcel which is not included in the second, if the parcel included in both mortgages is not sufficient to satisfy both debts, equity gives the junior mortgagee the right to call upon the senior mortgagee to exhaust the parcel not covered by both mortgages, before he forecloses against the other parcel. But equity will not compel the first mortgagee to satisfy himself in that manner, if it would be detrimental to his interests or inconvenient to him. In such a case, however, the court will direct him to assign his mortgage to the junior mortgagee, who may then foreclose against the parcel not covered by his own mortgage.³ An exception to this rule of marshalling of assets between two mortgages is, however, recognized in favor of a wife who joins in the execution of one mortgage for the purpose and with the intention of relinquishing her homestead, and reserves her homestead in the execution of the second mortgage. The second mortgagee cannot, on the principle set forth above, claim the right of satisfying his claim against the homestead.⁴ Not only is this the case, but the first mortgagee can be required to exhaust his lien on the mortgaged property, which is not covered by the homestead claim, before he is permitted to enforce such lien against the homestead estate.⁵

¹ *Welsh v. Beers*, 8 Allen, 151; *Bryant v. Damon*, 6 Gray, 564; *Johnson v. Rice*, 8 Me. 157; *The State v. Throup*, 15 Wis. 314; *Cheesebrough v. Millard*, 1 Johns. Ch. 425.

² *Stevens v. Cooper*, 1 Johns. 425; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Johnson v. Rice*, 8 Me. 157; *Parkman v. Welsh*, 19 Pick. 231; *Paxton v. Harrier*, 11 Pa. St. 312; *Inglehart v. Crane*, 42 Ill. 261; *Taylor v. Short*, 27 Iowa, 361; 1 Am. Rep. 280.

³ *Lanoy v. Athol*, 2 Atk. 446; *Evertson v. Booth*, 19 Johns. Ch. 486; *Cheesebrough v. Millard*, 1 Johns. Ch. 412; *Warren v. Warren*, 30 Vt. 530; *Ayres v. Husted*, 15 Conn. 516; *Reilly v. Mayor*, 12 N. J. Eq. 55; *Blair v. Ward*, 10 N.

J. Eq. 120; *Baine v. Williams*, 10 Smed. & M. 113; *Inglehart v. Crane*, 42 Ill. 261; *White v. Polleys*, 20 Wis. 505; *Clark v. Bancroft*, 13 Iowa, 327; *Cowden's Estate*, 1 Pa. St. 274; *Swigert v. Bk. of Ky.*, 17 B. Mon. 285; *Miami Ex. v. U. S. Bank, Wright*, (Ohio) 249; *Conrad v. Harrison*, 3 Leigh, 532; *Bk. of S. C. v. Mitchell*, Rice Eq. 389; *Marr v. Lewis*, 31 Ark. 203; 25 Am. Rep. 553.

⁴ *Mitchelson v. Smith*, (Neb. 1890) 44 N. W. 871; *Horton v. Kelly*, 40 Minn. 193; *McCreery v. Schaffer*, 26 Neb. 173.

⁵ *Horton v. Kelly*, 40 Minn. 193; *McCreery v. Schaffer*, 26 Neb. 173.

CHAPTER XXV.

CHATTEL MORTGAGES AND PLEDGES IN EQUITY.

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§ 463. **Chattel mortgages defined.—Conflict of common law and equitable theories.—Equity of redemption.**—A mortgage of personal property, according to the common law, is a sale or transfer of the title to the property, upon the condition that if a debt of the grantor is paid when it falls due, the sale will become void and the title revert, otherwise to remain in full force. Upon the breach of a condition, the title becomes absolute in the grantee.¹ The chattel mortgage, therefore, is nothing more than a conditional sale, in which the condition is the payment of a debt. If the mortgagor of a common law mortgage, of real as well as of personal property, failed to perform the condition at the agreed time, the title to the property became absolute in the mortgagee, even though the estate may have been worth much more than the mortgage debt.² There was no remedy by which the mortgagor could enforce the acceptance of payment after the breach of the condition, even where his failures arose from some accident or unavoidable delay; or where the payment of the debt with interest to date of the tender of payment would do no injury to the mortgagee. This rigorous rule of the common law did not fail to be productive of great justice in many instances, and like all cases of hardships resulting from the technicality of the common law it attracted the attention of the court of chancery. A long contest ensued between these courts from the time of the Magna Charta until the reign of James I., when chancery acquired jurisdiction over questions arising out of mortgages, and decreed that the mortgagor may become entitled to redeem his property, after condition broken, by the payment of the debt and interest, and in the reign of Charles I., the law of mortgages was firmly established as a branch of equity jurisprudence.³ This right of the mortgagor to redeem the property after

¹ Parshall v. Eggert, 52 Barb. 367; Porter v. Parmly, 43 How. Pr. 445; 34 N. Y. S. C. 398; Tompkins v. Batle, 11 Neb. 147, 151; Miner v. Judson, 2 Hun, 441; Mowry v. Wood, 12 Wis. 413.

² Fay v. Cheney, 14 Pick. 399; Wood v. Trask, 7 Wis. 566; Brigham v. Winchester, 1 Met. 390; Wade's Case, 5 Rep. 115.

³ 1 Spence Eq. Jur. 603; Jones on Mortg., § 6; How v. Vigneres 1 Rep. in Ch. 32; Emanuel

the breach of the condition was recognized only in a court of equity. The legal title, as viewed from the legal stand-point, was still considered to be absolute in the mortgagee, and discharged of all rights of the mortgagor in and to the property. The right to redeem was therefore no legal right. It was simply an equity, and hence was called the EQUITY OF REDEMPTION.¹ As a result of this equitable jurisdiction, mortgages, both real and personal, assumed in equity a different character from what they had in law. Equity seized hold of the real intention of the parties and construed the mortgage to have only the effect of a lien, instead of being a conditional sale, whereby a defeasible title to the property became vested in the grantee. The purposes of the parties are fully carried out under this theory of a lien, while the hardships of the common law forfeiture for the breach of the condition are avoided. Equity treated a mortgage, therefore, as a lien, instead of a conditional sale. This is necessarily involved in a recognition of the right of redemption.² But, at this point, in the development of the law, chattel mortgages and mortgages of real property part company. As soon as equity assumed jurisdiction over mortgages, it began to exert a potent influence over the development of the law in respect to the mortgages of real property, and has more or less superseded the common law theories in respect to the character of the real estate mortgage and the rights and interests of the mortgagor and mortgagee, so that the incidents of the real estate mortgage, as unfolded by the modern law of mortgages, are everywhere more in harmony with the equitable lien theory than with the common law theory of an estate upon condition.³ But for some inexplicable reason—unless it be that chattel mortgages, until recently, have been comparatively rare, and hence the same opportunity has not been present for a modification of their legal character through the influence of the equitable doctrines—the same radical variation from the common law definition of a mortgage is not to be noticed in the case of a chattel mortgage. Although the right of redemption after condition broken is conceded to the mortgagor of a chattel mortgage; it is in the absence of statute strictly an equitable remedy, not recognized in a court of law.⁴

College v. Evans, 1 Rep. in Ch. 18; *Roscarrick v. Barton*, 1 Cas. in Ch. 217; *Casborne v. Scarfe*, 1 Atk. 603; *Willette v. Winnelly*, 1 Vern. 488; *Price v. Perrie*, 2 Freem. 258.

¹ See *post*, § 467.

² *Flanders v. Chamberlain*, 24 Mich. 305, 313; *Davis v. Hubbard*, 38 Ala. 185, 189; *Sidener v. Bible*, 43 Ind. 230; *Woodward v. Wilcox*, 27 Ind. 207; *Blakemore v. Taber*, 22 Ind. 466; *Tritipo v. Edwards*, 35 Ind. 467; *Broadhead v. McKay*, 46 Ind. 595; *Evans v. Merriken*, 8 Gill & J. 39; *Headley v. Goundray*, 41 Barb. 282; *Jackson v. Willard*, 4 Johns. 41; *Kinna v. Smith*, 2 Green Ch. 14; *Runyan v. Mersereau*, 11 Johns. 534; *Eaton v. Whiting*, 3 Pick. 484; *Anderson v. Baumgartner*, 27 Mo. 80; *Ragland v. Justices*, 10 Ga. 65; *Hannah v. Carrington*, 18 Ark. 85;

Matthews v. Wallwyn, 4 Ves. 118; 4 Kent's Com. 138; *Timms v. Shannon*, 19 Md. 296; *McMillan v. Richards*, 9 Cal. 365; *Myers v. White*, 1 Rawle, 353; *Whitney v. French*, 25 Vt. 663; *Ellison v. Daniels*, 11 N. H. 280; *Deedly v. Cadwell*, 19 Conn. 218; *Hughes v. Edwards*, 9 Wheat. 500; *Green v. Hart*, 1 Johns. 580. See *ante*, §§ 411-414, where the same matter is explained in connection with real estate mortgages.

³ *Tiedeman on Real Prop.*, § 301, and *ante*, § 414.

⁴ *Evans v. Merriken*, 8 Gill & J. 39; *Wood v. Dudley*, 8 Vt. 430; *Charter v. Stevens*, 3 Denio, 33; *Bunacleugh v. Poolman*, 3 Daly, 236; *Hulson v. Walter*, 34 How. Pr. 385; *Porter v. Parmly*, 43 How. Pr. 445; 34 N. Y. S. C. 398.

After condition broken, no other right than the right of redemption is recognized as belonging to the mortgagor;¹ and the universal judicial opinion is that, in law, the title of the mortgagee to the goods becomes absolute upon the breach of the condition, subject only to the mortgagor's right of redemption.² And where the debt is payable in installments, default in the payment of the first installment will cause the title to become absolute in the mortgagee.³ The only apparent exceptions to this general rule seem to be found in Michigan and Oregon, where the chattel mortgage is treated as a lien, and the title is not held to become absolute in the mortgagee upon breach of the condition, as at common law.⁴ The mortgagor's right of redemption is the chief distinction between the chattel mortgage and the ordinary conditional sale.⁵

§ 464. **Parol defeasance, when enforceable.**—It is a cardinal rule of evidence that parol evidence is admissible to vary or control the meaning of a written instrument. And in the application of this rule to the law of chattel mortgages, as to that of real estate mortgages, it is held that where the bill of sale is executed on its face apparently absolute, it cannot be made to operate as a mortgage by parol proof of the intention of the grantor to execute a mortgage instead of an absolute bill of sale. This is certainly the legal rule; hence at law a parol defeasance is invalid, if the transfer or sale had been effected by a written instrument.⁶ But the instrument must be a bill of sale or other form of transfer of title to the goods, in order that the parol defeasance may be declared invalid. The fact that a bill of parcels or account has been issued, does not prevent the parol defeasance from being operative; for in that case the sale was itself parol.⁷ But in equity, this rule is more or less ignored, in respect to parol defea-

¹ *Boyd v. Beandin*, 54 Wis. 193, 198; *Leach v. Kimball*, 34 N. H. 568.

² *Langdon v. Buel*, 9 Wend. 80; *Achley v. Finch*, 7 Cow. 290; *Fox v. Burns*, 12 Barb. 677; *Byron v. May*, 2 Chand. 103; *Anderson v. Hunn*, 5 Hun, 79; *Fuller v. Acker*, 1 Hill, 473; *Flanders v. Thomas*, 12 Wis. 410; *Talman v. Smith*, 39 Barb. 390; *Butler v. Miller*, 1 N. Y. 496; *Brown v. Bement*, 8 Johns. 96; *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *Heyland v. Badger*, 35 Cal. 404; *Wright v. Ross*, 36 Cal. 414; *Rhines v. Phelps*, 3 Gilm. 456; *Pike v. Colvin*, 67 Ill. 227; *Bean v. Barney*, 10 Iowa, 498; *Winchester v. Ball*, 54 Me. 558; *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; 2 Fed. Rep. 128; *Thornhill v. Gilmer*, 4 Smed. & M. 153; *Bowens v. Benson*, 57 Mo. 26; *Leach v. Kimball*, 34 N. H. 568; *Woodside v. Adams*, 40 N. J. L. 417, 427; *Patchin v. Pierce*, 12 Wend. 61; 1 Hill, 473; *Moody v. Haselden*, 1 S. C. 129; *Nichols v. Webster*, 1 Chandl. 203; *Musgat v. Pumpelly*, 46 Wis. 660; *Smith v. Coolbaugh*, 21 Wis. 427; *Lowe v. Wing*, 13 N. W. Rep. 892, (1882) Wis.; *Smith v. Koust*, 50 Wis. 380; *Smith v. Phillips*, 47 Wis. 202; *Blodgett v. Blodgett*, 48 Vt. 32; *Hulsen v. Walter*, 34 How. Pr. 385; *Hall v. Snowhill*, 2 Green, (N.

J.) 8; *Bryant v. Carson River Lumber Co.*, 3 Nev. 313; *Robinson v. Campbell*, 8 Mo. 365; a. c., 615; *Volney & Stamp v. Gilman*, 43 Miss. 456; *Flanders v. Barstow*, 18 Me. 357; *Brown v. Phillips*, 3 Bush, 656; *Fikes v. Manchester*, 43 Ill. 379; *Durfee v. Grinnell*, 69 Ill. 371; *McConnell v. People*, 84 Ill. 583; *Larmon v. Carpenter*, 70 Ill. 549; *In re Haake*, 2 Sawy. 231; *Moore v. Murdock*, 26 Cal. 514; *Mervine v. White*, 50 Ala. 388.

³ *Flanders v. Barstow*, 18 Me. 357; *Halstead v. Swartz*, 1 T. & C. (N. Y.) 559; *Pulver v. Richardson*, 3 T. & C. 436; *Burton v. Tannehill*, 6 Blackf. 470; *Murray v. Erskine*, 100 Mass. 597.

⁴ *Kohl v. Lynn*, 34 Mich. 360; *Lucking v. Weston*, 25 Mich. 443; *Cary v. Hewitt*, 26 Mich. 228; *Baxter v. Spencer*, 33 Mich. 325; *Chapman v. State*, 5 Oreg. 432.

⁵ See *post*, § 467

⁶ *Harper v. Ross*, 10 Allen, 332; *Bryant v. Crosby*, 36 Me. 562; *Hogel v. Lindell*, 10 Mo. 483; *Montany v. Rock*, 10 Mo. 506; *Hartshorn v. Williams*, 31 Ala. 149; but see *contra*, *Fuller v. Parish*, 3 Mich. 211; *Reed v. Jewett*, 5 Me. 96.

⁷ *Caswell v. Keith*, 12 Gray, 351; *Hazard v. Loring*, 10 Cush. 267.

sance; and parol evidence is very generally held to be admissible to prove that a bill of sale, absolute on its face, was intended to be a mortgage. The authorities are not uniform as to how far, or in what cases, such evidence is admissible. Some have held that in any case parol evidence can be introduced to prove a bill of sale to be a mortgage, thus ignoring completely the application to mortgages of the rule of evidence, just explained,¹ while others either deny the right to admit parol evidence altogether,² or limit its admissibility to such cases as fall within the ordinary equitable jurisdiction of fraud, accident or mistake, *i. e.*, where the failure to reduce the defeasance to writing arose out of some fraud, accident or mistake.³ The parol defeasance will not only be valid in equity against the parties to the mortgage, but likewise against all others, who might subsequently acquire interests in the property, with notice of the fact that the sale was made with a defeasance.⁴ But it cannot be enforced against a subsequent purchaser for value and without notice of its existence.⁵

¹ *Parks v. Hall*, 2 Pick. 206; *Hodges v. Tenn. Marine & Fire Insurance Co.*, 8 N. Y. 416; *Coe v. Cassidy*, 72 N. Y. 133; *Farrell v. Bean*, 10 Md. 217; *Doughty v. McGalgan*, 6 G. & J. 275; *Stokes v. Hollis*, 43 Ga. 282; *Todd v. Hardig*, 5 Ala. 698; *Watson v. James*, 15 La. An. 386; *Scott v. Henry*, 13 Ark. 112; *Rogers v. Vaughan*, 31 Ark. 62; *Ward v. Deering*, 2 Mon. 9; *Hickman v. Cantrell*, 9 Yerg. 172; *Hurford v. Harned*, 6 Oreg. 362; *Bartel v. Lope*, 6 Oreg. 321; *Love v. Blair*, 72 Ind. 281; *Wilmerding v. Mitchell*, 52 N. J. L. 476; *Wilson v. Carver*, 4 Hayw. 90; *Loyd v. Currin*, 3 Humph. 462; *Carter v. Burris*, 10 Sm. & M. 527; *Humphries v. Bartee*, 10 Sm. & M. 282; *Johnson v. Clark*, 5 Ark. 322; *National Ins. Co. v. Webster*, 83 Ill. 470; *Hudson v. Isbell*, 5 St. & P. 67; *Parish v. Gates*, 29 Ala. 254; *Laeber v. Langhor*, 45 Md. 477; *Ing v. Brown*, 3 Md. Ch. 521; *Michelson v. Fowler*, 27 Hun, 159; *Smith v. Beattie*, 31 N. Y. 542; *Despard v. Walbridge*, 15 N. Y. 374; *Trieber v. Andrews*, 31 Ark. 163; *Russell v. Southard*, 12 How. 139; *Babcock v. Wyman*, 19 How. 239; *Sprigg v. Bk. of Mt. Pleasant*, 14 Pet. 201; *Pierce v. Robinson*, 13 Cal. 116; *Farmer v. Grose*, 42 Cal. 169; *Kuhn v. Rumpff*, 46 Cal. 299; *Klock v. Walter*, 70 Ill. 416; *Conwell v. Evill*, 4 Ind. 677; *Heath v. Williams*, 30 Ind. 495; *Johnson v. Smith*, 39 Iowa, 549; *Zuver v. Lyons*, 40 Iowa, 570; *Richardson v. Woodbury*, 43 Me. 206; *Campbell v. Dearborn*, 109 Mass. 130; *Hassam v. Barrett*, 115 Mass. 24; *McDonough v. Squire*, 111 Mass. 256; *Glass v. Hulbert*, 102 Mass. 24; *Swetland v. Swetland*, 3 Mich. 482; *Belate v. Morrison*, 8 Minn. 87; *Weide v. Gehl*, 21 Minn. 449; *Littlewort v. Davis*, 50 Miss. 403; *Freeman v. Wilson*, 51 Miss. 329; *O'Neill v. Capelle*, 62 Mo. 202; *Slowey v. McMurray*, 27 Mo. 116; *Schade v. Bessenger*, 3 Neb. 140; *Cookes v. Culbertson*, 9 Nev. 109; *Sweet v. Parker*, 22 N. J. Eq. 453; *Cottrell v. Long*, 20 Ohio, 464; *Rhines v. Baird*,

41 Pa. St. 256; *Palmer v. Guthrie*, 76 Pa. St. 441; *Nichols v. Reynolds*, 1 R. I. 30; *Mead v. Randolph*, 8 Tex. 191; *Gibb v. Penny*, 43 Tex. 560; *Wright v. Bates*, 13 Vt. 348; *Hill v. Loomis*, 42 Vt. 562; *Ross v. Norvell*, 1 Wash. (Va.) 14; *Bird v. Wilkinson*, 4 Leigh, 266; *Klinck v. Price*, 4 W. Va. 4; *Rogan v. Walker*, 1 Wis. 527; *Wilcox v. Bates*, 26 Wis. 465; *Fuller v. Parrish*, 3 Mich. 211; *Tyler v. Strang*, 21 Barb. 198.

² *Bassett v. Bassett*, 10 N. H. 64; *Porter v. Nelson*, 4 N. H. 130; *Boody v. Davis*, 20 N. H. 140. See *Osgood v. Thompson*, 30 Conn. 27, where the question is pronounced to be a very doubtful one.

³ *Freeman v. Baldwin*, 13 Ala. 246; *McKinstry v. Conly*, 12 Ala. 678; *Sewell v. Price*, 32 Ala. 97; *Whitfield v. Cates*, 6 Jones Eq. 136; *Washburn v. Merrills*, 1 Day, 139; *Brainerd v. Brainerd*, 15 Conn. 575; *Chaires v. Brady*, 19 Fla. 133; *Collins v. Tillon*, 26 Conn. 368; *French v. Burns*, 35 Conn. 359. In Georgia, a statute confines the admission of parol evidence to prove a defeasance to cases of fraud. Code of 1873, 3809; *Spence v. Steadman*, 49 Ga. 133; *Broach v. Barfield*, 57 Ga. 601; *Briggs v. Bird*, 55 Ga. 650. The courts, which admit parol evidence to prove a parol defeasance in any case, justify this extension of the equitable jurisdiction on the ground that "fraud in the use of the deed (mortgage) is as much a ground for the interposition of equity as fraud in its creation." *Jones on Mortgages*, § 288; see, also, to same effect, *Pierce v. Robinson*, 13 Cal. 116; *Conwell v. Evill*, 4 Ind. 677; *O'Neill v. Capelle*, 62 Mo. 202; *Wright v. Bates*, 13 Vt. 348; *Strong v. Stewart*, 4 Johns. Ch. 167; *Rogan v. Walker*, 1 Wis. 52; *Moreland v. Bernhart*, 44 Tex. 275.

⁴ *Omaha Book Co. v. Sutherland*, 10 Neb. 334.

⁵ *Morgan v. Shinn*, 15 Wall. 105.

§ 465. Can a chattel mortgage cover after-acquired property?—¹

It is said to be "a common learning in the law, that a man cannot grant or charge property which he hath not."² And inasmuch as the common law, and the still prevalent, theory is that the chattel mortgage is a grant *in presenti* upon condition, there is no escape from the conclusion that at law a chattel mortgage cannot, as a mortgage, be made to cover after-acquired goods;³ not even where the subject of the mortgage is a stock of goods, and the agreement of the parties is that the mortgagor shall retain the stock, sell the goods at retail in the course of trade, and keep up the stock by purchasing other goods of like kind.⁴ The only exception to this general rule, which the common law recognized, was in relation to those things which were in the potential, but not actual, possession of the party who made the grant or mortgage; such as the increase or growths from the property of the grantor or mortgagor. For example, it has been held possible, at common law, to make a mortgage of a growing crop, where one owned the land, or had a possessory interest therein,⁵ and even of a crop not yet planted, if it is to be planted or grown during the continuance of the present possessory interest in the land,⁶ although the authorities are at variance on this latter proposition, many of the courts refusing to apply the doctrine of potential existence

¹ For other discussions of the effect of present transfers or assignments of property not presently owned by the transferrer, see *ante*, §§ 374-377, 386.

² Perkins, § 65.

³ Jones v. Richardson, 10 Met. 481; Chesley v. Josselyn, 7 Gray, 489; Farmers' Loan & Trust Co. v. Long Beach Imp. Co., 27 Hun, 89; Otis v. Sill, 8 Barb. 102; Griffith v. Douglass, 73 Me. 532; Hunt v. Bullock, 23 Ill. 320; Wilson v. Wilson, 37 Md. 1; Rose v. Bevan, 10 Md. 466; Letourno v. Ringgold, 3 Cranch C. C. 103; Looker v. Peckwell, 38 N. J. L. 253; Comstock v. Scales, 7 Wis. 159; Williams v. Briggs, 11 R. I. 476; Cook v. Corthell, 11 R. I. 482; Parker v. Jacobs, 14 S. C. 112; Chapman v. Weimer, 4 Ohio St. 481; Hunter v. Bosworth, 43 Wis. 583; Pierce v. Emery, 32 N. H. 484, 505; Wagner v. Watts, 2 Cranch C. C. 169; Hamilton v. Rogers, 8 Md. 301; Roy v. Goings, 6 Bradw. 162; s. c., 96 Ill. 361; Head v. Goodwin, 37 Me. 181; Chapin v. Cram, 40 Me. 561; Gardner v. McEwen, 19 N. Y. 123; Bonsey v. Amee, 8 Pick. 236; Codman v. Freeman, 5 Cush. 306.

⁴ Williams v. Briggs, 11 R. I. 476; Rose v. Bevan, 10 Md. 466; Moody v. Wright, 13 Met. 17; Rhines v. Phelps, 3 Gilm. 455; Chapin v. Cram, 40 Me. 561; St. Louis Drug Co. v. Dart, 7 Mo. App. 590; Sharpe v. Pearce, 74 N. C. 600; Barnard v. Eaton, 2 Cush. 294; Jones v. Richardson, 10 Met. 481; Hamilton v. Rogers, 8 Md. 301; Wright v. Bircher, 5 Mo. App. 323; Griffith v. Douglass, 73 Me. 532; Parker v. Jacobs, 14 S. C. 112. In Georgia, it is provided by statute that such a mortgage will be efficient to cover the goods added to the stock by way of replen-

ishing the stock. Ga. Code of 1882, § 1954. See also, in construction of this statute, Chisholm v. Chittenden, 45 Ga. 213; Anderson v. Howard, 49 Ga. 313; Goodrich v. Williams, 50 Ga. 425; Johnson v. Patterson, 2 Woods, 443.

⁵ Cayce v. Stovall, 50 Miss. 396; Thrash v. Bennett, 57 Ala. 156; Jones v. Webster, 48 Ala. 109; Stephens v. Tucker, 55 Ga. 543; s. c., 58 Ga. 391; McGee v. Fitzer, 37 Tex. 27; Moore v. Byrum, 10 S. C. 452; Cook v. Steel, 42 Tex. 53; Butler v. Hill, 1 Baxt. 375; Stearns v. Gafford, 56 Ala. 544; White v. Thomas, 52 Miss. 49. And if the means of identification are provided in the description of the mortgaged property, the mortgage may be made to cover only a part of growing crop. Stephens v. Tucker, 55 Ga. 543. But if the description does not point out which portion is covered by the mortgage, the mortgage is only an executory agreement, until the portion of crop covered by it has been set apart, or otherwise definitely ascertained. Prentice v. Nutter, 25 Minn. 485; Thurman v. Jenkins, 2 Baxt. 426; Williamson v. Steele, 3 Lea. 527.

⁶ Van Hoozer v. Cory, 34 Barb. 9, 12; Wood v. Lester, 29 Barb. 145; Robinson v. Ezzell, 72 N. C. 231; Watkins v. Wyatt, 9 Baxt. 250; Conderman v. Smith, 41 Barb. 404; Argues v. Wasson, 51 Cal. 620; Cotten v. Willoughby, 83 N. C. 75; Womble v. Leach, 83 N. C. 84; Harris v. Jones, 83 N. C. 317. In New Mexico, the mortgage of a growing crop is declared to be void and of no effect; and in California, it is provided by statute that such mortgages shall be enforced, even after severance of the crop from the soil. Jones on Chattel Mortgages, § 143.

to an unplanted crop, so as to make a mortgage of the crop valid at law.¹ It is also held, under the same doctrine of potential existence, that a mortgage of all the crops, to be grown on the land during the continuance of the lease under which the mortgagor holds possession, is valid.² Although growing trees, fruit and grass are generally considered a part of the realty and, as such, cannot be the subject of a chattel mortgage,³ if a mortgage is given of growing trees and grasses, to be cut and severed from the soil,⁴ and more especially where it is given by one who does not own the land, but has purchased the same from the owner of the land,⁵ it is a good chattel mortgage under the doctrine of potential existence. It is further held, that a valid chattel mortgage may be made at common law of the future increase of stock which the mortgagor then owned,⁶ and of the future profits or income from the use of the mortgagor's steamboat.⁷ And so, also, may the sailor mortgage his share in the profits of a whaling voyage, which is actually begun or projected,⁸ but not the profits of a voyage not yet projected.⁹ But a mortgage could not be made at law of the fish which may be caught on a projected voyage, for the fisherman has no potential interest in the fish which he may catch in the future, although he may mortgage the earnings to be derived from the voyage.¹⁰ It is, also, impossible to mortgage a mere possibility or expectancy of acquiring property.¹¹ It is, also, another apparent exception of the general rule which prohibits at law the mortgage of goods not yet acquired, that if personal property become annexed to other property which is itself covered by

¹ *McCaffrey v. Woodin*, 65 N. Y. 459; *Stowell v. Bair*, 5 Bradw. 104; *Cressey v. Sabre*, 17 Hun, 120; *Elmore v. Simon*, 67 Ala. 526; *Millman v. Neher*, 20 Barb. 37; *Bank v. Crary*, 1 Barb. 542; *Rees v. Coats*, 56 Ala. 439; *Hutchinson v. Ford*, 9 Bush, 318; *Tomlinson v. Greenfield*, 31 Ark. 557; *Apperson v. Moore*, 30 Ark. 56. In Arkansas, it is now provided by statute that such a mortgage shall be valid at law. *Sambeth v. Ponder*, 33 Ark. 707. But in order that an instrument may operate as a mortgage of an unplanted crop, it must contain words of grant, and something more than an agreement that the creditor shall have the right to enter and take possession of the crop when grown. *Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cush. 50; *Millman v. Neher*, 20 Barb. 37; *Buskirk v. Cleveland*, 41 Barb. 610.

² *Petch v. Tutin*, 15 M. & W. 110; 15 L. J. Exch. 280; *Argues v. Wasson*, 51 Cal. 620; *Everman v. Robb*, 52 Miss. 653; *Booker v. Jones*, 55 Ala. 266; *Thrash v. Bennett*, 57 Ala. 156; *Adams v. Tanner*, 5 Ala. 740; *Mauldin v. Armistead*, 14 Ala. 702; s. c., 18 Ala. 500; *Headrick v. Bratton*, 63 Ind. 438; *Pennington v. Jones*, 57 Iowa, 37; *Fejavary v. Broesch*, 52 Iowa, 88; *Robinson v. Kruse*, 29 Ark. 575; *Robinson v. Mauldin*, 11 Ala. 977; *Stearns v. Gafford*, 56 Ala. 544; *Brown v. Coats*, 56 Ala. 439; *Jones v. Webster*, 48 Ala. 109; *Sillers v. Lester*, 48 Mi s. 513; *Quirique v. Dennis*, 24 Cal. 154; *Smith v. Atkins*, 18 Vt. 461, 465; *Harris v. Frank*, 52 Miss. 155;

Bellows v. Wells, 36 Vt. 599; *Lewis v. Lyman*, 22 Pick. 437; *Moulton v. Robinson*, 27 N. H. 550.

³ *Crosby v. Wadsworth*, 6 East, 602; *Scorell v. Borall*, 1 You. & Jer. 396; *Rodwell v. Phillips*, 9 M. & W. 505; *Wintermute v. Light*, 46 Barb. 278; *Green v. Armstrong*, 1 Den. 550; *Teal v. Anty*, 2 B. & B. 99; s. c., 4 J. B. Moo. 542; *Carrington v. Roots*, 2 M. & W. 248; *Bank of Lansingburg v. Crary*, 1 Barb. 542, 547; *Cudworth v. Scott*, 41 N. H. 456, 463.

⁴ *Cook v. Stearns*, 11 Mass. 533; *Douglas v. Shumway*, 13 Gray, 498; *Cudworth v. Scott*, 41 N. H. 462; *Wood v. Lester*, 29 Barb. 145; *Erskine v. Plummer*, 7 Me. 447; *Nelson v. Nelson*, 6 Gray, 385.

⁵ *Claflin v. Carpenter*, 4 Met. 580; *Smith v. Jencks*, 1 Denio, 380; s. c., 1 N. Y. 90; *Green v. Armstrong*, 1 Denio, 550; see *Sheldon v. Conner*, 48 Me. 584.

⁶ *Grantham v. Hawley*, Hob. 132; *Sawyer v. Gerrish*, 70 Me. 254; *Moore v. Byrum*, 10 S. C. 452; *Farrar v. Smith*, 64 Me. 74; *Oakes v. Moore*, 24 Me. 214, 220.

⁷ *Stewart v. Ray*, 3 Ala. 573.

⁸ *Gardner v. Hoeg*, 18 Pick. 168; *Tripp v. Brownell*, 12 Cush. 376; *Low v. Pew*, 108 Mass. 347.

⁹ *Cooper v. Douglass*, 44 Barb. 409.

¹⁰ *Robinson v. McDonnell*, 5 Mau. & Sel. 228; *Low v. Pew*, 108 Mass. 347; but see *Jones v. Webster*, 48 Ala. 109; *Curtis v. Auber*, 1 J. & W. 526.

¹¹ *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570.

a mortgage, that the thing so annexed becomes a part of the mortgaged property and, as such, is covered by the mortgage. This happens often where the mortgage is given to an uncompleted article.¹ And, on the same principle, it is held that a mortgage of domestic animals covers their increase.² But this would be the case in the absence of an express stipulation that the increase shall be included, only as long as it is necessary for the young to follow the dam for nurture.³ The mortgage, likewise, covers the growth of cuttings from mortgaged plants.⁴

§ 466. **How far mortgage of after-acquired property is invalid.—The mortgage in equity.**—But it must be observed, in the foregoing discussion, that the mortgage of after-acquired goods is held to be invalid only as against subsequent purchasers and attaching creditors. Such a mortgage is good as between the parties to the mortgage, the mortgagor being estopped from denying its validity as to the after-acquired goods;⁵ and the mortgage is also held to be valid against a purchaser who buys with notice of the mortgage, on the ground that since the mortgagor is bound, the purchaser with notice is not misled and, therefore, gets no better title.⁶ For the same reason, viz.: that of notice, if the mortgagee has taken possession of the after-acquired property under the mortgage, the mortgage will be valid against subsequent purchasers and attaching creditors.⁷ And the same result is attained, whether the mortgagor voluntarily puts the mortgagee into possession, or the mortgagee acquires possession against the will of the mortgagor, but in pursuance of an executory agreement contained in the mortgage that he shall take possession on default of payment.⁸ Another form of validating the mortgage of after-acquired

¹ *Reid v. Fairbanks*, 1 C. L. R. 787; *Harding v. Coburn*, 12 Met. 333; *Jenckes v. Goffe*, 1 R. I. 511; *Ex parte Ames*, 1 Lowell, 561; *Perry v. Pettingill*, 33 N. H. 433; *Putnam v. Cushing*, 10 Gray, 334; *Crosby v. Baker*, 6 Allen, 295; *Comins v. Newton*, 10 Allen, 518; *The Canada*, 7 Fed. Rep. 248; *Southworth v. Ashland*, 3 Sandf. 448; and see *Dunning v. Stearns*, 9 Barb. 630; *Frost v. Willard*, 9 Barb. 440; *Sumner v. Hamlet*, 12 Pick. 76; *Pulcifer v. Page*, 32 Me. 404; *Glover v. Austin*, 6 Pick. 209; *Gregg v. Sanford*, 24 Ill. 17.

² *Forman v. Proctor*, 9 B. Mon. 124; *M'Carty v. Blevins*, 5 Yerg. 195; *Gundy v. Biteler*, 6 Bradw. 510; *Nicholson v. Temple*, 4 P. & B. N. B. 248; *Hughes v. Graves*, 1 Litt. 317; *Tonville v. Casey*, 1 Murphy, (N. C.) 389; *Evans v. Meniken*, 8 Gill & J. 39.

³ *Winter v. Landphere*, 42 Iowa, 471; see *Thorpe v. Cowles*, 55 Iowa, 408; *Kellogg v. Lovely*, 46 Mich. 131; *Fowler v. Merrill*, 11 How. 375.

⁴ *Bryant v. Pennell*, 61 Me. 108.

⁵ *Allen v. Goodnow*, 71 Me. 420, 425; *Fejavary v. Brosch*, 52 Iowa, 88.

⁶ *Robson v. Michigan Central R. R. Co.*, 37 Mich. 70; *People v. Bristol*, 35 Mich. 28; *Amerli-*

can Cigar Co. v. Foster, 36 Mich. 368; *Cadwell v. Pray*, 41 Mich. 307; *Wood v. Lester*, 29 Barb. 145; *McGee v. Fitzer*, 37 Tex. 27.

⁷ *Rowley v. Rice*, 11 Met. 333; *Chase v. Denny*, 130 Mass. 566; *Butterfield v. Baker*, 5 Pick. 522; *Carrington v. Smith*, 8 Pick. 419; *Leland v. Colver*, 34 Mich. 418; *McCaffrey v. Woodin*, 65 N. Y. 459; *Kennedy v. Nat. Union Bank*, 23 Hun, 494; *Gregg v. Sanford*, 24 Ill. 17; *Roy v. Goings*, 6 Bradw. 162; *Chapman v. Weiner*, 4 Ohio St. 481; *Thompson v. Foerstel*, 10 Mo. App. 290; *Farmers' Loan and Trust Co. v. Commercial Bank*, 11 Wis. 207; *Morrow v. Reed*, 30 Wis. 81; *Booker v. Jones*, 55 Ala. 266; *Stern v. Simpson*, 62 Ala. 194; *Moore v. Byrum*, 10 S. C. 452, 462; *Oliver v. Town*, 28 Wis. 328; *Chynoweth v. Tenney*, 10 Wis. 397; *Cameron v. Marvin*, 26 Kans. 612, 629; *Brown v. Webb*, 20 Ohio, 389; *Hunt v. Bullock*, 23 Ill. 320; *Titus v. Mabee*, 25 Ill. 257; *Brown v. Platt*, 8 Bosw. 324; *Cook v. Corthell*, 11 R. I. 482; *Williams v. Briggs*, 11 R. I. 476; *Griffith v. Douglass*, 73 Me. 532; *Mitchell v. Black*, 6 Gray, 100; *Moody v. Wright*, 13 Met. 32.

⁸ *Thompson v. Foerstel*, 10 Mo. App. 290; *Chapman v. Weiner*, 4 Ohio St. 481. And the attempted revocation of a license to enter into

goods is to indorse on the mortgage, after the goods have been acquired, some sort of satisfaction of the mortgage.¹ Where the after-acquired goods have been mixed up with the goods which were in possession when the mortgage was executed, the burden is on the mortgagee to prove which of the goods were the property of the mortgagor at the date of the mortgage.² But whatever doubt and confusion may prevail as to the validity at law of mortgages which cover after-acquired goods, since equity treats the chattel mortgage as a lien, instead of a grant, the mortgage will be enforced in a court of equity over the after-acquired property, "attaching in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice."³ But in order that the chattel mortgage may, in any case, at law or in equity, cover after-acquired property, the mortgage must show that it was intended to cover the after-acquired property;⁴ and the mortgage must describe these goods, so that they may be identified by the description.⁵

The authorities do not agree as to the effect of recording a chattel mortgage which covers after-acquired property, as to charging subsequent purchasers with constructive notice of the lien on the after-acquired property. Some of the courts hold that the recording does not serve to give constructive notice,⁶ not even when the mortgage has become valid at law by a reduction of the after-acquired goods to the possession of the mortgagee.⁷ But there are other courts, which maintain that the record gives constructive notice of the contents of the mortgage, although it is only operative in equity.⁸

possession will not avail to prevent the enforcement of the mortgage. *Wood v. Lead-bitter*, 13 M. & W. 838; *Wood v. Manly*, 11 Ad. & E. 34; *McCaffrey v. Woodin*, 65 N. Y. 459; but see *contra*, *Chynoweth v. Tenney*, 10 Wis. 397; *Single v. Phelps*, 20 Wis. 398.

¹ *Brown v. Thompson*, 59 Me. 372; see, also, *Griffith v. Douglass*, 73 Me. 532.

² *Hamilton v. Rogers*, 8 Md. 301; but see *Mowry v. White*, 21 Wis. 417; *Dunning v. Stearns*, 9 Barb. 630; *Simmons v. Jenkins*, 76 Ill. 479.

³ *Story, J.*, in *Mitchell v. Winslow*, 2 Story C. C. 634; *Butt v. Ellitt*, 19 Wall. 544; s. c., 1 Woods C. C. 214; *Nat. Shoe & Leather Bank v. Small*, 7 Fed. Rep. 837; *Apperson v. Moore*, 30 Ark. 56; *Parker v. Jacobs*, 14 S. C. 112; *Floyd v. Morrow*, 26 Ala. 353; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Fejavary v. Broesch*, 52 Iowa, 88; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Cook v. Corthell*, 11 R. I. 482; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626; *Thompson v. Foerstel*, 10 Mo. App. 290, 299; *Page v. Gardner*, 20 Mo. 507; *Pennock v. Coe*, 23 How. 117; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Gevens v. Wright*, 18 N. J. Eq. 330; *McCaffrey v. Woodin*, 65 N. Y. 459; *First Nat. Bank v. Turnbull*, 32 Gratt. 695; *Brockenbrough v. Brockenbrough*, 31 Gratt.

580; *Ross v. Wilson*, 7 Bush, 29; *Zaring v. Cox*, 78 Ky. 527; *Borst v. Nalle*, 28 Gratt. 423; *Levy v. Welsh*, 2 Edw. Ch. 438; *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311; *Wright v. Bircher*, 72 Mo. 179; *Griffith v. Douglass*, 73 Me. 532; *Williams v. Winsor*, 12 R. I. 9; *Sillers v. Lester*, 48 Miss. 513; *Stephens v. Pence*, 56 Iowa, 257; *Gregg v. Sanford*, 24 Ill. 17; *Robinson v. Mauldin*, 11 Ala. 977; *Schulenburg v. Martin*, 1 McCrary, 348; *Brett v. Carter*, 2 Low. 458; *Beall v. White*, 94 U. S. 382; but see *contra*, *Moody v. Wright*, 13 Met. 30; *Barnard v. Eaton*, 2 Cush. 294; *Chynoweth v. Tenney*, 10 Wis. 397; *Hunter v. Bosworth*, 43 Wis. 583.

⁴ *Phillips v. Both*, 58 Iowa, (1882) 499.

⁵ *Belding v. Read*, 3 Hurl. & C., 955; *Lazarus v. Andrade*, 5 C. P. D. 318.

⁶ *Jones v. Richardson*, 10 Met. 493; *Frost v. Willard*, 9 Barb. 440; *Farmers' Loan & Trust Co. v. Long Beach Imp. Co.*, 27 Hun, 89; *Jones v. Chamberlain*, 5 Heisk. 210; *Single v. Phelps*, 20 Wis. 398; *Tedford v. Wilson*, 3 Head, 311; *Polk v. Foster*, 7 Barb. 98; *Griffith v. Douglass*, 75 Me. 532.

⁷ *Single v. Phelps*, 26 Wis. 398; *Mowry v. White*, 21 Wis. 417.

⁸ *Gregg v. Sanford*, 24 Ill. 17; *Hart v. Farmers' & Merchants' Bank*, 33 Vt. 252; *Duke v. Strick-*

§ 467. **The mortgagor's right of redemption.**—As has been already explained,¹ according to the common law, the mortgagee's title to the mortgaged goods becomes absolute upon default in payment; and at law the mortgagor has, after default, no claim whatever on the mortgaged goods.² But, as in the case of mortgages of real property, so here, the court of equity assumes jurisdiction for the purpose of preventing an injustice to the mortgagor resulting from the forfeiture of his title to the mortgaged goods for default in payment, where the value of the goods was greater than the amount of the debt, and decreed that if the mortgagor would pay into court the full amount of the debt within a reasonable time after default, he should have the right to recover his property from the mortgagee. And this is called the mortgagor's right or equity of redemption.³ This right of redemption is generally conceded to the mortgagor, independently of any statutory authority.⁴ The mortgagor is not permitted by an agreement, contemporaneous with the execution of the mortgage, to debar himself of right of redemption. Such an agreement is absolutely void.⁵ But in order that the mortgagor may redeem his property from the mortgage, he must make a lawful tender of payment of the debt in full in the bill or before the suit is brought.⁶ And the action must be brought within a reasonable time after default. What constitutes a reasonable time, independent of statutory regulation, will no doubt depend upon the circumstances of each case.⁷ It would seem but proper that, as in the case of mortgages of real property, the provision of the Statute of Limitations, in reference to actions at law for the recovery of personal

land, 43 Vt. 494; *Parker v. Jacobs*, 14 S. C. 112; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Brown v. Allen*, 35 Iowa, 306; see, also, *Butler v. Hill*, 1 Baxt. 375; *Williamson v. Steele*, 3 Lea. 527, as to mortgage of a growing crop.

¹ See *ante*, § 463.

² *Taber v. Hamlin*, 97 Mass. 489; *Burtis v. Bradford*, 122 Mass. 129; *Wendell v. N. H. Bank*, 9 N. H. 404, 420.

³ *Flanders v. Chamberlain*, 24 Mich. 305, 313; *Davis v. Hubbard*, 38 Ala. 185, 189; *Evans v. Merriken*, 8 Gill & J. 39; *Boyd v. Beandin*, 54 Wis. 193; *Leach v. Kimball*, 34 N. H. 568. In a late Indiana case, it was doubted whether the mortgagor had any equity of redemption in a chattel mortgage. *Sidener v. Bible*, 43 Ind. 230; but see *Blakemore v. Taber*, 22 Ind. 466; *Woodward v. Wilcox*, 27 Ind. 207; *Trittupo v. Edwards*, 35 Ind. 467; *Broadhead v. McKay*, 46 Ind. 595.

⁴ *Flanders v. Barstow*, 18 Me. 357; *Carter v. Stevens*, 3 Denio, 33; *Stoddard v. Dennison*, 38 How. Pr. 296; *Patchin v. Pierce*, 12 Wend. 61; *Dupuy v. Gibson*, 36 Ill. 197; *Wylder v. Crane*, 53 Ill. 490; *Foster v. Ames*, 1 Low. 313; *Smith v. Coolbaugh*, 21 Wis. 427; *Wilson v. Brannan*, 27 Cal. 258; *Blodgett v. Blodgett*, 48 Vt. 32; *Tannahill v. Tuttle*, 3 Mich. 104; *Flanders v. Chamberlain*, 24 Mich. 305; *Van Brunt v.*

Wakelee, 11 Mich. 177; *Heyland v. Badger*, 35 Cal. 404; *Saxton v. Williams*, 15 Wis. 292; *Flanders v. Thomas*, 12 Wis. 410; *Waite v. Dennison*, 51 Ill. 319; *Hammers v. Dole*, 61 Ill. 307; *Bragelman v. Dane*, 69 N. Y. 69; *Hinman v. Judson*, 13 Barb. 629; *Pratt v. Stiles*, 17 How. Pr. 211; s. c., 9 Abb. Pr. 150; *West v. Crary*, 47 N. Y. 423. But the equitable remedy for redemption is always superseded by a statutory remedy, except where the latter remedy proves ineffectual. *Gordon v. Clapp*, 111 Mass. 22; *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248; *Bushnell v. Avery*, 121 Mass. 148.

⁵ *Bunacleigh v. Poolman*, 3 Daly, 236; *Lavigne v. Naramore*, 52 Vt. 267; see *Landers v. George*, 49 Ind. 309.

⁶ *Flanders v. Chamberlain*, 24 Mich. 305; *Lavigne v. Naramore*, 52 Vt. 267; *Stoddard v. Dennison*, 38 How. Pr. 296; *Halstead v. Swartz*, 46 How. Pr. 289, 291; *Hall v. Ditson*, 55 How. Pr. 19; *Adams v. Nebraska City Nat. Bank*, 4 Neb. 370; *Tallon v. Ellison*, 3 Neb. 63, 74. The failure to tender payment before the suit is brought only affects the question of costs. *Boyd v. Bendin*, 54 Wis. 193.

⁷ *Lavigne v. Naramore*, 52 Vt. 267; *Arnold v. Chapman*, 13 R. I. 586; *Stoddard v. Dennison*, 38 How. Pr. 296; *Hatfield v. Montgomery*, 2 Port. (Ala.) 58.

property, should govern by analogy this question of reasonable time in respect to the bill for redemption.¹ Where a statute provides a time for redemption, as a matter of course the action must be brought within that time.² But in any case, whether there be a statute or not, the time of redemption does not begin until there has been a default; and the mortgagor may, by the terms of the mortgage, have his entire life-time in which to pay the debt.³ If the mortgagee has consumed the property, or otherwise disposed of it, so that he could not, in obedience to a decree for redemption, restore the mortgaged property to the mortgagor, the court will, instead thereof, decree damages to be estimated by the value of the mortgaged property at the time it was disposed of by the mortgagee.⁴

§ 468. The mortgagee's right of possession after forfeiture.—

Upon default in payment of the mortgage debt, the legal title of the mortgagee, according to the general prevailing theory of chattel mortgages, becomes absolute in him, and the legal title of the mortgagor is defeated altogether. In consequence of his acquisition of the absolute title to the mortgaged goods, the mortgagee is entitled to the possession of the goods, and may maintain his action of replevin for the recovery of the possession of them. And he has this right to possession after forfeiture, notwithstanding the provisions in the mortgage for the sale of the property, and a payment to the mortgagor of the surplus remaining after the satisfaction of the mortgage debt.⁵ A different rule obtains in Michigan and Oregon, where it is held that the mortgagor is not divested of his legal title to the mortgaged prop-

¹ See *Byrd v. McDaniel*, 33 Ala. 18; *Perry v. Craig*, 3 Mo. 516; *Baker v. Baker*, 13 B. Mon. 406.

² *Winchester v. Ball*, 54 Me. 558; *Clapp v. Glidden*, 39 Me. 448. In Maine, Massachusetts, Minnesota, Rhode Island, redemption can be called only within six days after forfeiture for default. In Kentucky, action for redemption must be brought within five years. In New Hampshire, Vermont, Delaware, Florida, Missouri, Pennsylvania, and South Carolina, statutes provide that the foreclosure of the mortgagor's equity of redemption shall not be made until due notice has been given, varying in length from thirty to sixty days. *Jones on Chattel Mortgages*, § 689.

³ *Joyner v. Vincent*, 4 Dev. & Bat. 512; *Bartlett v. Thynes*, 2 Hill (C. C.) Eq. 171. And part payment will stop the running of the time of redemption. *Winchester v. Ball*, 54 Me. 558.

⁴ *Mowry v. First Nat. Bank*, 54 Wis. 38; *Boyd v. Beandin*, 54 Wis. 193; *Blodgett v. Blodgett*, 48 Vt. 32; *Stoddard v. Dennison*, 38 How. Pr. 296; *Bragelman v. Dane*, 69 N. Y. 69.

⁵ *Burdick v. McVanner*, 2 Denio, 170; *Durfree v. Grinnell*, 69 Ill. 371; *Nichols v. Webster*, 1 Chandl. 203; *McConnell v. Scott*, 67 Ill. 274; *Jefferson v. Barkto*, 1 Bradw. 568. See, also, generally, as to effect of default on the mortgagee's title to the mortgaged goods, *Lowe v.*

Wing, 56 Wis. (1882) 31; *Smith v. Koust*, 50 Wis. 360; *Smith v. Coolbaugh*, 21 Wis. 427; *Musgat v. Pumpelly*, 46 Wis. 660; *Blodgett v. Blodgett*, 48 Vt. 32; *Hulsen v. Walter*, 34 How. Pr. 385; *Fuller v. Acker*, 1 Hill, 473; *Ackley v. Finch*, 7 Cow. 290; *Hall v. Snowhill*, 2 Green, (N. J. L.) 8; *Bryant v. Carson River Lumber Co.*, 3 Nev. 313; *Robinson v. Campbell*, 8 Mo. 365; s. c., *Id.* 615; *Volney Stamps v. Gilman*, 43 Miss. 456; *Flanders v. Barstow*, 18 Me. 357; *Brown v. Phillips*, 3 Bush, 656; *Fikes v. Manchester*, 43 Ill. 379; *Simmons v. Jenkins*, 76 Ill. 479; *Constant v. Matterson*, 22 Ill. 546; *Rhines v. Phelps*, 3 Gilm. 455; *Wright v. Ross*, 36 Cal. 414; *Heyland v. Badger*, 35 Cal. 404; *Brown v. Lipscomb*, 9 Port. 472; *Nervine v. White*, 50 Ala. 338; *Moore v. Murdock*, 26 Cal. 514; *In re Haake*, 2 Sawy. 231; *Larmon v. Carpenter*, 70 Ill. 549; *McConnell v. People*, 84 Ill. 583; *Pike v. Calvin*, 67 Ill. 227; *Bean v. Barney*, 10 Iowa, 498; *Winchester v. Ball*, 54 Me. 558; *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; s. c., 2 Fed. Rep. 128; *Thornhill v. Gilmer*, 4 Sm. & M. 153; *Bowens v. Benson*, 57 Mo. 26; *Leach v. Kimball*, 34 N. H. 568; *Woodside v. Adams*, 40 N. J. L. 417; *Langdon v. Buel*, 9 Wend. 80; *Patchin v. Pierce*, 12 Wend. 61; s. c., 1 Hill, 473; *Moody v. Haseldon*, 1 S. C. 129; *Flanders v. Thomas*, 12 Wis. 410; *Smith v. Phillips*, 47 Wis. 202.

erty, until the transfer under a decree of foreclosure.¹ And, although the mortgagor still has his equity of redemption, by the enforcement of which he can recover his property, the mortgagee is not obliged to proceed to the foreclosure of the equity of redemption, because he had taken possession of the property. He has a right to hold the possession, as long as the debt remains unpaid, and can force the mortgagor to the action for redemption.² The mortgagee, by taking possession of the mortgaged goods on default of payment, acquires the right, independent of any decree of the court or special grant of power of sale, to bar the mortgagor's equity of redemption by a sale of the mortgaged property. The relation of the mortgagor and mortgagee, under these circumstances, is held to be equivalent to that of pledgor and pledgee, and the mortgagee acquires the pledgee's right to sell after due notice to the mortgagor. This is not only the case, where there is no grant of power to sell,³ but also where express provisions for the sale of the property at public auction are contained in the mortgage; the property may be sold at private sale, under this implied power, if the mortgagee has taken possession of the property.⁴ And in New York it has been held that the sale operates as a valid bar of the mortgagor's equity, although no notice of the projected sale has been given to him.⁵ But a reasonable notice of the sale is generally required to be given to the mortgagor; and what is a reasonable notice is generally to be determined by a consideration of all the circumstances of each particular case.⁶

§ 469. **Foreclosure of the mortgagor's equity of redemption in equity and at law.**—Where the mortgagee has not acquired the possession of the mortgaged property after default of the mortgagor, and the mortgage cannot, for that reason, be considered to have the characteristics of a pledge, the mortgagor's equity cannot be barred by the mortgagor's sale of the property, unless the mortgagor has consented to the sale, when it becomes in effect the joint sale of the

¹ Kohl v. Lynch, 34 Mich. 360; Baxter v. Spencer, 33 Mich. 325; Cary v. Hewitt, 26 Mich. 228; Lucking v. Wesson, 25 Mich. 443; Chapman v. State, 5 Ore. 432.

² Craig v. Tappin, 2 Sandf. Ch. 78; Bradley v. Redmond, 42 Iowa, 452; Nichols v. Webster, 1 Chand. (Wis.) 203; Craft v. Bullard, 1 Smed. & M. Ch. 366; Murray v. Erskine, 109 Mass. 597.

³ Patchin v. Pierce, 12 Wend. 61, 63; Charter v. Stevens, 3 Denio, 33; Craig v. Tappin, 2 Sandf. Ch. 73, 90; Chamberlain v. Martin, 43 Barb. 607; Huggans v. Fryer, 1 Lans. 276; Talman v. Smith, 39 Barb. 390; Hall v. Bellows, 11 N. J. Eq. 333; Runyon v. Groshon, 12 N. J. Eq. 86; Denny v. Faulkner, 22 Kans. 89; Bryan v. Robert, 1 Strobb. Eq. 334; Broadhead v. McKay, 46 Ind. 595; Wilson v. Brannan, 27 Cal. 258; Bryant v. Carson River Lumbering Co., 3 Nev. 313; Johnson v. Vernon, 1 Bailey, 527; Bird v. Davis, 14 N. J. Eq. 467; Champman v. Hunt, 13

N. J. Eq. 370; Long Dock Co. v. Mallery, 12 N. J. Eq. 93; Hulsen v. Walter, 34 How. Pr. 385; Ballo v. Cunningham, 60 Barb. 425; Hall v. Ditson, 55 How. Pr. 19; Stoddard v. Dennison, 38 How. Pr. 296; Hart v. Ten Eyck, 2 Johns. Ch. 62, 100.

⁴ Flanders v. Chamberlain, 24 Mich. 305; Talman v. Smith, 39 Barb. 390; Freeman v. Freeman, 17 N. J. Eq. 44; Robinson v. Campbell, 8 Mo. 365; s. c., *Id.* 615; Dane v. Mallory, 16 Barb. 46; Landon v. Emmons, 27 Mass. 87; McConnell v. People, 84 Ill. 583; Waite v. Dennison, 51 Ill. 319; Hungate v. Reynolds, 72 Ill. 425; Wyliner v. Crane, 53 Ill. 490.

⁵ Chamberlain v. Martin, 43 Barb. 607; Hall v. Ditson, 55 How. Pr. 19; s. c., 5 Abb. N. C. 198; Patchin v. Pierce, 12 Wend. 61.

⁶ Wilson v. Brannan, 27 Cal. 358; Bird v. Davis, 14 N. J. Eq. 467; see Freeman v. Freeman, 17 N. J. Eq. 44, 47.

two, and an equivalent of foreclosure;¹ or the sale is made under the judicial decree, or in the exercise of a special power of sale. In very many of the states, the statute provides for the foreclosure of chattel mortgages, and wherever these provisions are to be found, they must be complied with, in order to secure a foreclosure of the chattel mortgage.² But in the absence of special statutory provisions, the court of equity has ample power to decree a foreclosure of the mortgagor's equity on reasonable terms.³ And the right to a foreclosure by a bill in equity is not taken away or precluded by the existence of a power of sale in the mortgagee for the purpose of a substitute for foreclosure. The mortgage may be foreclosed in equity, although the mortgage contains such a power of sale.⁴ Nor is the right to foreclosure precluded by the mortgagee's right at law to recover the possession, and by such possession to be enabled to sell the property.⁵ The foreclosure of chattel mortgages in equity differs in no essential respect from that of real estate mortgages, and hence it will be sufficient to refer to what has been already stated in reference to the foreclosure of mortgages of real estate.⁶

§ 470. **Pledges.**—Equity assumes jurisdiction also over pledges. It is, however, not because the pledge is in any sense an equitable interest, but because under peculiar circumstances where an accounting or a discovery is needed, but where the pledge has been assigned, the remedy for the pledgor is not adequate, and he must resort to a court of equity to secure a sufficient redemption.⁷ And while, furthermore, the pledgee may bar the pledgor's right of redemption by a sale under the power of sale, which he acquired by implication as a part of the pledge, he need not so sell the pledge, but instead he may resort to a court of equity to secure a foreclosure of the pledgor's right of redemption by the ordinary methods, which are applied by equity in the foreclosure of mortgages of all kinds. In some of the states the foreclosure by statute in equity is almost universally resorted to;⁸ and where personal notice cannot be given to the pledgor, or where the

¹ *Harris v. Lynn*, 25 Kans. 281; *Talman v. Smith*, 39 Barb. 390; *McConnell v. People*, 71 Ill. 481.

² See Jones on Chattel Mortgages, Chapter XVII.

³ *Brown v. Greer*, 13 Ga. 285; *Broadhead v. McKay*, 46 Ind. 595; *Morris v. Tillson*, 81 Ill. 607; *Hammers v. Dole*, 61 Ill. 307; *Dupuy v. Gibson*, 36 Ill. 197; *Hall v. Bellows*, 11 N. J. Eq. 333; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Charter v. Stevens*, 3 Den. 33; *Wylder v. Crane*, 53 Ill. 490; *Aldrich v. Goodell*, 75 Ill. 452; *Packard v. Kingman*, 11 Iowa, 219; *Blackmore v. Taber*, 22 Ind. 466.

⁴ *Briggs v. Oliver*, 68 N. Y. 336; *Rich v. Milk*, 20 Barb. 616.

⁵ *Marx v. Davis*, 56 Miss. 745; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93.

⁶ See *ante*, §§ 440-444.

⁷ *Hasbrouck v. Vandervoort*, 4 Sandf. 74; *Counyngham's Appeal*, 57 Pa. St. 474; and see *Brown v. Runals*, 14 Wis. 698; *Jones v. Smith*, 2 Ves. 372; *Bartlett v. Johnson*, 9 Allen, 530; *Merrill v. Houghton*, 51 N. H. 61; *White Mts. R. R. v. Bay State Iron Co.*, 50 *Id.* 57.

⁸ *Strong v. Nat. Mech. Bkg. Assn.*, 45 N. Y. 718; *Booth v. Eighmie*, 60 *Id.* 238; *Stearns v. Marsh*, 4 Denio, 227; *Diller v. Brubaker*, 52 Pa. St. 498, 502; *Worthington v. Tormey*, 34 Md. 182; *Ex parte Mountfort*, 14 Ves. 606; *Carter v. Wake*, L. R. 4 Ch. D. 605; *Boynton v. Payrow*, 67 Me. 587; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Dupuy v. Gibson*, 36 Ill. 197; *Donohoe v. Gamble*, 38 Cal. 340.

articles pledged are things in action, except commercial securities, it is also necessary for the pledgee to resort to the foreclosure in equity.¹

¹ *Stearns v. Marsh*, 4 Denio, 227; *Wheeler v. Newbould*, 16 N. Y. 392; *Gay v. Moss*, 34 Cal. 125; *Donohoe v. Gamble*, 38 *Id.* 340; Cal. Civil Code, §§ 3006, 3011; *Booth v. Eighmie*, 60 N. Y. 238; *Diller v. Brubaker*, 52 Pa. St. 498, 502; *Worthington v. Tormey*, 34 Md. 182; *Ex parte*

Mountfort, 14 Ves. 606; *Carter v. Wake*, L. R. 4 Ch. D. 605; *Boynton v. Payrow*, 67 Me. 587; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Dupuy v. Gibson*, 36 Ill. 197; *Strong v. Nat. Mech. Bkg. Assn.*, 45 N. Y. 718.

CHAPTER XXVI.

GENERAL EXPLANATION CONCERNING EQUITABLE REMEDIES.

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§ 472. **General statement.**—The last division of equity jurisprudence includes the remedies and remedial rights which one can claim under the equitable jurisdiction. The remedial rights of equity are very often vitally different from those which can be enjoyed in a court of law; and the defect and limitation of the common law remedies and remedial rights constitute, as has been already explained, one important ground for the assumption of jurisdiction by courts of equity over a great many causes of action, which otherwise would fall exclusively within the jurisdiction of courts of common law origin. In this connection, it must be observed that nothing will be said in reference to equity practice or pleading, simply the explanation given of the remedial rights which parties are permitted, under the doctrines of equity jurisprudence, to claim at the hands of courts of equity or of courts having equity powers. The equity practice and pleadings do not fall within the limitations of equity jurisprudence; and for that reason no explanation of them will be attempted in this volume.

§ 473. **General classification.**—Classification of the remedial rights may vary according to the stand-point from which the writer views them, either in relation to the limitation and inadequacy of the common law procedure as a cause for the exercise by a court of equity of jurisdiction, in order to provide the needed remedy, or in the relation of such remedy to the ultimate recovery or assertion of the complainant's substantive rights. Inasmuch as in a previous connection the jurisdiction of a court of equity has been explained by a division of such jurisdiction into exclusive, concurrent and auxiliary, the same division will be employed in this connection, setting forth the equitable remedies and remedial rights.

§ 474. **Equitable remedies acting in personam or in rem.**—One peculiarity of all equitable remedies, where they have not been modified by statute, is that the equitable decree consists invariably of an order of the court directing that the parties, against whom the decree had been rendered, shall or shall not do whatever is needed to be done or to be refrained from doing, in order to carry out the judgment of the court. Thus, for example, if the equitable suit was in relation to rights of property, and the decree of the court is to the effect that the

plaintiff in the suit is entitled to the property, of which the defendant has had possession and whose technical legal title is in the defendant, the decree of the court in that case would not be a declaration that the subject-matter of the litigation belongs to the plaintiff in the action, and that the title to it becomes vested in him by virtue of this decree; but, instead of such a judgment, as would be obtained in the common law action of replevin, the decree of the court of equity is that the plaintiff is entitled to such property, and directs the defendant to make the necessary transfer or conveyance in order that the claim of the defendant to such property may be released. In other words, the decree operates *in personam* against the person of the defendant, and not *in rem* against the subject-matter of the litigation.

If the defendant refuses to comply with the order of the court and make the conveyance, or do whatever else is necessary to carry into effect the decree of the court, under the original methods of equitable proceeding, nothing could be done but to punish the defendant for contempt of court in disobeying the order, and to keep him in jail until he became more amenable to the order of the court. But in many of our states, probably in the majority of them, statutes have been passed providing that a decree of a court of equity, where the title to property is the subject-matter of the suit, shall have the effect of transferring to and vesting in the party, declared to be entitled thereto, the title of the property in dispute. In some of the states the statute is positive in its declaration that all equitable decrees shall have such effect, while in others the courts are permitted to make their decree operate to transfer the title of the property in dispute by a declaration to that effect in the decree.¹ These statutes, when enacted by the states, have only the effect of controlling proceedings in equity, which are instituted in their own courts. Inasmuch as the equity jurisdiction and the equity powers of the United States courts are not controlled by state legislation, but by acts of Congress, the fact that statutory changes in the character of equitable remedies, as thus described, have been created in the particular states, will not control or affect the character of the equitable remedy which is sought for in the United States courts, sitting in a district or circuit within the state in which such legislation has been enacted. The character of the equitable decree, and its effect in the United States courts, under such circumstances, remains the same and unaffected by the state legislation, though the property which constitutes the subject-matter of the suit is situated within the state.²

¹ Such statutes are to be found in Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Vermont, Virginia, West Virginia, and South Carolina. *Shotwell v. Lawson*, 30

Miss. 27; *King v. Bill*, 28 Conn. 593; *Taylor v. Boyd*, 3 Ohio, 337; *Price v. Sisson*, 2 Beasl. 163; *Griffith v. Phillips*, 3 Grant's Cas. 381; *Young v. Frost*, 1 Md. 377, 403; *Randall v. Pryor*, 4 Ohio, 424; *Penn v. Hayward*, 14 Ohio St. 302; *Battle v. Bering*, 7 Yerg. 529; *Gitt v. Watson*, 18 Mo. 274; *Hoffman v. Stigers*, 28 Iowa, 302.

² *Watkins v. Holman*, 16 Pet. 25, 26; *Briggs v. French*, 1 Sumn. 504; *Lyman v. Lyman*, 2

§ 475. **Remedies in personam beyond territorial jurisdiction.**—Inasmuch as the equitable decree operates against the person of the defendant, and not against the subject-matter of the suit, in order that a court of equity may assume jurisdiction and render a decree between the parties, it is not necessary, as a general rule, that the subject-matter of the suit should be corporeally within the jurisdiction of the court, provided the parties are in person within the jurisdiction, so that they can be personally summoned to answer the complaint. Hence, a court of equity is able to employ the remedies *in personam* against the parties who are within its jurisdiction in respect to almost every kind of subject-matter or cause of dispute, wherever such subject-matter may be situated; as for example, a court of equity of England, where the parties are within the jurisdiction of that court, may issue its decree *in personam* for relief against fraud, or for the settlement of a partnership, or for the action for specific performance, and the like, though the subject-matter of such litigation may be situated in this country. And the same rule has been applied to the United States courts, in respect to the litigation arising in the different states, and likewise to the ex-territorial jurisdiction of the state courts of equity.¹ Where, however, the statute is strictly local and relates to specific property, and the necessary effect of the statute is the determination of titles to lands, the disposition of the courts is to deny or limit the ex-territorial jurisdiction, and to require the suit to be maintained in the state in which the subject-matter of the suit is located.² In this connection, it must be borne in mind, that the statutory changes, in the effect of equitable decrees, making them remedies *in rem* instead of remedies *in personam*, are not declared to have the effect of taking away the power of a court of equity to issue a decree *in personam*, where that form of decree is necessary to the assumption of jurisdiction. For example, the decree *in rem*, which is permitted by a court of equity by state legislation, cannot be rendered where the subject-matter of the suit is located beyond the jurisdiction of the court; it can only be applied to those equitable suits, which are

Paine, 11, 13; Tardy v. Morgan, 3 McLean, 358; Massie v. Watts, 6 Cranch, 148; Shepherd v. Comm'r of Ross Co., 7 Ohio, 271.

¹ Hawley v. James, 7 Paige, 213; Mead v. Merritt, 2 Id. 402; Dickinson v. Hoomes' Adm'r, 8 Gratt. 353; Moor v. Hood, 9 Rich. Eq. 311; Ross v. Southwestern R. R. Co., 53 Ga. 514; Guild v. Guild, 16 Ala. 121; Topp v. White, 12 Heisk. 165; Penn v. Hayward, 14 Ohio St. 302; Henry v. Doctor, 9 Ohio, 49; Willis v. Cowper, 2 Id. 124; Olney v. Eaton, 66 Mo. 563; Pingree v. Coffin, 12 Gray, 288, 304; Gardner v. Ogden, 22 N. Y. 327, 332, 339; Newton v. Bronson, 13 Id. 587; Bailey v. Ryder, 10 Id. 363; De Klyn v. Watkins, 3 Sandf. Ch. 185; Cleveland v. Burrill, 25 Barb. 532; Sutphen v. Fowler, 9 Paige, 280; Briggs v. French, 1 Sumn. 504; Carrington's

Heirs v. Brents, 1 McLean, 187; Watts v. Waddle, 1 Id. 200; Tardy v. Morgan, 3 Id. 358; Moore v. Jeager, 2 McArthur, 465; Wood v. Warner, 2 McCart. 81; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94; Penn v. Lord Baltimore, 1 Ves. Sen. 444; 2 Eq. Lead. Cas. 1806 (4th Am. ed.); Caldwell v. Carrington's Heirs, 9 Peters, 86; Watkins v. Holman, 16 Id. 25; Massie v. Watts, 6 Cranch, 148.

² Miss. & Mo. R. R. v. Ward, 2 Black, 485; North Ind. R. R. v. Mich. Cent. R. R., 15 How. (U. S.) 233; 5 McLean, 444; Massie v. Watts, 6 Cranch, 148. As to injunctions restraining threatened acts in other states, see West. U. Tel. Co. v. West., &c. R. R., 8 Baxt. 54; Atlantic, &c. Tel. Co. v. Baltimore & Ohio R. R., 14 J. & S. 377.

brought for the settlement of the rights of the parties in property, located within the territorial jurisdiction of the court. Where a court of equity is asked to assume jurisdiction over a cause of action, the subject-matter of which is beyond its territorial jurisdiction, the only kind of a decree which it can render in such a suit would be the decree *in personam*; and it has been held that, notwithstanding this statutory regulation of equitable remedies, a court of equity, in assuming the jurisdiction over ex-territorial causes of action, may be able to employ the ancient decree *in personam*, for the reason that the statutory remedy *in rem* cannot apply.¹

¹ Hawley v. James, 7 Paige, 213; Sutphen v. Fowler, 9 Paige, 280; Newton v. Bronson, 13 N. Y. 587; Bailey v. Ryder, 10 N. Y. 383; Gardner v. Ogden, 22 N. Y. 332-339; Pingree v. Coffin, 12 Gray, 304; Davis v. Parker, 14 Allen, 94; Brown v. Desmond, 100 Mass. 267; see Topp v. White,

12 Heisk. 165; Moore v. Jeager, 2 McArthur, 465; Penn v. Lord Baltimore, 1 Ves Sen. 444; 2 Lead. Cas. in Eq. and notes thereto; Caldwell v. Carrington, 9 Peters, 86; Watkins v. Holman, 16 Peters, 25; Mead v. Merritt, 2 Paige, 402.

CHAPTER XXVII

INJUNCTION.

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§ 478. Fundamental principle and general nature of injunction.

—The purpose of an action for injunction, and the effect of the injunction itself, is to prevent the occurrence of injury to the property or the rights of another through some threatened wrongful act. The injunction serves, therefore, as a preventive remedy, restraining the commission of wrong, in contrast with the ordinary remedies resorted to for the purpose of recovering damages for injuries already done, or restoring one's rights, which have been taken away or violated by others. In determining in what cases, the right to an injunction may be asserted, the purpose of the injunction must be clearly kept in mind. The court of equity will issue a decree of injunction for the protection of any right, which might be threatened with violation, as long as the remedies at law for the protection of the right are shown to be incomplete and inadequate; on the other hand, if the claim for damages which can be made good at law will be a complete satisfaction for the injury occasioned by an actual commission of the wrong, then a court of equity will refuse to grant the decree.¹ It is

¹ *Phillips v. Stone Mountain*, 61 Ga. 386; *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173; *Davis v. Am. Soc., &c.*, 6 Daly, 81; 75 N. Y. 362; *Cohen v. Goldsboro*, 77 N. C. 2; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Powell v. Foster*, 59 Ga. 790; *Johnson v. Conn. Bk.*, 21 Conn. 148, 157; *Watson v. Sutherland*, 5 Wall. 74; see *Atlantic, &c. Tel. Co. v. Baltimore & O. R. R.*, 14 J. & S. 377; *West. U. Tel. Co. v. West, &c. R. R.*, 8 Baxt. 54; *Parker v. Winnipiseogee, &c. Co.*, 2 Black, (U. S.) 545; *Olmsted v. Loomis*, 6 Barb. (N. Y.) 160; *Fisk v. Wilber*, 7 Barb. (N. Y.) 400; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 164; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 180; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; s. c., 11 Am. Dec. 485; *Coe v. Lake Co.*, 37 N. H. 254; *Burston v. Augusta*, 17 Me. 202; *Goodrich v. Moore*, 2 Minn. 61; s. c., 72 Am. Dec. 74; *Hart v. Mar-*

shall, 4 Minn. 296; *Montgomery v. McEwen*, 9 Minn. 108; *Finley v. Thayer*, 42 Ill. 350; *Whitelsey v. Hartford, &c. R. Co.*, 23 Conn. 241; *Thibodaux v. Wright*, 3 La. Ann. 180; *Laughlin v. Lamas Co.*, 6 Ind. 223; *Camp v. Mathe-son*, 30 Ga. 170; *Arnold v. Klipper*, 24 Mo. 273; *Winnipiseogee Lake Co. v. Worster*, 29 N. H. (9 Fost.) 433; *Warne v. Morris, &c. Co.*, 5 N. J. Eq. (1 Hals.) 410; *Balcom v. Julien*, 22 How. (N. Y.) Pr. 349; *Rogers v. Michigan, &c. R. Co.*, 28 Barb. (N. Y.) 539; *Stevenson v. Fayer-weather*, 21 How. (N. Y.) Pr. 449; *McCoy v. United States Bank*, 5 Ohio, 548; *Wilkins v. Hogue*, 2 Jones (N. Car.) Eq. 479; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Borland v. Thornton*, 12 Cal. 440; *Hulse v. Wright, Wright, (Ohio)*, 61.

also required, as a ground for claiming the right, to show reasonable diligence in seeking the aid of equity. Any delay of an unreasonable character in seeking the protection of an injunction, particularly where in consequence of the delay the other party has incurred great expenses, and made extensive outlays of capital, the court will refuse to grant the injunction and will leave the parties to their actions at law.¹ And this required diligence must appear on the face of the petition; if the bill or petition shows upon its face that there has been an unreasonable delay, the court will dismiss the bill without any inquiry into the cause at issue.²

§ 479. **Kinds of injunctions.—Interlocutory, perpetual and mandatory.**—The remedy of injunction may be intended to serve as a temporary, as well as a permanent protection against the commission of a wrong. Where there is great danger of a continuance of the wrong, a perpetual injunction against the further commission of the injury is generally asked for. The plaintiff's right to a perpetual injunction will depend, as it will be explained more fully in other connections, upon the certainty of his right to the subject-matter of the dispute, and the absence of an adequate remedy at law for the purpose of preventing irreparable injury to himself. It is not sufficient for the plaintiff to show in his evidence that the defendant is about to commit an injury against him, but this must appear upon the pleadings, and he must show by his pleadings the necessity for the injunction, to protect his rights. The burden of establishing a right to a perpetual

¹ *Gibson v. Moore*, 22 Tex. 611; *Fitzhugh v. Orton*, 12 Tex. 41; *Musgrove v. Chambers*, 12 Tex. 32; *Crawford v. Winfield*, 25 Tex. 414; *Kidwell v. Masterson*, 3 Cranch (U. S.) C. C. 52; *Wells v. Wall*, 1 Oreg. 295; *Grey v. Ohio, &c. R. Co.*, 1 Gratt. Cas. (Pa.) 412; *Pensacola, &c. R. Co. v. Jackson*, 21 Fla. 146; *Logansport v. La Rose*, 99 Ind. 117; *Brown v. Merrick Co. Comms.*, 18 Neb. 355; *Dierks v. Martin*, 16 Neb. 120; *Atty.-Gen. v. Sheffield*, 3 De G. M. & G. 304; *Dulin v. Caldwell*, 28 Ga. 117; *Griffin v. Augusta, &c. R. Co.*, 70 Ga. 164; *Morris v. Edwards*, 62 Tex. 205; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Central R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 127; *United Co. v. Standard Oil Co.*, 33 N. J. Eq. 123; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 379; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282; *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19; *Bradfield v. Dewell*, 48 Mich. 9; *Hill v. Harris*, 51 Ga. 628; *Fuller v. Melrose*, 1 Allen, (Mass.) 166; *Russ v. Wilson*, 22 Me. 207; *Binney's Case*, 2 Bland, (Md.) 99; *Sedam v. Williams*, 4 McLean, (U. S.) 51; *Pillow v. Thompson*, 20 Tex. 206; *Callaway v. Alexander*, 8 Leigh, (Va.) 114; *Northern Pac. R. Co. v. St. Paul, &c. R. Co.*, 2 McCrary, (U. S.) 260; *Jones v. Cameron*, 81 N. Car. 154; *American Dock and Imp. Co. v. School Trustees*, 35 N. J. Eq. 181; *Parker v. Spillin*, 10 Phila. (Pa.) 8; *Miller v. McGuire*, Morr. (Iowa,) 150; *Kriebbaum v. Bridges*, 1

Iowa, 14; *Paynter v. Evans*, 7 B. Mon. (Ky.) 420; *Todd v. Fisk*, 14 La. An. 13; *Williams v. Jones*, 18 Miss. 10 Smed. & M.) 108; *Semple v. McGatagan*, 18 Miss. 98; *Bruner v. Planters' Bank*, 23 Miss. 514; *Shipp v. Wheelless*, 33 Miss. 646; *Jordan v. Thomas*, 34 Miss. 72; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Champion v. Miller*, 2 Jones (N. Car.) Eq. 194; *Vaughn v. Johnson*, 9 N. J. Eq. (1 Stock.) 173; *Schroepel v. Shaw*, 3 N. Y. 446; *Sample v. Barnes*, 14 How. (U. S.) 70; *Wynn v. Wilson*, Hempst. (U. S.) 698; *Parker v. Winnipiseogee, &c. Co.*, 2 Black, (U. S.) 545; *Burden v. Stein*, 27 Ala. 104; *Dibbla v. Truelock*, 12 Fla. 185; *Tarver v. McKay*, 15 Ga. 550; *Water Co. v. Bucks*, 5 Ga. 315; *Rogers v. Kingsbury*, 22 Ga. 60; *Vaughn v. Fuller*, 23 Ga. 366; *Cleckley v. Beall*, 37 Ga. 583; *Ramsey v. Perley*, 34 Ill. 504; *Titcomb v. Potter*, 11 Me. (2 Fairb.) 218; *Faulkner v. Campbell*, Morr. (Iowa,) 148.

² *Jones v. Bennett*, 1 Bro. P. C. 528; *Smith v. Whitmore*, 1 H. & M. 576; *Morris v. Edwards*, 62 Tex. 205; *Nevins v. McKee*, 61 Tex. 412; *Contretras v. Haynes*, 61 Tex. 104; *Johnson v. Templeton*, 60 Tex. 238; *Schleicher v. Markward*, 61 Tex. 102; *Montgomery v. Carleton*, 56 Tex. 361; *Plummer v. Power*, 29 Tex. 14; *Snow v. Hawpe*, 22 Tex. 168; *Burnley v. Rice*, 21 Tex. 171.

³ *Fort Clark Horse R. Co. v. Anderson*, 108 Ill. 64; s. c., 48 Am. Rep. 545; *Jefferson v. Hamil-*

injunction rests always upon the party making the claim to such protection, and only when that claim is clearly established.¹ It is also necessary that the party to be enjoined shall have been made a party to the suit.²

Ordinarily, a court will grant an injunction against the acts of the defendant, only when the plaintiff has completely proven his case and the question of right of property, or otherwise, has been definitely settled by the court, in favor of the plaintiff; and then the injunction is made perpetual. But there are cases in which the danger of irreparable injury is so great, that if the plaintiff were denied all protection against the wrongful acts of the defendant, until the case was tried and the question of right definitely settled, the perpetual injunction would prove to be of very little value; or, at any rate, would not serve as a complete protection against the wrongful acts of the defendant. Where, therefore, the danger of irreparable injury pending the settlement of the suit is very great and serious, the court will entertain a prayer for what is called a preliminary or interlocutory injunction, which provides for restraining the disputed or contested acts of the defendant, until the suit for a perpetual injunction has been decided. The court will grant this preliminary injunction, only when the plaintiff makes out a very strong *prima facie* case of right against the defendant.³ But where the plaintiff's complaint or petition shows no cause of action;⁴ or where his right to the perpetual injunction is doubtful on his *prima facie* presentation of the case, the preliminary or interlocutory injunction will be refused; at least, that is the case with respect to what are called special interlocutory injunctions. A distinction is made by the courts between special and common interlocutory injunctions; the common interlocutory injunction being those which are granted as a matter of course, and would generally include preliminary injunctions, restraining the transfer of property or *choses in action*, concerning whose title a dispute has arisen. But the special preliminary interlocutory injunctions are those, in which the claim for a preliminary injunction must be based upon the particular facts of

ton, 69 Ga. 463; Stringham v. Brown, 7 Iowa, 33; Sloan v. Boolbaugh, 10 Iowa, 31; Waffenden v. Waffenden, 1 Ariz. 328; see Broadbent v. Imperial Gas Co., 7 De G. M. & G. 436; s. c., 3 Jur. U. S. 221; 26 L. J. Ch. 276; Hunt v. Peake, 1 Johns. 705.

¹ Spangler v. Cleveland, 43 Ohio St. 526; Bonaparte v. Camden, &c. R. Co., 6 Baldw. (U. S.) 218; Whalen v. Dalashmutt, 59 Md. 250; Burnham v. Kempton, 44 N. H. 78.

² Chapman v. Harrison, 4 Rand. (Va.) 336; Orth v. Orth, (Mich.) 37 N. W. Rep. 67; Thorne v. Sweeney, 13 Nev. 415; Champion v. Sessions, 2 Nev. 271; Errissman v. Errissman, 25 Ill. 119; Hornesby v. Burdell, 9 S. Car. 303; McLaughlin v. Kelly, 22 Cal. 212; Ottawa v. Walker, 21 Ill. 610; Alsop v. Allen, 43 Tex. 598.

³ Wallace v. McVey, 6 Ind. 300; S. P. Real Del Monte, &c. Co. v. Pond, &c. Co., 23 Cal. 82; Flagg v. Sloan, 16 Ind. 432; see Androvette v. Brown, 4 Abb. (N. Y.) Pr. 440; s. c., 15 How. (N. Y.) Pr. 75; Blakemore v. Glamorganshire, 1 My. & K. 154; Hicks v. Michal, 15 Cal. 107; Atty.-Gen. v. Paterson, 9 N. J. Eq. (1 Stock.) 624; Ward v. Dewey, 7 How. Pr. (N. Y.) 17; Corning v. Troy, &c. Factory, 6 How. (N. Y.) Pr. 89; Zinsser v. Cooledge, 17 Fed. Rep. 538; see Hamilton v. Eden Gold Mining Co., 75 Ga. 447; International Tooth Crown Co. v. Mills, 22 Fed. Rep. 659; McHenry v. Jewett, 90 N. Y. 58.

⁴ Allen v. Meyer, 73 N. Y. 1; Wright v. Brown, 67 N. Y. 1; Collins v. Collins, 71 N. Y. 270; Paul v. Munger, 47 N. Y. 469.

the case at bar, the danger of irreparable injury and a reasonable certainty of the right of the plaintiff in the matter.¹

Originally, injunctions, whether preliminary or perpetual, were employed for the purpose of restraining the doing of a wrongful act; but, sometimes, in order to procure the end desired, it is necessary for the court, not only to restrain the doing of a wrongful act, but also to compel the removal of some obstruction or nuisance which had already been erected or committed, and when the order of the court takes that form, it is called a mandatory injunction, and is contrasted with ordinary injunctions, which may be called *prohibitive*, in that they operate as a prohibition of an act or of a series of acts, which threaten the injury. These mandatory injunctions are granted only in cases of extreme danger of irreparable injury, and where the legal remedies are plainly inadequate.² Where, however, other remedies, whether legal or equitable, are adequate to the enforcement of an obligation or the protection of one's rights, the mandatory injunction will be denied.³ As a general rule, a mandatory injunction will only be granted as a perpetual injunction, after a final hearing of the case in dispute;⁴ but whenever it is plainly necessary to resort to the man-

¹ Purnell v. Daniel, 8 Ired. Eq. (N. Car.) 9; Bradford v. Peckham, 9 R. I. 250; Woodworth v. Rogers, 3 Woodb. & M. (U. S.) 135; Troy v. Norment, 2 Jones (N. Car.) Eq. 318; Peterson v. Matthis, 3 Jones (N. Car.) Eq. 31; Chadwell v. Jordan, 2 Tenn. Ch. 635; Patterson v. Gordon, 3 Tenn. Ch. 18; but see Anderson v. Noble, 1 Drew. 143; Magnay v. Mines Royal Co., 3 Drew. 130; Martin v. Cook, 6 Jones (N. Car.) Eq. 199; Murray v. Knapp, 62 Barb. (N. Y.) 566; Woodworth v. Rogers, 3 Woodb. & M. (U. S.) 135.

² Lane v. Howard, Cary, 148; Ludlow v. Lanning, Hopk. (N. Y.) 231; Wood v. Mason, 3 Sumn. (U. S.) 318; Kershaw v. Thompson, 4 Johns. (N. Y.) Ch. 609; Roberdeau v. Rous, 1 Atk. 1; Gates v. Hemby, 2 Atk. 360; Penn v. Lord Baltimore, 1 Ves. 444; Dove v. Dove, 2 Dick. 617; s. c., 1 Bro. C. C. 375, 1 Cox, 101; Stribley v. Hawkie, 3 Atk. 275; Shelton v. Shelton, Foth. 115; Denio v. Carew, Foth. 75; Blakemore v. Glamorganshire Canal, &c., 1 Myl. & K. 154; Spencer v. Birm. Ry. Co., 8 Sim. 193; Great North, &c. Ry. v. Clarence Ry., 11 Coll. 507; Rankin v. Huskisson, 4 Dim. 13; Cole, &c. Co. v. Virginia, &c. Co., 1 Sawy. (U. S.) 470, 685; Rogers, &c. Works v. Erie R. Co., 20 N. J. Eq. 379; Longwood R. Co. v. Baker, 27 N. J. Eq. 166; Corning v. Troy, &c. Factory, 40 N. Y. 191; Guskin v. Balls, L. R. 13 Ch. Div. 324; Cook v. Chilcott, L. R. 3 Ch. Div. 694; Krehl v. Burrell, L. R. 7 Ch. Div. 551; Manners v. Johnson, L. R. 1 Ch. Div. 673; London, &c. Co. v. Tenant, L. R. 9 Ch. App. 212; Goodson v. Richardson, L. R. 9 Ch. App. 221; Auburn, &c. Co. v. Douglass, 12 Barb. (N. Y.) 553; Penniman v. N. Y., &c. Co., 13 How. Pr. N. Y. 40; Green v. Green, 5 Hare, 400; Atty.-Gen. v. Met. B. of W., 1 Hen. & M. (Va.) 298; Hepburn v.

Lordan, 2 Hen. & M. (Va.) 345; Mexborough v. Bower, 7 Beav. 127; Greatrex v. Greatrex, 1 De G. & M. 692; Hervey v. Smith, 1 K. & J. 389.

³ Fallon v. Railroad Co., 1 Dill. (U. S.) 121; South Wales R. W. Co. v. Wythes, 5 De G. M. L. 880; Heathcote v. North Stafford R. Co., 20 L. J., n. s., 82; see Danforth v. Philadelphia, &c. R. Co., 30 N. J. (Stew.) Eq. 12; Wilkerson v. Clements, L. R. 8 Ch. App. 96; Beck v. Allison, 56 N. Y. 387; Justice v. Croft, 18 Ga. 473; Erington v. Aynesley, 2 Bro. C. C. 341; People v. Albany, &c. R. Co., 24 N. Y. 267; Union Pac. R. Co. v. Hall, 91 U. S. 343; Blackett v. Bates, L. R. 1 Ch. App. 117; Ross v. Union Pac. R. Co., Woolw. (U. S.) 26; Lucas v. Commerford, 3 Bro. C. C. 166; Mastin v. Halley, 61 Mo. 196.

⁴ Mammouth Vein, &c. Appeal, 54 Pa. St. 183; Brown's Appeal, 62 Pa. St. 17; Andenreid v. Phil., &c. R. Co., 68 Pa. St. 370, reversing s. c., 27 Leg. Int. (Pa.) 149; Lehigh Coal & Nav. Co. v. Beaver Meadow R. Co., 7 Leg. & Ins. (Pa.) 325; Mocanaqua Coal Co. v. Northern Cent. R. Co., 4 Brewst. (Pa.) 158; s. c., 9 Phila. (Pa.) 250; Gale v. Abbott, 8 Jur., n. s., 987; Blakemore v. Glamorganshire Canal Co., 1 Myl. & K. 154; Durrell v. Pritchard, L. R. 1 Ch. App. 244; Great West. R. Co. v. Birmingham, &c. R. Co., 2 Ph. 597; Shrewsbury R. Co. v. Shrewsbury, &c. R. Co., 1 Sim., n. s., 410; Washington University v. Green, 1 Md. Ch. 97; Rogers, &c. Works v. Erie R. Co., 5 C. E. Green, (N. J.) 379; Andenreid v. Phil., &c. R. Co. 68 Pa. St. 370; compare Beadel v. Perry, L. R. 3 Eq. 456; Durrell v. Pritchard, 1 Ch. App. 244; Cole, &c. Co. v. Virginia, &c. Co., 1 Sawy. (U. S.) 470; Baptist Congregation v. Scannell, 3 Grant's Cas. (Pa.) 48; Frear v. Sasterlin, 6 Luz. L. Reg. (Pa.) 111; Farmers' R. Co. v. Reno, &c. R. Co., 53 Pa. St. 224.

datory injunction prior to the final settlement of the suit, then it may be granted as an interlocutory injunction.¹

§ 480. **Injunction when resorted to for the protection of equitable interests and in aid of equitable remedies.**—Where the estate or interest which is threatened by a wrongful attack is of a purely equitable character, inasmuch as such interest or estate can obtain no recognition at all in a court of law, the common law action for the redress of wrongs would have no application whatever; and hence, as to such interests, the legal remedies would in every case be totally inadequate; so that it may be laid down as a general proposition, to which there is no exception, that a court of equity will employ the remedy of injunction whenever it deems it necessary for the protection of an equitable interest, without taking notice at all of the question of adequacy of the common law remedy. This is true, not only in respect to equitable estates or interests which still remain exclusively equitable in character, but likewise in respect to those equitable interests, such as the rights of assignees of *choses in action*, whose interests, although originally equitable, have been recognized by courts of law and are now strictly legal rights, as well as equitable rights. Thus, for example, equity will grant an injunction, to prevent the transfer of negotiable instruments, in the interest of the defrauded maker or acceptor, so that such instrument may not get into the hands of a *bona fide* holder who could assert his right to enforce such instrument against the original obligor.* For the same purpose, a court of equity enjoins a transfer of all sorts of *choses in action*, although not strictly negotiable, such as stocks, bills of lading, and the like.³ The court will very readily grant the injunction in order to restrain any breach of trust on the part of a trustee, and enjoin such trustee from doing any act which would be injurious to the trust estate; the injunction is the only effective remedy in the enforcement of trusts, and in compelling the trustee to discharge his duty as such.⁴ The injunction has

¹ Robinson v. Byron, 1 Bro. (C. C.) 588; Hervey v. Smith, 1 Kay & J. 392; Bispham's Prin. of Eq., § 400.

² Osborn v. U. S. Bk., 9 Wheat. 738, 845; Deaderick v. Mitchell, 6 Baxt. 35; Bridges v. Robinson, 2 Tenn. Ch. 720; Belohradsky v. Kuhn, 69 Ill. 547; Thiedemann v. Goldschmidt, 1 De G. F. & J. 4, 10; Ferguson v. Fisk, 28 Conn. 501; Hile v. Davison, 20 N. J. Eq. 228; Metler's Adm'rs v. Metler, 18 Id. 270; 19 Id. 457; Zeigler v. Beasley, 44 Ga. 56; Hinkle v. Margerum, 50 Ind. 240; Hood v. Aston, 1 Russ. 412; Thurman v. Burt, 53 Ill. 129; James v. Roberts, 18 Ohio, 548; Cowles v. Ragnet, 14 Ohio, 38; Wooster v. Eaton, 11 Mass. 375; Roll v. Ragent, 4 Ohio, 419; Sackett v. Hillhouse, 5 Day, (Conn.) 451; Rembert v. Brown, 17 Ala. 667; Robinson v. Jefferson, 1 Del. Ch. 244.

³ King v. King, 6 Ves. 172; Lord v. Chedworth v. Edwards, 8 Id. 46; Stead v. Clay, 1 Sim. 294; 4 Russ. 550; Athenæum Life Ass. Co. v. Pooley,

3 De G. & J. 294; Osborn v. U. S. Bk., 9 Wheat. 738, 844, 845; Hile v. Davison, 20 N. J. Eq. 228; Elder First Nat. Bk., 12 Kans. 238.

⁴ Morrison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452; Dance v. Goldingham, L. R. 8 Ch. 902; Brennan v. Preston, 2 De G. M. & G. 813; North Car. R. v. Drew, 3 Woods, 674; People v. Clark, 70 N. Y. 518; Menard v. Hood, 68 Ill. 121; Owen v. Ford, 49 Mo. 438; Chesapeake, &c. R. Co. v. Patton, 5 W. Va. 234; Joseph v. McGill, 52 Iowa, 127; French v. Snell, 29 N. J. Eq. 95; Vogler v. Montgomery, 54 Mo. 577; Venable v. Everett, 63 Ga. 633; Sierra Nevada, &c. Co. v. Sears, 10 Nev. 346; Great W. R. Co. v. Birmingham Co., 2 Ph. 597; Cuttis v. Buckingham, 3 V. & B. 168; Spiller v. Spiller, 3 Swanst. 556; Winslow v. Wood, 70 N. Car. 430; Lee v. Pearce, 68 N. Car. 76; Harris v. Carstarphen, 69 N. C. 416; Craycroft v. Moorehead, 67 N. Car. 422; Ponton v. McAdoo, 71 N. Car. 101; Mc-

also been used to restrain a life-tenant from making use of a tax title, which he had purchased.¹ It may be stated, generally, that a court of equity will employ the remedy of injunction in suits for the enforcement of some equitable right or trust or lien, or to compel the specific performance of a contract, where such injunction is needed to prevent the transfer of the subject-matter of the litigation to other parties, and thus take such subject-matter beyond the power of disposition of the court.²

§ 481. **Injunction to prevent violation of contracts.**—Where a contract has been broken, it is presumed that a common law remedy for damages is a satisfactory and adequate remedy; and where that is not the case and the contract calls for the doing of an affirmative act, the proper remedy in equity would be an action for the specific performance of the contract. But where the contract creates a negative obligation, as where the obligor agrees *not* to do something, if the common law remedy proves inadequate, a decree of the court of equity, which would aim to accomplish a specific performance of the contract, would necessarily take the form of an injunction against the doing of those things which the obligor has agreed not to do; so that it may be stated as a general proposition, that in all cases where the contract creates a negative obligation, that is, an obligation to refrain from doing something, a court of equity will enjoin the doing of the prohibited thing, whenever the court of equity would under similar circumstances grant a decree for specific performance of a contract, which calls for the doing of an affirmative act.³ Thus, for example, covenants in deeds, leases, and agreements, which restrain or limit the use to which lands may be put, and particularly where this restrictive covenant is imposed upon two or more adjoining lots, a court will enjoin the violation of the covenant and the consequent breach of the equitable easement which arises under such circumstances, not only at the instance of the original covenant, but likewise at the instance of subsequent

Corkle v. Brem, 76 N. Car. 407; Peebles v. Davie Co. Comms., 82 N. Car. 385; Williams v. Wadsworth, 51 Conn. 277.

¹ Phelan v. Boylan, 25 Wis. 679.

² Robinson v. Pickering, L. R. 16 Ch. D. 371, 680; Venable v. Everett, 63 Ga. 633; Sierra Nev. Min. Co. v. Sears, 10 Nev. 346; Vogler v. Montgomery, 54 Mo. 577; Vavasaur v. Krupp, L. R. 9 Ch. D. 351; Building Assn. v. Ashmead, 7 Phila. 272; Joseph v. McGill, 52 Iowa, 127; French v. Snell, 29 N. J. Eq. 95; Lempriere v. Lange, L. R. 12 Ch. D. 675.

³ Singer Mfg. Co. v. Union, & Co., 6 Fish. Pat. C. (U. S.) 480; Morris Canal Co. v. The Society, 5 N. J. Eq. (1 Hals.) 203; Western Union Tel. Co. v. Philadelphia, & Co. R. Co., 9 Phila. (Pa.) 494; Wason v. Sanborn, 45 N. H. 169; Jordan v. Woodward, 38 Me. 423; Burnham v. Kempton, 44 N. H. 78; Webber v. Gage, 39 N. H. 182; Pusey v. Wright, 31 Pa. St. 387; Wolfe v. Burke, 56 N. Y. 115; Taylor v. Gillies, 5 Daly,

(N. Y.) 285; Palmer v. Harris, 60 Pa. St. 156; Connell v. Reed, 128 Mass. 477; Dunlop v. Gregory, 10 N. Y. 241; Guerand v. Dandeleit, 32 Md. 561; Ropes v. Upton, 125 Mass. 258; Carroll v. Hickey, 10 Phila. (Pa.) 308; Grow v. Seligman, 47 Mich. 607; s. c., 41 Am. Rep. 737; Richardson v. Peacock, 26 N. J. Eq. 40; Maxwell v. East River Bank, 3 Bosw. (N. Y.) 124; Spier v. Lambdin, 45 Ga. 319; Peabody v. Norfolk, 98 Mass. 459; Hubbard v. Miller, 27 Mich. 15; Webber v. Gage, 39 N. H. 182; Coe v. Lake Co., 37 N. H. 254; Burnham v. Kempton, 44 N. H. 78; Lake Co. v. Worster, 29 N. H. 433; Jordan v. Woodward, 38 Me. 423; Morse v. Machias Water Power Co., 42 Me. 119; Niagara Falls, & Co. v. Great Western R. Co., 39 Barb. (N. Y.) 212; Brown's Appeal, 62 Pa. St. 17; Elder v. Shaw, 12 Nev. 78; Florence Sewing Machine Co. v. Singer Mfg. Co., 8 Blatchf. (U. S.) 113; Collins v. Plumb, 16 Ves. 454.

purchasers of these several adjoining lots, all of which are subject to the restraining covenant. In this case, of course, the equitable easement furnishes the ground for an interference of the court of equity, where the claim for protection is made by the subsequent purchaser of the several lots in question, but the original covenantee can likewise claim the protection of the remedy of injunction, on the ground that the common law remedy for the breach of this contract would not prove adequate.¹ Although the court of equity never enforces a forfeiture of property or of interests on account of the breach of some condition annexed thereto, leaving the parties to their remedies at law for the enforcement of the condition or of the forfeiture resulting from the breach; yet, if it can be shown in any case, that the interest of one of the parties can only be adequately protected by an injunction against the breach of the condition, the court of equity may and will enjoin such a breach of the condition.²

Very many examples may be given, which illustrate the employment of the injunction for the purpose of restraining the violation of contracts. A few are found to be contracts, in which the stipulations are negative in form and in fact, and correspond in character to the class of contracts which would be specifically enforced by a court of equity, if the stipulation had been of an affirmative character. The inadequacy of the legal remedy being established, the court readily grants this decree of specific performance; thus, for example, all agreements not to carry on a particular trade if they are valid. Where this agreement is of a more or less limited character, a court will enjoin its violation.³ So, also, will an illegal combination in restraint of trade be enjoined.⁴ Injunctions have also been issued for

¹ *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212; *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Howard v. Ellis*, 4 Sandf. (N. Y.) Ch. 369; *Trenor v. Jackson*, 46 How. Pr. (N. Y.) 389; s. c., 15 Abb. Pr. (N. Y.) 115; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Pugh v. Jayne*, 17 Leg. Int. (Pa.) 149; *Pope v. Bell*, 35 N. J. Eq. 1; *per Sir Geo. Jessel*, M. R., in *Leech v. Schweder*, L. R. 9 Ch. 465 n; *Tripping v. Eckersley*, 2 K. & J. 264, 270, 273.

² *Tallmadge v. East River Bank*, 2 Duer, (N. Y.) 614; *Watrous v. Allen*, 57 Mich. 362; *Tulk v. Moxhay*, 2 Phill. (N. Car.) 774; *Mann v. Stephens*, 15 Sim. 377; *Hill v. Miller*, 3 Paige, (N. Y.) 264; *Barron v. Richard*, 8 Paige, (N. Y.) 354; *Brouwer v. Jones*, 23 Barb. (N. Y.) 153; *Linzee v. Mixer*, 101 Mass. 512; *Gilbert v. Peteler*, 38 N. Y. 165; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

³ *Diamond Match Co. v. Roeber*, 35 Hun, (N. Y.) 421; *Thayer v. Young*, 86 Ind. 259; *Eckart v. Garlach*, 12 Phila. (Pa.) 530; *Gompers v. Rochester*, 56 Pa. St. 194; *Guerard v. Dandelest*, 32 Md. 561; s. c., 3 Am. Rep. 164; *Dunlop v. Gregory*, 10 N. Y. 241; *Ropes v. Upton*, 125 Mass. 258; *Carroll v. Hickey*, 10 Phila. (Pa.)

308; *Baumgarten v. Broadway*, 77 N. Car. 8; see *Berger v. Armstrong*, 41 Iowa, 447; *Spicer v. Hoop*, 51 Ind. 365; *Hahn v. Concordia Society*, 42 Md. 460; *Harkinson's App.*, 78 Pa. St. 196; *Smalley v. Greene*, 52 Iowa, 243; *Hedge v. Lowe*, 47 Iowa, 137; *McClurg's App.*, 58 Pa. St. 51; *Palmer v. Graham*, 1 Pars. (Pa.) 476; *Reece v. Hendricks*, 1 Leg. Gaz. (Pa.) 79; *Jenkins v. Temples*, 39 Ga. 655; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Wolfe v. Burke*, 56 N. Y. 115; *Taylor v. Gillies*, 5 Daly, (N. Y.) 285; *Palmer v. Harris*, 60 Pa. St. 156; *Meriden Co. v. Parker*, 39 Conn. 450; *Connell v. Reed*, 128 Mass. 477; *Baker v. Pottmeyer*, 75 Ind. 451; *Berger v. Armstrong*, 41 Iowa, 447; *Caswell v. Gibbs*, 33 Mich. 331; *Doty v. Martin*, 32 Id. 462; *Butler v. Burleson*, 16 Vt. 176. Not to build, &c., *Rankin v. Huskisson*, 4 Sim. 13; *Lloyd v. London, &c. Ry.*, 2 De G. J. & S. 568; *Bowes v. Law*, L. R. 9 Eq. 636; *St. Andrew's Church's Appeal*, 67 Pa. St. 512; *Cobbs v. Niblo*, 6 Ill. App. 60; *Ropes v. Upton*, 125 Mass. 258; *McNutt v. McEwen*, 10 Phila. 112; *Carroll v. Hickey*, 10 Id. 308; *Harkinson's Appeal*, 78 Pa. St. 196; *Richardson v. Peacock*, 28 N. J. Eq. 151; 26 Id. 40.

⁴ *Stanton v. Allen*, 5 Den. (N. Y.) 434; *Hilton v. Eckersley*, 32 Eng. L. & Eq. 198.

the purpose or preventing the violation of the agreements by railroad companies not to run trains past a certain station without stopping, agreements not to ring a certain bell,² or by an author not to write or publish a competitive book.³ Contracts and agreements not to disclose confidential communications,⁴ and other agreements of the same kind may be cited, where injunctions are issued for the purpose of restraining the violation of contracts of a negative character.⁵ Not only will injunctions be issued for the purpose of restraining the violation of contracts, which are negative *in form*, but the same remedy will be employed where the obligation, although having an affirmative form, yet likewise is really negative; as, for example, where husband and wife have upon separation agreed that the children should spend part of each year with each of them, a court of equity will enjoin one or the other of the parties against interfering with the performance of the contract by restraining the action of the children.⁶

§ 482. **Contracts for personal service.**—One of the propositions, upon which the doctrine of specific performance rests, is that a court of equity will never decree the specific performance of a contract, where it is impossible for the court to secure such performance; and this rule has been applied to all contracts which call for the personal service of the obligor, in the performance of which a personal skill is required. Courts of equity invariably refuse to grant a decree for the specific performance of such contracts; for example, the contract of a singer, or actor, or an author to write a book, and the like. And according to the early cases in England, the court of equity would refuse to entertain a bill for redress of any sort, in the case of a threatened breach of such a contract.⁷ But the later English authorities have recognized the power of the court of equity to enjoin an obligor of such a contract from doing anything in the way of rendition of similar service to others, which would interfere with the performance of the violated contract. While a court of equity cannot affirmatively compel a singer or actor to perform a contract to act or sing, it can prevent such actor or singer from making an engagement of a similar sort with someone else, and thus negatively secure a specific perform-

¹ Hood v. North East. Ry., L. R. 8 Eq. 666; 5 Ch. 525; Phillips v. Great West. Ry., L. R. 7 Ch. 409; Rigby v. Great West. Ry., 2 Ph. 44.

² Martin v. Nulkin, 2 P. Wms. 266.

³ Barfield v. Nicholson, 2 S. & S. 1; Morris v. Colman, 18 Ves. 437.

⁴ Complainant in Peabody v. Norfolk, 98 Mass. 452; Cholmondeley v. Clinton, 19 Ves. 261; Morrison v. Moat, 9 Hare 255; Evitt v. Price, 1 Sim. 483; Williams v. Williams, 3 Mer. 159; Bryson v. Whitehead, 1 Sim. & Stu. 74; Benwell v. Inus, 24 Beav. 307; Vickery v. Welch, 19 Pick. (Mass.) 523; Salomon v. Hertz, 40 N. J. Eq. 400; Jarvis v. Peck, 10 Paige, (N. J.) 118; Taunton Mfg. Co. v. Cook, Boston L. Rep. 547.

⁵ Peck v. Matthews, L. R. 8 Eq. 515; Dyke v.

Taylor, 3 De G. F. & J. 467; Nicholson v. Rose, 4 De G. & J. 10; Shrewsbury, &c. Ry. v. London, &c. Ry., 3 Macn. & G. 70; Wagner v. Meety, 89 Mo. 150; Hall v. Wesster, 7 Mo. App. 56; Gold, &c. Tel. Co. v. Todd, 17 Hun, 548; Gillis v. Hall, 2 Brews. 342; Beckwith v. Howard, 6 R. I. 1; Manhattan, &c. Co. v. Van Keuren, 23 N. J. Eq. 251; Haskell v. Wright, *Id.* 389; Parker v. Garrison, 61 Ill. 250; Frank v. Brunnemann, 8 W. Va. 462.

⁶ In Hamilton v. Hector, L. R. 6 Ch. 701; see, also, Drury v. Molins, 6 Ves. 328; Pratt v. Brett, 2 Madd. 62; Briggs v. Law, 4 Johns. Ch. 22; Marvin v. Drexle's Ex'rs, 68 Pa. St. 362.

⁷ Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, 6 *Id.* 340.

ance of the contract. In America, the later English doctrine has been adopted by some of the courts.³ But the older English doctrine is still recognized by a large number of American cases; or if it has been rejected at all by them, only to a partial extent.³

§ 483. **Private rights protected by injunction.**—**Miscellaneous cases.**—As a general rule, it has been held that a court of equity will enjoin injuries to private rights of all sorts and of every character, whenever the common law remedy of damages for the violation of such rights proves inadequate. A court of equity will enjoin the violation of a right, whether it be legal or equitable, provided the legal remedies can only furnish an inadequate protection. Thus, for example, a corporation may be enjoined from doing acts or making use of the corporate property, which would be *ultra vires*.⁴ So, also, may a court of equity restrain by injunction any unlawful act of a director or a managing officer of a corporation.⁵ So, on the

¹ *Jennings v. Brighton, &c. Bd.*, 4 De G. J. & S. 735; *Johnson v. Shrewsbury, &c. Ry.*, 3 De G. M. & G. 914; *Stock v. Brockelbank*, 3 Macn. & G. 250; *Wolverhampton, &c. Ry. v. London, &c. Ry.*, L. R. 16 Eq. 433; *Donnell v. Bennett*, L. R. 22 Ch. D. 835; *Lumley v. Wagner*, 1 De G. M. & G. 604; *Montague v. Flockton*, L. R. 16 Eq. 189.

² *West. U. Tel. Co. v. Union Pac. Ry.*, 1 McCrary, 558; *West. U. Tel. Co. v. St. Joe, &c. Ry.*, 1 Id. 565; *Singer, &c. Co. v. Union, &c. Co.*, 1 Holmes, 253; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Daly v. Smith*, 38 N. Y. Sup. Ct. 158; *McCaull v. Brahan*, 16 Fed. Rep. 37; see *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280; *Alleghany Base Ball Club v. Bennett*, 14 Fed. Rep. 257; *Healy v. Allen*, 38 La. An. 867; *Caldwell v. Cline*, 8 Mart., n. s., (La.) 684; *Hayes v. Willis*, 11 Abb. Pr., n. s., (N. Y.) 167; *Fredricks v. Mayer*, 13 How. Pr. (N. Y.) 566; *Daly v. Smith*, 49 How. Pr. (N. Y.) 150; see, also, *Hahn v. Concordia Soc.*, 42 Md. 460; *Burton v. Marshall*, 4 Gill, (Md.) 487.

³ See *Sanquirico v. Benedetti*, 1 Barb. 315; *Bk. of Cal. v. Fresno, &c. Co.*, 53 Cal. 201; *West. U. Tel. Co. v. West, &c. R. R.*, 8 Baxt. 54; *Crutchfield v. Wason Car Works*, 8 Id. 242; *Smith v. McElwain*, 57 Ga. 247; *Hahn v. Concordia Soc.*, 42 Md. 460; *Manhattan Man., &c. Co. v. N. J. Stock Yard, &c. Co.*, 22 N. J. Eq. 161; *Gallagher v. Fayette Co. R. R.*, 38 Pa. St. 102.

⁴ *Lord Auckland v. Westminster Bd.*, L. R. 7 Ch. 597; *Metts v. Northern Ry.*, L. R. 5 Ch. 621; *Pudsey Gas Co. v. Corpor. of Bradford*, L. R. 15 Eq. 167; *Pickering v. Stephenson*, L. R. 14 Eq. 325; *Kernaghan v. Williams*, L. R. 6 Eq. 228; *London, &c. Ry. v. London Ry.*, 4 De G. & J. 362; *Ware v. Regent's Canal Co.*, 3 Id. 212; *Rogers v. Oxford, &c. Ry.*, 2 Id. 662; *Hodgson v. Earl of Powis*, 1 De G. M. & G. 6; *Cohen v. Wilkinson*, 1 Macn. & G. 481; *Platteville v. Galena, &c. R. R.*, 43 Wis. 493; *Central R. Co. v.*

Collins, 40 Ga. 582; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; s. c., 12 Hun, (N. Y.) 53; 17 Hun, (N. Y.) 169; *Bronson v. Lacrosse, &c. R. Co.*, 2 Wall. (U. S.) 302; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Chetlain v. Rep. Life Ins. Co.*, 86 Ill. 220; *Faulds v. Yates*, 57 Ill. 416; *Terwillinger v. Great Western, &c. Co.*, 59 Ill. 449; *Kelly v. Maripose, &c. Co.*, 14 Hun, (N. Y.) 632; *Underwood v. New York, &c. R. Co.*, 17 How. (N. Y.) Pr. 537; *Hazard v. Durant*, 11 R. I. 195; *March v. East R. Co.*, 40 N. H. 587; s. c., 43 N. H. 515; *Sears v. Hotchkiss*, 25 Conn. 175; *Pratt v. Pratt*, 33 Conn. 446; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 46; *Taylor v. Miami Exp. Co.*, 5 Ohio, 162; *Tippecanoe Co. v. Lafayette, &c. R. Co.*, 50 Ind. 86; *Rogers v. Lafayette, &c. Works*, 52 Ind. 297; *Stewart v. Erie, &c. Transp. Co.*, 17 Minn. 372; *Brewer v. Boston Theatre Co.*, 104 Mass. 378.

⁵ *Frostburg Building Ass'n v. Stark*, 47 Md. 338; *Mozley v. Alston*, 1 Ph. 798; *Simpson v. Westminster P. H. Co.*, 8 H. L. 717; *Stewart v. Erie, &c. Transp. Co.*, 17 Minn. 372; *Gifford v. N. J., &c. Co.*, 2 Stock. (N. J.) 121; *Dummer v. Chippenham*, 14 Ves. 245; *Wisuree v. First Congregational Church*, 14 Ohio St. 31; *Atty-Gen. v. Mayor, Bligh*, n. s., 321; *James, &c. Co. v. Anderson*, 12 Leigh, (Va.) 278; *Gartside v. East St. Louis*, 43 Ill. 47; *Ware v. Regents, &c. Co.*, 3 De Gex, 212; *Hawes v. Oakland*, 14 Otto, n. s., 450; *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; *Atty-Gen. v. Great N. R. Co.*, 1 Dr. & Sm. 154; *Bagshaw v. Eastern R. Co.*, 7 Hare, 114; *Sears v. Hotchkiss*, 25 Conn. 171; *Manderson v. Commercial Bank*, 23 Pa. St. 379; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Central R. Co. v. Collins*, 40 Ga. 582; *Fraser v. Whalley*, 2 Hem. 10; *Stewart v. Little M. R. Co.*, 14 Ohio, 353; *Hill v. Parrish*, 14 N. J. Eq. 380; *Thompson v. Tammany Soc.*, 17 Hun, (N. Y.) 305; *Webb v. Ridgely*, 38 Md. 364; *Brown v. Pac., &c. Co.*, 5 Blatch. (U. S.) 525; *Reed v. Jones*, 6 Wis. 680; *Cannon v. Trask*, L. R. 20 Eq. 669; *Dowling v.*

other hand, may the minority of a religious corporation be restrained from interfering with the control of the majority.¹ And the injunction may issue to restrain the expulsion of a member from a club or society.² As a general rule, an injunction is not a proper remedy for determining the right of one to act as an officer of a corporation, the writ of *quo warranto* is the usual remedy in such cases. But if the character of the duties of the office renders it possible that great danger might result to the corporation or to the stockholders, if a claimant to the office were permitted to perform the duties of such office, until his title to the office could be determined by a writ of *quo warranto*, then a preliminary injunction could be granted against the performance of the duties of the office, until his title thereto has been definitely settled.³ An injunction can also be properly employed in preventing the doing of acts by a mortgagor or mortgagee in respect to the subject-matter of the mortgage; as, for example, to restrain a mortgagee from making an improper sale of the property under the power of sale,⁴ or a mortgagor from doing anything with the property, whereby the security would be imperiled, whether the act constituted waste or not.⁵ So, also, may a court restrain the sale of property under an illegal tax.⁶ But illegal taxation will never be restrained by injunction, unless some special reason is shown for equitable interference; in other words, only when the remedy at law proves to be inadequate.⁷ But a court will enjoin the collection of an

Pontypool, &c. Ry., L. R. 18 Eq. 714; Featherstone v. Cooke, L. R. 16 Eq. 298; Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Carlisle v. South East. Ry., 1 Macn. & G. 689; Pond v. Vt. Valley R. R., 12 Blatch. 280.

¹ Cooper v. Gordon, L. R. 8 Eq. 249; Perry v. Shipway, 4 De G. & J. 353.

² Lowry v. Read, 3 Brews. 452; Gregg v. Mass. Med. Soc., 111 Mass. 185; Fisher v. Bd. of Trade, 80 Ill. 85; Fisher v. Keane, L. R., 11 Ch. D. 353; Labouchere v. Earl of Wharnccliffe, L. R., 13 Ch. D. 346.

³ See Aslatt v. Corpor. of Southampton, L. R. 16 Ch. D. 143; Hussey v. Gallagher, 61 Ga. 86.

⁴ Capehart v. Briggs, 77 N. C. 261; Purnell v. Vaughan, *Id.* 268; Haggerson v. Phillips, 37 Wis. 364; Collins v. Lamport, 4 De G. J. & S. 500.

⁵ Bagnall v. Villar, L. R. 12 Ch. D. 812; Warner v. Jacob, L. R. 20 Ch. D. 220; Truman v. Redgrave, L. R. 18 Ch. D. 547; Mut. Life Ins. Co. v. Bigler, 79 N. Y. 568; Taylor v. Collins, 51 Wis. 123; Walker v. Brewster, L. R. 5 Eq. Cas. 25; Herz v. Bank, 2 Giff. 686; Rochester v. Curtiss, 1 Clarke, (N. Y.) 336; Harrison v. Newton, 9 N. Y. Leg. Obs. 311; s. c., 1 Code R., n. s., (N. Y.) 207; Frankford v. Lenning, 2 Phila. (Pa.) 403; s. c., 1 Am. L. Rep. 357; Hough v. Doylestown, 4 Brewst. (Pa.) 333; Bunnell's Appeal, 69 Pa. St. 59; Hieskell v. Gross, 3 Brewst. (Pa.) 430; s. c., 7 Phila. (Pa.) 317; Philadelphia's Appeal, 78 Pa. St. 33; s. c., Phila. (Pa.) 490.

⁶ Kean v. Asch, 27 N. J. Eq. 57; Oliver v.

Memphis, &c. R. R., 30 Ark. 128; Deming v. James, 72 Ill. 78; Abbott v. Edgerton, 53 Ind. 196; Trowbridge v. Horan, 78 N. Y. 439.

⁷ Scribner v. Allen, 12 Minn. 148; Coulson v. Harris, 43 Miss. 728; McDonald v. Murphree, 45 Miss. 705; Page v. St. Louis, 20 Mo. 138; Deane v. Todd, 22 Mo. 90; State v. Parkville, &c. R. Co., 32 Mo. 496; First Nat. Bank v. Meredith, 44 Mo. 500; Rockingham Savings Bank v. Portsmouth, 52 N. H. 17; Brown v. Concord, 56 N. H. 375; Hoagland v. Delaware, 17 N. J. Eq. 107; Liebstain v. Mayor, &c. of Newark, 24 N. J. Eq. 200; Hoboken Land, &c. Co. v. Hoboken, 31 N. J. Eq. 461; Elyton Land Co. v. Ayres, 62 Ala. 413; Tallessee Mfg. Co. v. Glenn, 50 Ala. 489; Clayton v. Lafargue, 23 Ark. 137; Floyd v. Gilbrath, 27 Ark. 675; Murphy v. Harrison, 29 Ark. 340; Oliver v. Memphis, &c. R. Co., 30 Ark. 128; De Witt v. Hays, 2 Cal. 463; s. c., 56 Am. Dec. 352; Minturn v. Hays, 2 Cal. 590; s. c., 56 Am. Dec. 366; Robinson v. Gaar, 6 Cal. 273; Merrill v. Gorham, 6 Cal. 41; Bucknall v. Story, 36 Cal. 67; Savings and Loan Assn. v. Austin, 46 Cal. 415; Houghton v. Austin, 47 Cal. 646; Central Pac. R. Co. v. Corcoran, 48 Cal. 65; Hollister v. Sherman, 63 Cal. 38; Dusenbury v. Mayor, &c. of Newark, 25 N. J. Eq. 295; Bank of Utica v. Utica, 4 Paige, (N. Y.) 399; s. c., 27 Am. Dec. 72; Wiggins v. New York, 9 Paige, (N. Y.) 16; Van Doren, v. New York, 9 Paige, (N. Y.) 388; Heywood v. Buffalo, 14 N. Y. 534; Marsh v. Brooklyn, 59 N. Y. 280; Livingston v. Hollenbeck 4 Barb. (N. Y.) 9. Van Rensselaer

illegal tax whenever such assessment or levy is tainted with fraud,¹ or the enforcement of such a tax would create a cloud upon the title.² Injunctions have also been issued for the purpose of preventing the confiscation of property to public use without compensation.³ So, also, may a municipal corporation be enjoined from the unauthorized issue of bonds;⁴ and any citizen may bring the suit for injunction. In, fact, if citizens fail to bring the suit, prior to the issue of the bonds, for the purpose of deciding the validity of such

v. Kidd, 4 Barb. (N. Y.) 17; *Dodd v. Hartford*, 25 Conn. 232; *Arnold v. Middleton*, 39 Conn. 401; *Rowland v. First School District*, 42 Conn. 30; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243; *Frost v. Flick*, 1 Dakota, 131; *Linton v. Athens*, 53 Ga. 588; *Decker v. McGoun*, 59 Ga. 805; *Georgia Loan Assn. v. McGowan*, 59 Ga. 811; *Wilkerson v. Watters*, 1 Idaho, n. s., 564; *Burns v. Mayor, &c. of Atchison*, 2 Kans. 454; *Missouri River, &c. R. v. Morris*, 7 Kans. 210, 231; *Messick v. Supervisors of Columbia Co.*, 50 Barb. (N. Y.) 190; *Thatcher v. Dusenbury*, 9 How. (N. Y.) Pr. 32; *Chemical Bank v. New York*, 12 How. Pr. (N. Y.) 476; s. c., 1 Abb. Pr. (N. Y.) 79; *Corwin v. Campbell*, 45 How. (N. Y.) Pr. 9; *Western Railroad Co. v. Nolan*, 48 N. Y. 513; *Pumpelly v. Oswego*, 45 How. Pr. (N. Y.) 219; *Hanlon v. Supervisors of Westchester*, 57 Barb. (N. Y.) 383; s. c., Abb. Pr. (N. Y.) n. s., 261, overruling *Wood v. Draper*, 24 Barb. (N. Y.) 187; s. c., 4 Abb. Pr. (N. Y.) 322; *Freeland v. Hastings*, 10 Allen, (Mass.) 570; *Brewer v. Springfield*, 97 Mass. 152; *Lord v. Charleston*, 99 Mass. 209; *Whiting v. Boston*, 106 Mass. 89; *Hunnewell v. Charleston*, 106 Mass. 350; *Pillsbury v. Humphrey*, 26 Mich. 245; *Corrothers v. Board of Education*, 16 W. Va. 527; *Christie v. Malden*, 23 W. Va. 667; *Warden v. Supervisors of Lafayette Co.*, 14 Wis. 672; *Wiltimore v. Rock Co.*, 15 Wis. 9; *Ivinson v. Hance*, 1 Wyo. 270; see *Comin v. Supervisors of Jefferson*, 3 Thomp. & C. (N. Y.) 296; *Mann v. Board of Education*, 53 How. (N. Y.) Pr. 289; *Crever v. Mayor, &c. of New York*, 12 Abb. Pr., n. s., (N. Y.) 340; *Broadnax v. Groom*, 64 N. Car. 244; *Burnet v. Cincinnati*, 3 Ohio 73; s. c., 17 Am. Dec. 582; *McCoy v. Chillicothe*, 3 Ohio, 370; s. c., 17 Am. Dec. 607; *Mechanics', &c. Bank v. Debolt*, 1 Ohio St. 591; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Hughes v. Kline*, 30 Pa. St. 227; *Wharton v. School Directors*, 42 Pa. St. 358; *Greene v. Mumford*, 5 R. I. 473; *Sherman v. Leonard*, 10 R. I. 469; *People's Sav. Bank v. Tripp*, 13 R. I. 621; *Red v. Johnson*, 53 Tex. 284; *Blanc v. Meyer*, 59 Tex. 89; *White Sulphur Springs Co. v. Robinson*, 3 W. Va. 542.

¹ *Leitch v. Wentworth*, 71 Ill. 146; *First National Bank v. Cook*, 77 Ill. 622; *Cleghorn v. Postlewaite*, 43 Ill. 428.

² *Jersey City v. Morris Canal, &c. Co.*, 12 N. J. Eq. (1 Beas.) 227; *Siegel v. Supervisors, &c.*, 26 Wis. 70; *Marquette, &c. R. Co. v. Marquette*, 35 Mich. 504; *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 253; *Wiley v. Flournoy*, 30 Ark.

609; *Greedup v. Franklin Co.*, 30 Ark. 101; *Mobile, &c. R. Co. v. Peebles*, 47 Ala. 317; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Fowler v. St. Joseph*, 37 Mo. 228; *Johnson v. Milwaukee*, 40 Wis. 315; *McPike v. Pen*, 51 Mo. 63; *Johnson v. Hahn*, 4 Neb. 39; *Hollenbeck v. Hahn*, 2 Neb. 377; *Leslie v. St. Louis* 47 Mo. 474; *Hanlon v. Westchester*, 8 Abb. Pr. (N. Y.) n. s., 261; s. c., 57 Barb. (N. Y.) 383; *Felton v. Oregon, &c. R. Co.*, 3 Sawy. (U. S.) 22; *Lockwood v. St. Louis*, 24 Mo. 20; *McCormick v. District of Columbia*, 4 Mackey, (D. C.) 396; *Palmer v. Rich*, 12 Mich. 414; *Scofield v. Lansing*, 17 Mich. 437; *Seeley v. West Port*, 47 Conn. 294; *Minn. Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Heywood v. Buffalo*, 14 N. Y. 534; *Mutual, &c. Ins. Co. v. Supervisors of N. Y.*, 33 Barb. (N. Y.) 322; *Mitchell v. Milwaukee*, 18 Wis. 92.

³ *Folley v. Passaic*, 26 N. J. Eq. 216; and see *Tribune Ass'n v. The Sun, &c. Ass'n*, 7 Hun, 175; *Dairiese v. Cooke*, 1 Otto, 580; *Lewis v. Providence*, 10 R. I. 97; *People v. Chicago*, 53 Ill. 424; *Baltimore v. Hook et al.*, 62 Md. 371; s. c., 6 Am. & Eng. Corp. Cas. 442; *Mason City, &c. Co. v. Mason*, 23 W. Va. 211; s. c., 7 Am. & Eng. Corp. Cas. 426; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Anderson v. Harvey's Heirs*, 10 Gratt. (Va.) 389; and *McMillen v. Ferrell*, 7 W. Va. 223; *Sower v. Philadelphia*, 35 Pa. St. 231; *Eidemiller v. Wyandotte City*, 2 Dill. (U. S.) 376; *Gardner v. Newburg*, 2 Johns. Ch. (N. Y.) 162; *Lafayette v. Bush*, 19 Ind. 326.

⁴ *Chestnutwood v. Hood*, 68 Ill. 132; *Springfield v. Edwards*, 84 Ill. 626; see *Jackson Co. v. Brush*, 77 Ill. 59; *McGoy v. Briant*, 63 Cal. 247; *McPike v. Pen*, 51 Mo. 63; *Curtenius v. Hoyt*, 37 Mich. 583; *Missouri River, &c. R. Co. v. Miami Co.*, 12 Kans. 530; *Allen v. Jay*, 66 Me. 124; *List v. Wheeling*, 7 W. Va. 501; *Delaware Co. v. McClintock*, 51 Ind. 325; *Allison v. Louisville, &c. R. Co.*, 9 Bush, (Ky.) 247; *Campbell v. Paris, &c. R. Co.*, 71 Ill. 611; *State v. Sabine Co. Court*, 51 Mo. 350; *Foster v. Kenosha*, 12 Wis. 616; *Chestnutwood v. Hood*, 68 Ill. 132; *Livingston Co. v. Weider*, 64 Ill. 427; *Marshall v. Silliman*, 61 Ill. 218; *Livingston Co. v. Weider*, 64 Ill. 427; *Allison v. Louisville, &c. R. Co.*, 9 Bush, Ky. 247; *Bond v. Wis., &c. R. Co.*, 45 Wis. 543; *Wright v. Bishop*, 88 Ill. 302; *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnear*, 43 Ill. 160; *Drake v. Phillips*, 40 Ill. 388; *Beaucamp v. Supervisors*, 45 Ill. 274; *Marshall v. Silliman*, 61 Ill. 218.

⁵ *Sherman v. Carr*, 8 R. I. 431; *Newmeyer v. Missouri, &c. R. Co.*, 52 Mo. 82; s. c., 14 Am.

bonds, by such delay it is possible that the *bona fide* purchaser may be enabled to recover on his bonds, notwithstanding the illegality of the issue.¹ And it may be stated, generally, that city officials can be restrained from acting under ordinances which are void for any reason.² Injunctions are also employed for the protection of the property rights of married women,³ in the settlement of partnership affairs after dissolution,⁴ and for the purpose of enjoining a partner, during the partnership, from engaging in a business which is injurious to such partnership.⁵ An injunction is also issued for the purpose of preventing a cloud upon the title, or the doing of those acts which would create a cloud upon the title.⁶ Other illustrations of cases in which injunctions will be issued may be added: such as to restrain the publication of spurious foreign securities;⁷ to restrain the submission of a dispute to arbitration, or to restrain the arbitration itself;⁸ to prevent one from taking letters from the post-office for a fraudulent purpose.⁹

§ 484. **Nuisances when restrained by injunction.**—A court of equity has jurisdiction over existing or threatened public nuisances, and may enjoin the future commission of them at the suit of the state

Rep. 394; *Douglass v. Placerville*, 18 Cal. 643; *Drake v. Phillips*, 40 Ill. 388; *Rice v. Smith*, 9 Iowa, 570; *Grant v. Davenport*, 36 Iowa, 396; *Smith v. Magourich*, 44 Ga. 163; *Howell v. Peoria*, 90 Ill. 104; but see *Roosevelt v. Draper*, 23 N. Y. 318; *Doolittle v. Broome Co.*, 18 N. Y. 155; *McCoy v. Briant*, 53 Cal. 247; *Wilhington v. Harvard*, 8 Cush. (Mass.) 66; *Baltimore v. Gill*, 31 Md. 375; *Merrill v. Plainfield*, 45 N. H. 126; *Frederick v. Groshen*, 30 Md. 436; *Baltimore v. Porter*, 18 Me. 284; *New London v. Brainard*, 22 Conn. 552; *Barr v. Deniston*, 19 N. H. 170.

¹ *Gelpcke v. Dubuque*, 1 Wall. 175 (1865); *Havemeyer v. Iowa County*, 3 Wall. 294; *Lee County v. Rogers*, 7 Wall. 181; *Thompson v. Lee County*, *Id.* 327; *Olcott v. Fond du Lac Sup.*, 16 Wall. 678 (1872); *State v. Holiday*, 72 Mo. 499; *Town of Plainview v. Winona & St. Peter R. Co.*, 36 Minn. 505; *People v. Mead*, 24 N. Y. 124; *Venice v. Murdock*, 92 U. S. 494 (1875); *Gould v. Sterling*, 23 N. Y. 439, 456; *Steines v. Franklin County*, 48 Mo. 167; *Columbia County v. King*, 13 Fla. 451; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Ralls County v. Douglass*, 105 U. S. 728; *Foot v. Johnson Co.*, 5 Dill. 208 (1878); *Cass Co. v. Johnson*, 95 U. S. 360; *Cutler v. Board, &c.*, 56 Miss. 115; *Vicksburg v. Lombard*, 51 Miss. 126; *ante*, § 511; *post*, § 517; *Kenosha v. Lamson*, 9 Wall. 477; *Campbell v. Kenosha*, 5 Wal. 1. 194 (1866); *Poster v. Kenosha*, 12 Wis. 616; *Butz v. Muscatine*, 8 Wall. 575; *Carroll Co. Sup. v. United States*, 18 Wall. 71; *Chicago v. Sheldon*, 9 Wall. 50; *Pine Grove Tp. v. Talcott*, 19 Wall. 686; *Elmwood v. Marcy*, 92 U. S. 289 (1875); *Anderson v. Santa Anna*, 116 U. S. 356; *Claborn County v. Brooks*, 111 U. S. 400; *Taylor v. Ypsilanti*, 105 U. S. 60; *Douglass v. County of Pike*, 101 U. S. 677.

² *Merrill v. Plainfield*, 45 N. H. 126; *Normand v. Otoe Co.*, 8 Neb. 18; *Oliver v. Keightley*, 24

Ind. 514; *Drake v. Phillips*, 40 Ill. 388; *Grant v. Davenport*, 36 Iowa, 396; *Hooper v. Ely*, 46 Mo. 505; *Douglass v. Placerville*, 18 Cal. 643; *Patterson v. Bowes*, 4 Grant, (Can.) 170; *West Gwillimbury v. Hamilton R. Co.*, 23 Grant, (Can.) 383; *Sank v. Phila.*, 4 Brewst. (Pa.) 133; s. c., 8 Phila. (Pa.) 117; *Crampton v. Sabriskie*, 101 U. S. 601; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Baltimore v. Gill*, 31 Md. 375; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *Page v. Allen*, 58 Pa. St. 338; *Stevens v. Railroad Co.*, 29 Vt. 546; *Webster v. Harwinton*, 32 Conn. 131; *Terrett v. Sharon*, 34 Conn. 105.

³ *Allen v. Benners*, 10 Phila. 10; *Simson v. Bates*, 10 *Id.* 66; *French v. Snell*, 29 N. J. Eq. 95.

⁴ *Large v. Ditmars*, 27 N. J. Eq. 283; *Cropper v. Coburn*, 2 Curt. (U. S.) 465; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *New v. Wright*, 44 Miss. 202; *Miles v. Thomas*, 9 Sim. 606.

⁵ *New v. Wright*, 44 Miss. 202; *Benton v. Wookey*, 6 Madd. 367; *Long v. Majestre*, 1 Johns. (N. Y.) Ch. 305; *Anderson v. Wallace*, 2 Wall. 540; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Cropper v. Coburn*, 2 Curt. (U. S.) 465; *Miles v. Thomas*, 9 Sim. 606; *Fairthorne v. Weston*, 3 Hare, 387; *Marshall v. Watson*, 25 Beav. 501; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; *Blackford v. Hawkins*, 1 L. J. Ch. 141; *Hall v. Hall*, 12 Beav. 414; *Morrison v. Moat*, 21 L. J., n. s., Ch. 248; s. c., 16 Jur. 321.

⁶ See *post*, § 543, removing cloud, and cases there cited; *Lehman v. Roberts*, 86 N. Y. 232; *Strusburg v. New York*, 87 *Id.* 452; *Dederer v. Voorhies*, 81 *Id.* 154; *Remington Paper Co. v. O'Dougherty*, 81 *Id.* 474.

⁷ *Emperor of Austria v. Day*, 3 De G. F. & J. 217.

⁸ *Pickering v. Cape Town Ry.*, L. R. 1 Eq. 84.

⁹ *Zellenhoff v. Collins*, 23 Hun, 156; and see *Guion v. Trask*, 1 De G. F. & J. 373.

or municipality.¹ Where, also, the public nuisances cause a special injury to some private person, the party so suffering the special injury may likewise institute a suit for an injunction. But in such a case, in order that he might secure the injunction, the special injury which he suffers must be real, and the legal remedy must be shown to be inadequate.² Where the nuisance is a private one, equity will restrain its further commission at the suit of the injured party. But in order that a private nuisance may be restrained by injunction, special ground for the interposition of the court of equity must be shown; the injury must be real, and permanent, and not trifling or temporary; in other words, the damage or injury must be irreparable, or the remedy at law prove inadequate. The jurisdiction of equity in all such cases is based upon the combined claim of an irreparable injury and the provision for avoiding a multiplicity of suits. And if, in that particular case, it can be shown that the interference of a court for the purpose of restraining the future commission of the nuisance is not necessary to the protection of the interest of the party injured, the court will refuse such injunction.³ If, for example, a nuisance is not of a dangerous character, and there is no danger of the nuisance being continuous, a court of equity will refuse to grant relief; but in order that a nuisance can be claimed to be a continuous one, it is not necessary for that injury to be unceasing; a repetition of the injury at intervals

¹ *Pennsylvania v. Wheeling, &c. Bridge Co.*, 13 How. (U. S.) 518; *Miss. & Mo. R. R. v. Ward*, 2 Black, 485; *Atty.-Gen. v. Cohoes Co.*, 6 Paige, 133; *Mohawk Bridge Co. v. Utica, &c. R.R.*, 6 *Id.* 554; *People v. Third Ave. R. R.*, 45 Barb. 63; *Hinchman v. Patterson, &c. R.R.*, 17 N.J. Eq. 75; *Craig v. The People*, 47 Ill. 487; *Atty.-Gen. v. Cleaver*, 18 Ves. 211, 217; *Atty.-Gen. v. Forbes*, 2 My. & Cr. 123; *Earl of Ripon v. Hobart*, 3 My. & K. 169, 179; *Atty.-Gen. v. Great East Ry.*, L. R. 6 Ch. 572; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 *Id.* 533; *Rochester v. Erickson*, 46 Barb. 92; *Coast Line R. R. v. Cohen*, 50 Ga. 451; *Watertown v. Cowen*, 4 Paige, (N. Y.) 510; *Mayor v. Bolt*, 5 Ves. 129; *Williams v. Smith*, 22 Wis. 600.

² *Shed v. Hawthorne*, 3 Neb. 179; *Sparhawk v. Union Passenger R. Co.*, 54 Pa. St. 401; *Peterson v. Railway Co.*, 5 Phila. (Pa.) 199; *Passenger R. Co. v. Philadelphia*, 2 W. N. C. (Pa.) 639; s. c., 33 Leg. Int. (Pa.) 264; *Passenger R. Co. v. Passenger R. Co.*, 1 W. N. C. (Pa.) 492; *Horner v. Craig*, 2 W. N. C. (Pa.) 11; *Corning v. Lowerre*, 6 Johns. (N. Y.) Ch. 439; *Doolittle v. Broome Co.*, 18 N. Y. 160; *O'Brien v. Norwich, &c. R. Co.*, 17 Conn. 372; *Hinchman v. Patterson, &c. R. Co.*, 2 C. E. Green, (N. J.) 75; *Beveridge v. Lacey*, 3 Rand. (Va.) 63; *Walker v. Shepardson*, 2 Wis. 384; *Meckling v. Kittanning Bridge Co.*, 1 Grant's (Pa.) Cas. 416; *Barnes v. Racine*, 4 Wis. 454; *Ewell v. Greenwood*, 26 Iowa, 377; *Williams v. Smith*, 22 Wis. 594; *Green v. Lake*, 54 Miss. 540; *Engs v. Peckham*, 11 R. I. 210; *Coast Line R. Co. v. Cohen*,

50 Ga. 451; *Price v. McCoy*, 40 Iowa, 533; *Illinois Co. v. St. Louis*, 2 Dill. (U. S.) 70; *Whitfield v. Rogers*, 26 Miss. 84; *Smith v. Bangs*, 15 Ill. 399; *Sheboygan v. Sheboygan, &c. R. R.*, 21 Wis. 667; *Pettibone v. Hamilton*, 40 Wis. 402; *Thayer v. New Bedford R. R.*, 125 Mass. 253; *Osborne v. Brooklyn, &c. R. R.*, 5 Blatch. 366; *Hartshorn v. South Reading*, 3 Allen, 501; *Central Bridge Corp. v. Lowell*, 4 Gray, 474; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Frink v. Lawrence*, 20 *Id.* 117; *Milbau v. Sharp*, 27 N. Y. 611; *Knox v. New York*, 55 Barb. 404; *Smith v. Lockwood*, 13 *Id.* 209; *Mayor, &c. v. Baumberger*, 7 Robt. 219; *Hudson River R. R. v. Loeb, Id.* 418; *Manhattan, &c. Co. v. Barker, Id.* 523; *Peck v. Elder*, 3 Sandf. 126; *Black v. Phila., &c. R. R.*, 58 *Id.* 249; *Philadelphia v. Collins*, 68 *Id.* 106; *Buck Mt., &c. Co. v. Lehigh, &c. Co.*, 50 *Id.* 91, 99; *Higbee v. Camden, &c. R. R.*, 19 N. J. Eq. 276; *Allen v. Board of Freeholders*, 2 Beasl. 68, 74; *Zabriskie v. Jersey City, &c. R. R.*, 2 *Id.* 314; *Delaware, &c. R. R. v. Stump*, 8 Gill & J. 479; *Hamilton v. Whitridge*, 11 Md. 128; *Savannah, &c. R. R. v. Shiels*, 33 Ga. 601; *Columbus v. Jaques*, 30 *Id.* 506; *Green v. Oakes*, 7 Ill. 249.

³ *Atty.-Gen. v. Nichol*, 16 Ves. 338, 342; *Wynstanley v. Lee*, 2 Swanst. 333, 335; *Fishmonger's Co. v. East India Co.*, 1 Dick. 163; *Blackmore v. Glamorganshire Canal Navigation*, 1 My. & K. 154; *Dent v. Auction Mart Co.*, 35 L. J. (Ch.) 555; see, also, *Dana v. Valentine*, 5 Met. (Mass.) 8; *New York v. Mapes*, 6 Johns. (N. Y.)

would make such injury a continuous one.¹ So, also, will an injury be considered irreparable, for the purpose of laying the foundation to the claim to an equitable injunction, although the damage can be repaired or actual compensation can be obtained. The constant exposure of the plaintiff to repeated commissions of the nuisance, and the constant necessity of resorting to the courts for the recovery of such compensation, makes the injury, in contemplation of law, an irreparable one, and one which cannot be adequately redressed in an action at law.²

But in order that an injunction may issue for the restraint of a nuisance, it is not necessary that a nuisance shall have been actually committed; a nuisance which is simply threatened may be restrained, as well as one which has been already committed and is threatened to be continued.³ The intervention of a court of equity for

Ch. 46; *Arnold v. Klepper*, 24 Mo. 273; *Rhea v. Forsyth*, 37 Pa. St. 503; *Porter v. Witham*, 17 Me. 292; *Mohawk, &c. R. Co. v. Artcher*, 6 Paige, (N. Y.) 83; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Norris v. Hill*, 1 Mich. 202; *Davis v. Londgreen*, 8 Neb. 43; *State v. Mobile*, 5 Port. (Ala.) 179; s. c., Am. Dec. 564; *Whitfield v. Rogers*, 26 Miss. 84; *Robeson v. Pittenger*, 1 Green (N. J.) Ch. 57; s. c., 32 Am. Dec. 413; *Heiskell v. Gross*, 3 Brewst. (Pa.) 430; s. c., 7 Phila. (Pa.) 317; *Bunnell's Appeal*, 69 Pa. St. 59; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Elmhurst v. Spencer*, 2 Mac. & G. 45; *Broadbent v. Imperial G. Co.*, 7 De G. M. & G. 436; *Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Weston v. Woodcock*, 5 M. & W. 587; *Earl of Ripon v. Hobart*, 3 Myl. & K. 180; *Dunning v. Aurora*, 40 Ill. 481; *Town of Lakeview v. Litz*, 44 Ill. 81; *Remington v. Foster*, 42 Wis. 608; *Powell v. Foster*, 59 Ga. 790; *Parker v. Winnipiseogee, &c. Co.*, 2 Black. (U. S.) 545; *Bruce v. Delaware, &c. Co.*, 19 Barb. (N. Y.) 371; *Bostock v. N. Staff. R. Co.*, 3 Sm. & G. 283; *Atty-Gen. v. Southampton*, 1 Giff. 363; *Ogletree v. McQuaggs*, 67 Ala. 584; *Kingsbury v. Flowers*, 65 Ala. 484; *St. James v. Arrington*, 36 Ala. 548; *Rosser v. Randolph*, 7 Port. (Ala.) 245; *Ferguson v. Selma*, 43 Ala. 400; *Dorsey v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704; *Green v. Lake*, 54 Mass. 540; s. c., 28 Am. Rep. 378; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Ray v. Lynes*, 10 Ala. 64; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 287; *Davidson v. Isham*, 1 Stock. (N. J.) 186.

¹ *Davis v. Londgreen*, 8 Neb. 43.

² *Wood v. Sutcliffe*, 2 Sim., n. s., 165; *Elmhurst v. Spencer*, 2 Mac. & G. 50; *Atty-Gen. v. Tel. Co.*, 30 Beav. 287; *Corning v. Troy, &c. Co.*, 40 N. Y. 191.

³ *Ross v. Butler*, 19 N. J. Eq. 294; *Gardener v. Newburg*, 2 Johns. (N. Y.) Ch. 162; s. c., 7 Am. Dec. 526; *Belknap v. Belknap*, 2 Johns. (N. Y.) Ch. 463; s. c., 7 Am. Dec. 548; *Catlin v. Valentine*, 9 Paige, (N. Y.) 575; s. c., 38 Am. Dec. 567; *Atty-Gen. ex rel. Bell v. Blont*, 4 Hawks, (N. Car.) 384; s. c., 15 Am. Dec. 526; *Clark v. Lawrence*, 6 Jones (N. Car.) Eq. 83;

Dunning v. Aurora, 40 Ill. 481, 486; *Wahle v. Reinbock*, 76 Ill. 322; *Fuselier v. Spalding*, 2 La. An. 773; *Blanc v. Murray*, 36 La. An. 162; s. c., 51 Am. Rep. 7; *Whitfield v. Rogers*, 26 Miss. 84; *Society, &c. v. Morris Canal, &c. Co.*, 1 N. J. Eq. 57; *Atty-Gen. v. Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304; *Dawson v. Paver*, 5 Hare, 415, 430; *Potts v. Levy*, 2 Drew, 272; *Elwell v. Crowther*, 31 Beav. 183; *State v. Mobile*, 5 Port. (Ala.) 279; s. c., 30 Am. Dec. 564; *Coker v. Birge*, 9 Ga. 425; s. c., 54 Am. Dec. 347; *De Give v. Seltzer*, 64 Ga. 423; *People v. St. Louis*, 5 Gilm. (Ill.) 351; s. c., 48 Am. Dec. 339; *Wier's Appeal*, 74 Pa. St. 230; *Aldrich v. Howard*, 7 R. I. 87; *Phillips v. Sockett*, 1 Tenn. 200; *Coalter v. Hunter*, 4 Rand. (Va.) 58; s. c., 15 Am. Dec. 726; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Walker v. Shepardson*, 2 Wis. 384; s. c., 60 Am. Dec. 423; *Hamilton v. Whitridge*, 11 Md. 128; s. c., 69 Am. Dec. 184; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Sellers v. Pennsylvania R. Co.*, 3 Phila. (Pa.) 319; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Dilworth's Appeal*, 91 Pa. St. 247; *Lining v. Geddes*, 1 McCord (S. Car.) Ch. 304; s. c., 16 Am. Dec. 606; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; s. c., 54 Am. Rep. 45; *Ramsey v. Riddle*, 1 Cranch (U. S.) C. C. 399; *Flint v. Russell*, 1 Dill. (U. S.) 151; *Duncan v. Hays*, 22 N. J. Eq. 25; *Mohawk Bridge Co. v. Utica, &c. R. Co.*, 6 Paige, (N. Y.) 554; *Hudson, &c. Canal Co. v. New York, &c. R. Co.*, 9 Paige, (N. Y.) 323; *Phoenix v. Comm. of Emigration*, 1 Abb. Pr. (N. Y.) 466; *Barnes v. Calhoun*, 2 Ired. (N. Car.) Eq. 199; *Simpson v. Justice*, 8 Ired. (N. Car.) Eq. 115; *Clark v. Lawrence*, 6 Jones (N. Car.) Eq. 83; *Fizzle v. Patrick*, 6 Jones (N. Car.) Eq. 354; *Dorsey v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *Laughlin v. Lamasco*, 6 Ind. 223; *Keiser v. Loveth*, 85 Ind. 240; s. c., 44 Am. Rep. 10; *Shiros v. Olinger*, 50 Iowa, 571; s. c., 32 Am. Rep. 138; *Adams v. Michael*, 38 Md. 123; s. c., 17 Am. Rep. 516; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800; s. c., 68 Am. Rep. 750; *Rogers v. Danforth*, 9 N. J. Eq. 289; *Butler v. Rogers*, 9 N. J. Eq. 487; *Wolcott v. Melick*, 11 N. J.

the purpose of restraining a nuisance, which has only been threatened, is an extraordinary exercise of the equitable jurisdiction, and is granted cautiously. It must be not only a clear case of nuisance, but the danger of suffering irreparable injury from the commission of the threatened nuisance must be imminent; and these claims for a pressing necessity for equitable intervention must be shown by facts, and cannot rest upon a mere inference, or upon opinion or belief. Where there is a reasonable doubt that there is any imminent danger of the threat being carried into execution, or if carried into execution, the damage that would ensue therefrom would not be of a very serious character, a court of equity will refuse to enjoin the commission of the threatened nuisance. So, likewise, will the injunction be refused, where there is a reasonable doubt as to whether the act threatened is a nuisance, in the legal acceptance of the term.¹

§ 485. **Violation of easements enjoined.**—Among the wrongs against property in the nature of nuisances, which will be very readily restrained by injunction, are violations of easements of all sorts. Wherever there has been an actual interference with the easement and danger of its continuance, or where the future interference with such easement is seriously threatened, for the future protection of such easement against such interference, an injunction will issue. The multiplicity of suits necessarily resulting from the continuance of the nuisance will, in every case, be a justification for the interference of equity by injunction. These injunctions have been issued for the purpose of restraining interferences with the easement of light and air.² Easements in streams of water, where they are threatened with violation by the diversion or pollution of the stream;³ or where owners

Eq. 204; s. c., 66 Am. Dec. 790; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; Atty.-Gen. v. Steward, 20 N. J. Eq. 415; *St. James' Church v. Arrington*, 36 Ala. 546; *Rouse v. Martin*, 75 Ala. 510; s. c., 51 Am. Rep. 463; *Kingsbury v. Flowers*, 65 Ala. 479; s. c., 39 Am. Rep. 14; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; s. c., 36 Am. Dec. 502; *Thebaut v. Canova*, 11 Fla. 143; *Harrison v. Brooks*, 20 Ga. 537; *Whitaker v. Hudson*, 65 Ga. 43; *Rounsaville v. Kohlheim*, 68 Ga. 668; s. c., 45 Am. Rep. 505; *Lake View v. Letz*, 44 Ill. 81.

¹ *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 206; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Rosser v. Randolph*, 7 Port. 245; *Ferguson v. Selma*, 43 Ala. 400; *Leigh v. Westervelt*, 2 Duer. (N. Y.) 618; *Wallace v. McVey*, 6 Ind. 303; *Wolcott v. Melick*, 3 Stock. (N. J.) 204; *Branch Turnpike Co. v. Yuba Co.*, 13 Cal. 190; *Thebaut v. Canova*, 11 Fla. 143; *Adams v. Michael*, 38 Md. 125; *Fort v. Groves*, 29 Md. 193; *St. James' Church v. Arrington*, 36 Ala. 548; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Lake View v. Letz*, 44 Ill. 81; *Ellison v. Commissioners*, 5 Jones' Eq. (N. Car.) 57; *Ross v. Butler*, 19 N. J. Eq. 294; *Williams v. N. Y. Cent. R. Co.*, 18 Barb. (N.

Y.) 222; *Higbee v. Camden, &c. R. Co.*, 20 N. J. Eq. 435; *Miss., &c. R. Co. v. Ward*, 2 Black. (U. S.) 494; *Clark v. Lawrence*, 6 Jones Eq. (N. Car.) 83; Atty.-Gen. v. Steward, 21 N. J. 340; *Duncan v. Hays*, 22 N. J. Eq. 29; *McConnell v. Gibson*, 12 Ill. 128; *Lockard v. Lockard*, 16 Ala. 430; *Lancaster v. Railroad*, 62 Ala. 562; *Spence's Equity*, 672; *Harrison v. Brooks*, 20 Ga. 537.

² *Aynsley v. Glover*, L. R. 10 Ch. 283; *Hackett v. Baiss*, L. R. 20 Eq. 494; *Smith v. Smith*, L. R. 20 Eq. 500; *Ecclesiastical Comm'rs v. Kino*, L. R. 14 Ch. D. 213; *Thruston v. Minke*, 23 Md. 487; *Robeson v. Pittenger*, 1 Green Ch. 57; *Irwin v. Dixon*, 9 How. (U. S.) 10; Atty.-Gen. v. Nichol, 16 Ves. 338; *Wynstanley v. Lee*, 2 Sw. 333; *Back v. Stacy*, 2 Russ. 121; *Tapling v. Jones*, 11 H. L. Cas. 290.

³ *Holt v. Corpor. of Rochdale*, L. R. 10 Eq. 354, 361; *Carlisle v. Cooper*, 21 N. J. Eq. 766, 779, 583, 585; Atty.-Gen. Steward, 21 Id. 340; 20 Id. 415; *Shimer v. Morris Canal Co.*, 27 Id. 363; *Holsman v. Boiling Spring, &c. Co.*, 1 McCarter, 335; *Jacobs v. Allard*, 42 Vt. 303; *Bull v. Valley Falls Co.*, 8 R. I. 42; *Frink v. Lawrence*, 20 Conn. 117; *Fisk v. Wilber*, 7 Barb. 395; *Pollitt v. Long*, 58 Id. 20; *Olmstead v. Loomis*, 9

of mills have acquired extraordinary rights in such streams for running their mills, and their easements are in danger of being injured or interfered with by some unreasonable use of the stream by riparian owners.¹ An injunction will also be granted for the purpose of restraining an unlawful or wrongful system of drainage,² as well as for the purpose of preventing interference with drains that have been lawfully constructed.³ An injunction will always be granted for the prevention of interference with lateral and subjacent support to lands and buildings,⁴ as well as with party walls.⁵ Encroachments upon public parks and highways will be restrained by injunction,⁶ as well as encroachments of municipal or public corporations upon the rights of adjoining proprietors.⁷ The number of illustrations of nuisances arising from violation of easements, which may be restrained by injunction, is almost without limitation, and it would be impossible to make any complete reference to all of them. Other illustrations of violations of easements will be found in the note below.⁸

Id. 152; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 165; *Van Bergen v. Van Bergen*, 2 *Id.* 272; 3 *Id.* 282; *Reid v. Gifford*, Hopk. Ch. 416; *Hammond v. Fuller*, 1 Paige, 197; *Arthur v. Case*, 1 *Id.* 447; *Belknap v. Trimble*, 3 *Id.* 577, 600; *Babcock v. New Jersey, &c. Co.*, 20 N. J. Eq. 296; *Spangler's Appeal*, 64 Pa. St. 387; *Sanderson v. Pa. Coal Co.*, 86 *Id.* 401; *Lewis v. Stein*, 16 Ala. 214; *Burden v. Stein*, 27 *Id.* 104; *Leach v. Day*, 27 Cal. 648; *Ferrea v. Knipe*, 28 *Id.* 340; *Grigsby v. Burtnett*, 31 *Id.* 406; *More v. Massini*, 32 *Id.* 590; *Hill v. Smith*, 32 *Id.* 166; *Levaroni v. Miller*, 34 *Id.* 231; *Yolo Co. v. Sacramento*, 36 *Id.* 193; *Grisby v. Clear Lake W. Co.*, 40 *Id.* 396; *Gregory v. Nelson*, 41 *Id.* 378; *Cowell v. Martin*, 43 *Id.* 605; *Cave v. Crafts*, 53 *Id.* 135; *Robinson v. Black Diamond Coal Co.*, 50 *Id.* 460; 57 *Id.* 412; *Bensley v. Mt. Lake W. Co.*, 13 *Id.* 306; *Logan v. Driscoll*, 19 *Id.* 623; *Robinson v. Russell*, 24 *Id.* 467; *Wixon v. Beaver River, &c. Co.*, 24 *Id.* 367; *Hulme v. Shreve*, 3 Green (N. J.) Ch. 116; *Rupley v. Welch*, 23 Cal. 452; *Phoenix, &c. Co. v. Fletcher*, 23 Cal. 481; *National, &c. Co. v. McCoy*, 23 Cal. 490; *Sheboygan v. Sheboygan, &c. R. Co.*, 21 Wis. 667; *Owen v. Field*, 12 Allen, (Mass.) 457; *Wilcox v. Wheeler*, 47 N. H. 488.

¹ *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 245; *Tucker v. Jewett*, 11 Conn. 311, 317, 324; *Ingraham v. Hutchinson*, 2 Conn. 584; *Mason v. Hill*, 5 Barn. & Adol. 1; *Bealey v. Shaw*, 6 East, 308; *Brown v. Best*, 1 Wils. 174; *Saunders v. Newman*, 1 Barn. & Adol. 258, 262; *Cary v. Daniels*, 8 Met. (Mass.) 466, 478; *Ortman v. Dixon*, 13 Cal. 38; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Gillett v. Johnson*, 30 Conn. 183; *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Sackrider v. Beers*, 10 Johns. (N. Y.) 241; *Wentworth v. Poor*, 38 Me. 243; *Clark v. Rockland Water Power Co.*, 52 Me. 78; *Dilling v. Murray*, 6 Ind. 324; *Shears v. Wood*, 7 Moore, 345; *Chandler v. Howland*, 7 Gray, (Mass.) 348; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Palmer v. Mulligan*, 3 Cal. (N. Y.)

307; s. c., 2 Am. Dec. 270; *Hetrich v. Deachler*, 6 Pa. St. 32; *Casebeer v. Mowry*, 55 Pa. St. 423; *Ferrea v. Knipe*, 28 Cal. 343; *Springfield v. Harris*, 4 Allen, (Mass.) 496; *Davis v. Getchell*, 50 Me. 604; 3 Kent's Com. 440, note a; *Tyler v. Wilkinson*, 4 Mason, (U. S.) 401; *Blanchard v. Baker*, 8 Greenl. (Me.) 253; s. c., 23 Am. Dec. 504.

² *Smith v. Fletcher*, L. R. 7 Exch. 305; s. c., 3 Eng. R. 305; *Ellis v. Duncan*, cited in *Goodale v. Tuttle*, 29 N. Y. 466; *Buffum v. Harris*, 5 R. I. 243; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, 11 Exch. 662; *Wheatley v. Baugh*, 25 Pa. St. 528; *Pettigrew v. Evansville*, 25 Wis. 223; *Miller v. Laubach*, 47 Pa. St. 154; *Curtiss v. Ayrault*, 47 N. Y. (2 Sick.) 73.

³ *Butler v. Peck*, Ohio St. 335; *Laumier v. Francis*, 23 Mo. 181; *Livingston v. McDonald*, 21 Iowa, 160.

⁴ *Hunt v. Peake*, Johns. 705; 6 Jur., n. s., 1071; *Farrand v. Marshall*, 19 Barb. (N. Y.) 380; *McMaugh v. Burke*, 12 R. I. 499; *Lasala v. Holbrook*, 4 Paige, (N. Y.) 173; s. c., 25 Am. Dec. 524; see, also, *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Quincy v. Jones*, 76 Ill. 231; *Story v. Odin*, 12 Mass. 157; *Partridge v. Scott*, 3 Me. & W. 220; *Brown v. Windsor*, 1 Crompt. & J. 20; *Hide v. Thornborough*, 2 Car. & Kir. 250.

⁵ *Ogden v. Jones*, 2 Bosw. (N. Y.) 685; *Phillips v. Bordman*, 4 Allen, (Mass.) 147.

⁶ *Corning v. Lowerre*, 6 Johns. Ch. 439; *Hill v. Miller*, 3 Paige, 254; *Trustees of Watertown v. Cowen*, 4 *Id.* 510.

⁷ *Drake v. Hudson River R. R.*, 7 Barb. 508; *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 239; *Morris, &c. R. R. v. Prudden*, 20 N. J. Eq. 530; *Coats v. Clarence Ry.*, 1 Russ. & My. 181; *Bona parte v. Camden, &c. R. R.*, Baldw. 205, 531; *Mohawk, &c. R. R. v. Archer*, 6 Paige, 83.

⁸ *Vernon v. Vestry of St. James, L. R.* 16 Ch. D. 449; *Meigs v. Lister*, 23 N. J. Eq. 199; *O'Riley v. McChesney*, 3 Lans. 278; *Snow v. Williams*, 16 Hun, 468; *Rothery v. N. Y. Rubber*

• In all applications for injunctions for the restriction or prevention of violations of easements, diligence in making the application is necessary. Any unnecessary delay in applying for protection, and acquiescence for an unreasonable length of time in the violation of the easement, will be a bar to the claim for an injunction.¹

§ 486. **Injunctions for the protection of patents, copyrights, literary property in general, and trade-marks.**—Whenever the rights in and to a patent or copyright have been definitely settled, either in a prior suit or in the same action, and there has either been a past infringement of such right, or infringements by the defendant to the suit in the future are seriously threatened, the court will, for the protection of such patent or copyright, enjoin the parties who threaten such infringement from the commission of such a wrong. In America, the United States courts alone have jurisdiction over questions relating to infringements of those rights.² Where an application is made for a preliminary injunction for the protection of patent rights, any serious doubt as to the right of the plaintiff to such patent will prevent his acquiring a temporary injunction.³ Independently of copyrights, no legal property is recognized by the law in the published literary efforts of an author. But until he has published, in the legal acceptance of the term, the products of his brain, he has a complete control over their disposition; and if anyone should interfere with or attempt to make use of such unpublished manuscripts without the consent of the author, a court will enjoin such a violation of his rights. These injunctions have been issued for the purpose of restraining the unauthorized publication or performance of dramatic composi-

Co., 24 *Id.* 172; *Seaman v. Lee*, 10 *Id.* 607; *Beach v. Elmira*, 22 *Id.* 158; *Henderson v. N. Y. Cent. R. R.*, 78 N. Y. 423; *Lynch v. Mayor, &c.*, 76 *Id.* 60; *Adams v. Popham*, *Id.* 410; *Campbell v. Seaman*, 63 *Id.* 568; *Olmsted v. Loomis*, 9 *Id.* 423; *Davis v. Lambertson*, 56 Barb. 480; *Owen v. Phillips*, 73 Ind. 284; *Wahle v. Reinbach*, 76 Ill. 322; *Green v. Nunnemacher*, 36 Wis. 50; *Pettibone v. Hamilton*, 40 *Id.* 402; *Lewis v. Stein*, 16 Ala. 214; *Ex parte Martin*, 13 Ark. 198; *Lamborn v. Covington Co.*, 2 Md. Ch. 409; *Ivimey v. Stocker*, L. R. 1 Ch. 396; *Smith v. Smith*, L. R. 20 Eq. 500; *Fenwick v. East London Ry.*, L. R. 20 Eq. 544; *Allen v. Martin*, L. R. 20 Eq. 462; *Mott v. Shoolbred*, L. R. 20 Eq. 22; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436, 460, 462; 7 H. L. Cas. 600; *St. Helen's, &c. v. Tipping*, H. L. Cas. 642; *Watson v. Sutherland*, 5 Wall. 74; *Parker v. Winnipiseogee, &c. Co.*, 2 Black. 645; *Cadigan v. Brown*, 120 Mass. 493; *Richmond Man. Co. v. Atlantic, &c. Co.*, 10 R. I. 106; *Duncan v. Hayes*, 22 N. J. Eq. 25.

¹ See, also, *Nosser v. Seeley*, 10 Neb. 460; *Payne v. Paddock*, Walk. (Mich.) 487; *Water Lot Co. v. Bucks*, 5 Ga. 315; *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Blanchard v. Doering*, 23 Wis. 200; *Wood v. Sutcliffe*, 2 Sim., n. s., 163;

Sheldon v. Rockwell, 9 Wis. 168; *Cobb v. Smith*, 16 Wis. 61; *Crosby v. Smith*, 19 Wis. 472; *Pettibone v. La Crosse, &c. R. Co.*, 14 Wis. 443; *Kane v. Bloodgood*, 7 John. 93; *Dexter v. Arnold*, 3 Sumn. (U. S.) 152; *Piatt v. Vattier*, 9 Pet. (U. S.) 405, 416, 417; *Sherwood v. Sutton*, Mass. (U. S.) 143, 146; *Bowman v. Wathen*, 1 How. (U. S.) 189; *Gould v. Gould*, 3 Story, (U. S.) 516; *Weller v. Smeaton*, 1 Cox Ch. 102.

² As to patent rights, *Potter v. Muller*, 2 Fish. Pat. Cas. (U. S.) 465; *Shelley v. Brannan*, 4 Fish. Pat. Cas. (U. S.) 198; s. c., Biss. (U. S.) 315; and see *Sickles v. Gloucester Mfg. Co.*, 1 Fish. Pat. Cas. (U. S.) 222; *Sanders v. Logan*, 2 Fish. Pat. Cas. (U. S.) 167; *Goodyear v. Day*, 2 Wall. (U. S.) Jr. 283; *Buchanan v. Howland*, 5 Blatchf. (U. S.) 151. As to copyrights, *Wilkins v. Aikens*, 17 Ves. 422; *Saunders v. Smith*, 3 Myl. & Cr. 728; *Dudley v. Mayhew*, 3 N. Y. 9; *Baker v. Taylor*, 2 Blatchf. (U. S.) 82; *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39; *Pierpont v. Fowle*, 2 Woodb. & M. (U. S.) 23; *Little v. Gould*, 2 Blatchf. (U. S.) 165, 362; *Paige v. Banks*, 7 Blatchf. (U. S.) 153; 13 Wall. (U. S.) 608.

³ *Dodge v. Card*, 2 Fish. Pat. Cas. (U. S.) 166; *Winans v. Eaton*, 1 Fish. Pat. Cas. (U. S.) 181; *Sullivan v. Redfield*, 1 Paine, (U. S.) 441; *Ogle v. Edge*, 4 Wash. (U. S.) 584.

tions,¹ of lectures,² of private letters, whether they are on literary topics, or relate only to matters of private business or family interests. In the case of private letters, the suit for injunction may be instituted by the writer against the person written to, or by both the writer and the person written to, against any stranger, who might undertake to publish the same without authority.³ So, also, will an injunction be granted against the manufacture, sale, or exhibition of copies of paintings, statuary, engravings, and other works of art, even though the originals have been publicly exhibited.⁴ In all of these cases, the facts, that such literary property has not been published to the world, and the authority of the author to duplicate and sell copies of the same has not thus been impliedly granted, is a necessary condition precedent to the claim for protection by injunction. A letter or a drama is not considered to have been published, so as to cause the author to lose his proprietary rights therein, because the letter has been delivered to one to whom it was addressed, or the drama has been presented to a select audience.

Similar to the protection which a court of equity will afford by injunction to patents, and copyrights, and literary property in general, is that which courts of equity give by means of an injunction against the unlawful or unauthorized use of trade-marks. There is some criticism by the courts of the right of recognizing any right of property in a trade-mark in those who make use of them; but whether such property and the right to an exclusive use of such trade-mark be recognized or denied at all, the court of equity will restrain the use of such trade-mark by others, on the ground that its unauthorized use constitutes a fraud upon the possible purchaser of the spurious articles; and for their protection, if not for the protection of the merchant or manufacturer who distinguishes his goods by such a trade-mark, the injunction will be granted.⁵

¹ *Keen v. Clark*, 5 Rob. (N.Y.) 38; *Daly v. Palmer*, 6 Blatchf. (U. S.) 256; *Emerson v. Davies*, 3 Story, (U. S.) 768, 793; *Keene v. Kimball*, 16 Gray, (Mass.) 545; *Keene v. Clarke*, 5 Robt. 38; *Palmer v. De Witt*, 47 N. Y. 532; 2 *Sweeny*, 530; 5 Abb. Pr., n. s., 130; *Boucicault v. Fox*, 5 Blatchf. 87.

² *Abernethy v. Hutchfson*, 1 H. & Tw. 28, 40; 3 L. J. Ch. 209; *Keene v. Kimball*, 16 Gray, 545, *per Hoar, J.*; *Bartlett v. Crittenden*, 4 McLean, 300.

³ *Earl of Granard v. Dunkin*, 1 Ball & B. 207; *Folsom v. Marsh*, 2 Story, 100, 113; *Hoyt v. Mackenzie*, 3 Barb. Ch. 320; *Wetmore v. Scovell*, 3 Edw. Ch. 515, 529; *Woolsey v. Judd*, 4 Duer, 379; *Wetmore v. Scovell*, 3 Edw. Ch. (N. Y.) 515; *United States v. Tanner*, 6 McLean, (U. S.) 128; *Eyre v. Higbee*, 23 How. Pr. (N. Y.) 198; *Grigsby v. Breckinridge*, 2 Bush, (Ky.) 481; *Hoyt v. Mackenzie*, 3 Barb. Ch. (N. Y.) 320; *Denis v. Leclercq*, 1 Martin, (Orleans T.) 291; *Folsom v. Marsh*, 2 Story, (U. S.) 100.

⁴ *Prince Albert v. Strange*, 1 Macn. & G. 25;

1 H. & Tw. 1; 2 De G. & Sm. 652; *Turner v. Robinson*, 10 Ir. Ch. 121, 510; *Keene v. Kimball*, 16 Gray, (Mass.) 551; *Bartlett v. Crittenden*, 4 McLean, (U. S.) 303; *Granard v. Dunkin*, 1 Ball & B. 207; *Palin v. Gothercoe*, 1 Coll. 565.

⁵ *Burgess v. Burgess*, 3 De G. M. & G. 896; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Anheuser-Busch Brewing Assoc. v. Clarke*, 26 Fed. Rep. 410; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *Davis v. Davis*, 27 Fed. Rep. 490; *Pratt Manfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492; *Estes v. Leslie*, 23 Blatchf. C. Ct. 476; s. c., 27 Fed. Rep. 23; *Estes v. Worthington*, 31 Fed. Rep. 154; *Pierce v. Gulttard*, 68 Cal. 68; *Glen Cove Manfg. Co. v. Ludeling*, 22 Fed. Rep. 823; *Alexander v. Morse*, 14 R. I. 153; s. c., 51 Am. Rep. 369; *New York Cab. Co. v. Mooney*, 15 Abb. (N. Y.) N. Cas. 152; *Avery v. Meikle*, 81 Ky. 73; *New Haven Patent Rolling Spring Bed Co. v. Farren*, 51 Conn. 324; *Williams v. Brooks*,

§ 487. **Slander or libel; wrongful use of names.**—The English have very generally, in their recent decisions, employed the remedy of injunction to restrain libelous publications against one's business, trade, or title to land, as well as to restrain the wrongful use of a name by which the public might be misled or the plaintiff injured in his business.¹ The ground, of course, for the employment of this remedy in this case is the inadequacy of other remedies as a protection against the threatened injuries; but the American courts have not manifested any disposition to follow the example of the English courts; and where the question has been raised, the injunction has been generally denied.

§ 488. **To restrain actions or judgments at law.**—This was probably the original ground for the intervention of a court of equity by injunction. Inasmuch as the original jurisdiction of equity was to supply more effective remedies where the common law remedies proved inadequate, it was impossible to afford the desired relief by the employment of the equitable remedy, if parties to the litigation were permitted to pursue the common law remedies. Hence, to enable a court of equity to assume complete charge of the case, the court would enjoin the parties to the litigation from pursuing their legal remedies. The injunction would not be issued against the court of law, but against the parties to the cause of action. There would, therefore, be no interference with the jurisdiction of the court of law directly; only the parties to the suit were enjoined from proceeding with their legal

50 Conn. 278; s. c., 47 Am. Rep. 642; *Bradley v. Norton*, 33 Conn. 157; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; s. c., 52 Am. Rep. 811; *McCann v. Anthony*, 21 Mo. App. 83; *Plant Seed Co.*, 23 Mo. App. 579; *Estes v. Williams*, 21 Fed. Rep. 189; *Carroll v. Ertheiler*, 14 Phila. (Pa.) 424; *Humphreys, &c. Co. v. Wenz*, 14 Fed. Rep. 250; *Collins Co. v. Olive, &c. Cor.*, 20 Blatchf. (U. S.) 542; *Funke v. Dreyfus*, 34 La. An. 80; s. c., 44 Am. Rep. 413; *Hegeman v. O'Bryne*, 9 Daly, (N. Y.) 264; *Godillot v. Harris*, 81 N. Y. 263; *Enoch Morgan's Sons Co. v. Troxell*, 57 How. (N. Y.) Pr. 121; *Gilman v. Hunnewell*, 122 Mass. 139; *Enoch Morgan's Sons Co. v. Schwachofer*, 55 How. (N. Y.) Pr. 37; *Bell v. Locke*, 8 Paige, (N. Y.) 75; *Taylor v. Carpenter*, 11 Paige, (N. Y.) 292; *Partridge v. Menck*, 2 Barb. (N. Y.) Ch. 101; *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; *Gillott v. Kettle*, 3 Duer, (N. Y.) 624; *Burnet v. Phalon*, 9 Bosw. (N. Y.) 624; *Christy v. Murphy*, 12 How. (N. Y.) Pr. 77; *Binger v. Wattles*, 28 How. (N. Y.) 206; *Fetridge v. Merchant*, 4 Abb. (N. Y.) Pr. 156; *Colladay v. Baird*, 4 Phila. (Pa.) 139; *Coats v. Holbrook*, 2 Sandf. (N. Y.) Ch. 586; *Taylor v. Carpenter*, 2 Sandf. (N. Y.) Ch. 603; *Perry v. Truefit*, 6 Beav. 66; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Newman v. Alvord*, 49 Barb. (N. Y.) 588; *Low v. Hart*, 90 N. Y. 457; *India Rubber Co. v. Rubber Comb, &c. Co.*, 45 N. Y. Super. Ct. 258; *England*

v. New York Pub. Co., 8 Daly, (N. Y.) 375; *Electro-Silicon Co. v. Levy*, 59 How. (N. Y.) Pr. 469; *Royal Baking Powder Co. v. Sherrill*, 59 How. (N. Y.) Pr. 17; *Potter v. McPherson*, 21 Hun, (N. Y.) 559; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226; *Pennsylvania Salt Manuf. Co. v. Babbitt*, 24 Leg. Int. (Pa.) 165; *Williams v. Johnson*, 2 Bos. (N. Y.) 1; *Curtis v. Ryan*, 2 Daly, (N. Y.) 312; s. c., 36 How. Pr. (N. Y.) 33; *Dixon v. Crucible Co. v. Guggenheim*, 2 Brewst. (Pa.) 321; s. c., 7 Phila. (Pa.) 408.

¹ *Dixon v. Holden*, L. R. 7 Eq. 488; *Springhead, &c. Co. v. Riley*, L. R. 6 Eq. 551; *Dicks v. Brooks*, L. R. 15 Ch. D. 22; *Thomas v. Williams*, L. R. 14 Ch. D. 864, 871, 872; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. D. 763; s. c., L. R. 6 Ch. D. 582; *Prudential Ass. Co. v. Knott*, L. R. 10 Ch. 142; *Fisher v. Appollinaris Co.*, L. R. 10 Ch. 297; *Clover v. Royden*, L. R. 17 Eq. 190; *Mulker v. Ward*, L. R. 13 Eq. 619.

² *Boston Diatite Co. v. Florence Man. Co.*, 114 Mass. 69; *Whitehead v. Kitson*, 119 Id. 484; *Life Assn. v. Boogher*, 3 Mo. App. 173; *Mauger v. Dick*, 55 How. Pr. 132; and *Singer Man. Co. v. Domestic, &c. Co.*, 49 Ga. 70. But in one case, *Celluloid Man. Co. v. Goodyear, &c. Co.*, 13 Blatch. 375, it has been held that the court may issue injunctions for the purpose of restraining all such publications when they are not only false and injurious but also malicious.

remedy. The suit for injunction for restraining actions in courts of law was at one time practically without limit, where the question was one of relative adequacy of the remedies at law and in equity; and in the exercise of the right to bring the matter of dispute completely within its control, a court of equity could enjoin actions at law in the courts of other countries, as well as in the legal courts in the same state or country. But this would be done only when absolutely necessary to the rendition of justice between the parties.¹ There is, however, one exception to that general proposition in respect to the United States courts, *i. e.*, the United States courts cannot restrain actions in state courts in the general exercise of their equitable jurisdiction.²

§ 489. **When jurisdiction is not exercised for restraining actions at law.**—In order that a court of equity may interfere for the purpose of restraining actions at law, the claim must be made good that the remedies at law are inadequate. If the parties to the litigation can find complete protection for their interests, or a satisfactory settlement of their dispute in their actions at law, a court of equity will not interfere. And this is the case, even though in the prosecution of the action at law the party has by his own act or omission failed to avail himself of the valid defense of the action. Where a court of law has jurisdiction over the causes of action, and the decision has been rendered, a court of equity will not interfere for the purpose of restraining the judgment, on the ground that the action has been wrongfully tried or decided by the court of law, whatever may be the reason for such wrongful decision.³ Whenever, therefore, a court

¹ *Ostell v. La Page*, 2 De G. M. & G. 892; *Kittle v. Kittle*, 8 Daly, 72; *Cole v. Young*, 24 Kans. 435; *In re Boyse*, L. R. 15 Ch. D. 591; *Moor v. Anglo-Italian Bk.*, L. R. 10 Ch. D. 181; *Hope v. Carnegie*, L. R. 1 Ch. 320; *In re Chapman*, L. R. 15 Eq. 75.

² *Goster v. Griswold*, 4 Edw. Ch. (N. Y.) 364; *Schuyler v. Pelissier*, 3 Edw. Ch. (N. Y.) 203; *Thompson v. Norris*, 63 How. Pr. (N. Y.) 418; compare *Hines v. Rawson*, 40 Ga. 356; s. c., 2 Am. Rep. 581; *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166; *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *McKim v. Voorhies*, 7 Cranch, (U. S.) 279.

³ *Chambers v. Penland*, 79 N. C. 53; *Atty.-Gen. v. Baker*, 9 Rich. Eq. 521; *Williams v. Stewart*, 56 Ga. 663; *Brown v. Wilson*, 56 *Id.* 534; *Shaw v. Lindsey*, 60 Ala. 344; *Womack v. Powers*, 50 *Id.* 5; *O'Connor v. Sheriff*, 30 La. An. pt. 1, 441; *Graham v. Roberts*, 1 Head, 56, 59; *Chadwell v. Jordan*, 2 Tenn. Ch. 635; *Hartman v. Heady*, 57 Ind. 545; *Comstock v. Henneberry*, 66 Ill. 212; *La Crosse, &c. Co. v. Reynolds*, 12 Minn. 213; *Kemp v. Tucker*, L. R. 8 Ch. 369; see, also, *Holmes v. Stateler*, 57 Ill. 209; *McClure v. Miller*, *Bailey Eq.* 107; *New Orleans v. Morris*, 3 Woods, 103; *Hungerford v. Sigerson*, 20 How. (U. S.) 156; *Tyler v. Hamersley*, 44 Conn. 419; *Wallack v. Soc. Ref. Juv. Del.*, 67 N. Y. 23; *Jackson v. Bell*, 31 N. J. Eq. 554; 32 *Id.* 411; *Holmes v. Steele*, 28 *Id.* 173; *Van Syckel*

v. Emery, 18 *Id.* 387; *Vanarsdalen v. Whitaker*, 10 Phila. 153; *Nelson v. Turner*, 2 Md. Ch. 73; *Simpson v. Lord Howden*, 3 My. & Cr. 97, 108; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Ware v. Horwood*, 14 Ves. 28, 31; *Bateman v. Willoe*, 1 Sch. & Lef. 201, 204, 206; *McCann v. Otee Co.*, 9 Neb. 324; *Slack v. Wood*, 9 Gratt. (Va.) 40; *Erie Canal Co. v. Lowie*, 5 Clark, (Pa.) 464; *Smith v. Mayor*, 1 Leg. Gaz. R. 86; *Ashton v. Parkinson*, 8 Phila. (Pa.) 338; s. c., 1 Leg. Gaz. (Pa.) 99; *Wright v. Eaton*, 7 Wis. 595; *Ableman v. Roth*, 12 Wis. 81; *Duncan v. Lyon*, 3 Johns. (N. Y.) Ch. 351; *Wingate v. Haywood*, 40 N. H. 437; *Davis v. Briggs*, 3 How. (N. Y.) Pr. 65; *Wordsworth v. Lyon*, 5 How. (N. Y.) Pr. 463; s. c., 1 Code R. (N. Y.) n. s., 163; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *Harn v. Schuyler*, 1 Johns. (N. Y.) Ch. 140; *Rogers v. Rathbun*, 1 Johns. (N. Y.) Ch. 367; *Tupper v. Powell*, 1 Johns. (N. Y.) Ch. 369; *Savage v. Todd*, 9 Paige, (N. Y.) 578; *Paterson v. Bangs*, 9 Paige, (N. Y.) 578; *Vilas v. Jones*, 10 Paige, (N. Y.) 76; s. c., 1 N. Y. 274; *Marine Ins. Co. v. Hodgson*, 7 Cranch, (U. S.) 332; *Prewitt v. Perry*, 6 Tex. 280; *McRae v. Purvis*, 12 La. An. 85; *Lee v. Hubbell*, 20 La. An. 651; *Hendrickson v. Hinchley*, 17 How. (U. S.) 443; *Glenn v. Fowler*, 8 Gill & J. (Md.) 340; *Huston v. Ditto*, 20 Md. 305; *Little v. Price*, 1 Md. Ch. 135; *Smith v. Walker*, 16 Miss. (8 Smed. & M.) 131; *Fanning*

errs in the trial of a cause, either in admitting or excluding evidence, or in not giving proper instructions to the jury, there will be no ground for the interposition of a court of equity.¹ So, also, will it be

v. Farmers', &c. Bank, 16 Miss. (8 Smed. & M.) 139; *Cole v. Hundley*, 16 Miss. (8 Smed. & M.) 473; *Love v. Pass*, 23 Miss. (14 Smed. & M.) 158; *Young v. Billups*, 23 Miss. 407; *Meek v. Howard*, 18 Miss. (10 Smed. & M.) 502; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Bellamy v. Woodson*, 4 Ga. 175; *Robins v. Mount*, 3 Ga. 74; *Vennun v. Davis*, 35 Ill. 568; *Skinner v. Deming*, 2 Ind. 558; *Johnson v. Lyon*, 14 Iowa, 431; *Smith v. Short*, 11 Iowa, 523; *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57 Iowa, 249; *Crawford v. Paine*, 19 Iowa, 172; *Faulkner v. Campbell*, Mor. 148; *Kreichbaum v. Bridges*, 1 Iowa, 14; *Stricker v. Field*, 9 Iowa, 366; *Minor v. Stone*, 1 La. An. 283; *Lockard v. Lockard*, 16 Ala. 423; *Watt v. Cobb*, 32 Ala. 530; *Foster v. State Bank*, 17 Ala. 672; *Bentley v. Dillard*, 6 Ark. 79; *Dugan v. Cureton*, 1 Ark. 31; *Andrews v. Fenter*, 1 Ark. 186; *Watson v. Palmer*, 5 Ark. 501; *Hempstead v. Watkins*, 6 Ark. 317; *Menifee v. Ball*, 7 Ark. 520; *Conway v. Ellison*, 14 Ark. 360; *Phelps v. Peabody*, 7 Cal. 50; *Pollock v. Gilbert*, 18 Ga. 398; *Taylor v. Sutton*, 15 Ga. 103.

¹ *Mayo v. Brytle*, 47 Cal. 623; *Hausmeister v. Gasper*, 21 Fed. Rep. 355; *Torpedo Co. v. Cleverdon*, 19 Fed. Rep. 231; *Wilson v. Hughell*, Mor. (Iowa,) 461; *Cowles v. Shaw*, 2 Iowa, 496; *Snyder v. Marks*, 109 U. S. 189; *Legg v. Horn*, 45 Conn. 409; *Grant v. Moore*, 88 N. Car. 77; *Finegan v. Ferdinandina*, 18 Fla. 127; *State v. Civil District Judge*, 34 La. An. 741; *People v. Wasson*, 64 N. Y. 167; *N. Y., &c. Co. v. Amer., &c. Co.*, 11 Paige, (N. Y.) 384; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *De Witt v. Hayes*, 2 Cal. 463; *Pico v. Sunol*, 6 Cal. 294; *Smith v. Sparrow*, 13 Cal. 597; *Imlay v. Carpenter*, 14 Cal. 173; *Logan v. Hillegass*, 16 Cal. 201; *Green v. Thomas*, 17 Cal. 86; *Comstock v. Clemens*, 19 Cal. 78; *Leach v. Day*, 27 Cal. 643; *Rahm v. Minis*, 40 Cal. 421; *Whalen v. Dalashmutt*, 59 Md. 250; *Hayes v. Hayes*, 2 Del. Ch. 191; *Olmsted's App.*, 86 Pa. St. 284; *Hewett v. Kuhl*, 10 C. E. Green, (N. J.) 24; *Powell v. Chamberlain*, 22 Ga. 123; *Carr v. Lee*, 44 Ga. 376; *Beauchamp v. Putnam*, 34 Ill. 378; *Yates v. Batavia*, 79 Ill. 500; *Hartman v. Heady*, 57 Ind. 545; *Smith v. Short*, 11 Iowa, 523; *Gibson v. Moore*, 22 Tex. 611; *Lanahan v. Gahan*, 37 Md. 105; *George's Creek, &c. Co. v. Detmold*, 1 Md. Ch. 371; *Jerome v. Ross*, 7 Johns. Ch. 315; *Goodell v. Lassen* 69 Ill. 145; *Dunham v. Miller*, 75 Ill. 379; *Kilpatrick v. Smith*, 77 Va. 347; *Kendall v. Missisquoi, &c. R. Co.*, 55 Vt. 438; *Pullman Palace Car Co. v. Central Trans. Co.*, 34 Fed. Rep. 357; *Richards Kirkpatrick*, 53 Cal. 433; *Stevenson v. Fayerweather*, 21 How. (N. Y.) 449; *Wilkins v. Hogue*, 2 Jones (N. Car.) Eq. 479; *McCoy v. U. S. Bank*, 5 Ohio, 548; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Borland v. Thorton*, 12 Cal. 440; *Hulse v. Wright*, Wright, (Ohio,) 61; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468; *Hamilton v. Ely*, 4 Gill, (Md.) 34; *White v.*

Flannigan, 1 Md. 525; *Whittlesey v. Hartford, &c. R. Co.*, 23 Conn. 421; *Camp v. Matheson*, 30 Ga. 170; *Thibodaux v. Wright*, 3 La. An. 130; *Arnold v. Kleeper*, 24 Mo. 273; *Winnipiseogee Lake Co. v. Worster*, 29 N. H. (9 Post.) 433; *Warne v. Morris, &c. Co.*, 5 N. J. Eq. (1 Halst.) 410; *Rogers v. Michigan, &c. R. Co.*, 28 Barb. (N. Y.) 539; *Balcom v. Julien*, 22 How. (N. Y.) Pr. 349; *Willis v. Stapels*, 39 Hun, (N. Y.) 644; *Fincke v. N. Y. Police Comm'rs*, 66 How. (N. Y.) Pr. 318; *Cummings v. Barrett*, 10 Cush. (Mass.) 196; *Washburn v. Miller*, 117 Mass. 376; *Parker v. Winnipiseogee Cotton Co.*, 2 Black, (U. S.) 545; *Sickles v. New Rochelle*, 41 Hun, (N. Y.) 408; *Goldfrank v. Young*, 64 Tex. 432, overruling *Blackwell v. Barrentt*, 52 Tex. 328; *Laughlin v. Lamasco*, 6 Ind. 223; *Finley v. Thayer*, 42 Ill. 350; *La Mothe v. Fink*, 8 Biss. (U. S.) 493; *Gore v. Brubacker*, 55 Md. 87; *Jacks v. Big-ham*, 36 Ark. 481; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Gutierrez v. Pino*, 1 New Mex. 392; *Frazier v. White*, 49 Md. 1; *Edwards v. Allonez Min. Co.*, 38 Mich. 46; *Palmer v. Logansport, &c. Co.*, 168 Ind. 137; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417; *Coughron v. Swift*, 18 Ill. 414; *Poage v. Bell*, 3 Rand. (Va.) 586; *Winkler v. Winkler*, 40 Ill. 179; *Webster v. Couch*, 6 Rand. (Va.) 519; *Sherman v. Clark*, 4 Nev. 138; *Arkrill v. Selden*, 1 Barb. (N. Y.) 316; *Mullen v. Jennings*, 1 Stock. (N. J.) 192; *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210; *Mears v. Howarth*, 34 Mich. 19; *Teft v. Stewart*, 31 Mich. 387; *Bennett v. Nichols*, 12 Mich. 22; *Oliver v. Memphis, &c. Co.*, 38 Ark. 123; *Murphy v. Harrison*, 29 Ark. 340; *Sanders v. Sanders*, 20 Ark. 610; *Lovette v. Longmire*, 14 Ark. 339; *Wooden v. Wooden*, 2 Green (N. J.) Ch. 429; *Frazier v. White*, 49 Md. 19; *Brandon v. Green*, 77 Humph. 130; *Duckworth v. Duckworth's Adm'r*, 35 Ala. 70; *Holmes v. Stateler*, 57 Ill. 209; *Vennum v. Davis*, 35 Id. 568; *Hinrichsen v. Van Winkle*, 27 Id. 334; *Johnson v. Lyon*, 14 Iowa, 431; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443, 445; *Walker v. Robbins*, 14 Id. 584; *Creath's Adm'r v. Sims*, 5 Id. 192; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Barker v. Elkins*, 1 Johns. Ch. 465; *Windwart v. Allen*, 13 Md. 196; *Katz v. Moore*, 13 Id. 566; *Lyday v. Douple*, 17 Id. 188; *Methodist Church v. Baltimore*, 6 Gill, 391; *Bateman v. Willse*, 1 Sch. & Lef. 201, 206; *Hungerford v. Sigerson*, 20 How. (U. S.) 156; *Dunn v. Fish*, 8 Blackf. (Ind.) 407; *Vaughn v. Johnson*, 1 Stock. (N. J.) 173; *Stockton v. Briggs*, 5 Jones (N. Car.) Eq. 309; *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234; *Cassel v. Scott*, 17 Ind. 514; *De Haven v. Covalt*, 33 Ind. 344; *Mo. Pac. R. Co. v. Reid*, 34 Kans. 410; *Clopton v. Carloss*, 42 Ark. 560; *Hazeltine v. Reusch*, 51 Mo. 50; *Mo. Pac. R. Co. v. Reid*, 34 Kans. 410; *Slack v. Wood*, 9 Gratt. (Va.) 40; *De Haven v. Covalt*, 33 Ind. 344; *Ableman v. Roth*, 12 Wis. 81; *Stillwell v. Carpenter*, 59 N. Y. 414; *Holmes*

no ground for the intervention of a court of equity, if the defendant had a good defense, which was not properly presented to the court, either through his own neglect or the negligence or other omission of his attorney.¹ Ignorance of the facts which constitute the defense would not furnish the ground for equitable intervention, unless it be shown that the party could not have acquired the information by the exercise of due diligence, and an opportunity for reversing the decision of the lower court by an appeal to the higher court has been lost or denied to him.² So, also, as a general rule, a court of equity will not restrain parties from proceeding in some other court of equitable jurisdiction; but where the suit in one court is instituted only by some of the parties, and it is necessary for the purpose of preventing a multiplicity of suits to cause all of the cases to be consolidated into one, then one court of equity may restrain proceedings in another court of similar jurisdiction.³

§ 490. **When the jurisdiction may be exercised.**—Under the earlier law, where the two courts were separate, there were three classes of cases in which equity might interfere by injunction to restrain the parties from pursuing their remedies at law. The first class of cases constitutes litigations over purely equitable rights, or where the defendant in a legal action had an equitable defense which he could not make use of in the action at law. In either case, a court

v. Steele, 28 N. J. Eq. 173; *Cairo R. Co. v. Titus*, 12 C. E. Green, (N. J.) 102; *Vanarsdelen v. Whitaker*, 10 Phila. (Pa.) 153; *Robuck v. Harkins*, 2 Mont. 447.

¹ *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Day v. Cummings*, 19 Vt. 496; *Peace v. Nailling*, 1 Dev. Eq. 289; *Champion v. Cahal's Adm'r*, 2 Swan, 550; *Warner v. Conant*, 24 Vt. 351; *Burton v. Wiley*, 26 *Id.* 430; *Emerson v. Udall*, 13 *Id.* 477; *Powell v. Stewart*, 17 Ala. 719; *Jamison v. May*, 13 Ark. 600; *Graham v. Roberts*, 1 Head, 56; *Barker v. Elkins*, 1 Johns. Ch. (N. Y.) 465; see *Matson v. Field*, 10 Mo. 100; *Hill v. Harris*, 51 Ga. 628; *Dodge v. Strong*, 2 Johns. Ch. (N. Y.) 228; *Holmes v. Stateler*, 57 Ill. 209; *Meredith v. Benning*, 1 Hen. & M. (Va.) 585; *Stanard v. Rogers*, 4 Hen. & M. (Va.) 438; *Turpin v. Thomas*, 2 Hen. & M. (Va.) 139; *Ponder v. Cox*, 26 Ga. 485; *Bealrd v. Foreman*, *Breese*, (Ill.) 385; *Gott v. Carn*, 6 Gill & J. (Md.) 309; *Ewin v. Mickle*, 45 Md. 413; *Stillwell v. Carpenter*, 59 N. Y. 414, reversing s. c., 1 Thomp. & C. (N. Y.) 615; *Shields v. McClung*, 6 W. Va. 79; *O'Connor v. Sheriff*, 30 La. An. pt. 1, 441; *Menifee v. Myers*, 33 Tex. 690; *Jones v. Cameron*, 81 N. Car. 154; *Blandry v. Felch*, 47 Cal. 183; *Abrams v. Camp*, 3 Scam. (Ill.) 290; *Lucas v. Spencer*, 27 Ill. 15; *Albro v. Dayton*, 28 Ill. 325; *Schricker v. Field*, 9 Iowa, 366; *Wilsey v. Maynard*, 21 Iowa, 107; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443; *Crim v. Handley*, 4 Otto, (U. S.) 652; *Hungerford v. Sigerson*, 20 How. (U. S.) 161; *Katz v. Moore*, 13 Md. 366; *Lyday v. Double*, 17 Md. 188; *Brandon v. Green*,

7 *Humph. (Tenn.)* 130; *Emerson v. Udall*, 13 Vt. 477; *Clute v. Potter*, 37 Barb. (N. Y.) 199; *Pettes v. Bank of Whitehall*, 17 Vt. 435; *Windward v. Allen*, 13 Md. 196; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Lafon v. Dessessart*, 1 Mart. (La.) n. s., 21; *Commissioner, &c. v. Patrick*, Sm. & M. Ch. 110; *Duckworth v. Duckworth*, 35 Ala. 70; *Brown v. Wilson*, 56 Ga. 534; *Shricker v. Field*, 9 Iowa, 367; *Meem v. Rucker*, 10 Gratt. (Va.) 506; *Risher v. Roush*, 2 Mo. 95; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498.

² *Allen v. Hamilton*, 9 Gratt. 255; *Miller v. Gaskins*, Sm. & Mar. Ch. 524; *Moran v. Woodward*, 8 B. Mon. 537; *Smith v. Allen*, 63 Ill. 474; *Holmes v. Stateler*, 57 *Id.* 209; *Hinrichsen v. Van Winkle*, 27 *Id.* 334; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Truly v. Wanzer*, 5 How. (U. S.) 141; *Emerson v. Udall*, 15 Vt. 477; *Slack v. Wood*, 9 Gratt. 40; *Ware v. Harwood*, 14 Ves. 31; *Cairo, &c. R. Co. v. Titus*, 12 C. E. Green, (N. J.) 102; *Crim v. Handley*, 4 Otto, (U. S.) 652; *Campbell v. Briggs*, 3 Rob. (La.) 110; compare *Brown v. Luehrs*, 79 Ill. 575; *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329; *Baltzell v. Randolph*, 9 Fla. 366; *Ludington v. Handley*, 7 W. Va. 269; *Ferrell v. Allen*, 5 W. Va. 43; *Rust v. Ware*, 6 Gratt. (Va.) 50; *Billups v. Sears*, 5 Gratt. (Va.) 31.

³ See *Erie Ry. v. Ramsey*, 45 N. Y. 637, *per Folger, J.*; but see *Endter v. Lennon*, 40 Wis. 299; *Wright v. Fleming*, 76 N. Y. 517; *Prudential Ass. Co. v. Thomas*, L. R. 3 Ch. 74; *Mann v. Fowler*, 26 Minn. 479; *Bond v. Greenwald*, 7 Baxt. 466; *Haescig v. Brown*, 34 Mich. 503.

of equity assumed jurisdiction because the equitable right or defense could not be asserted successfully in the court of law.¹ And, on the same general ground, have courts of equity enjoined actions at law, where that is necessary to avoid a multiplicity of suits, and to enable all of the questions involved in the dispute, and in respect to all of the parties, to be settled in one action.² Courts of equity have also assumed jurisdiction when it is necessary to obtain a discovery in aid of a defense at law.³ Thus, in cases of interference for the purpose of securing to the defendant the protection of his equitable rights, the defense will only be available when the equitable defense or right is inseparably connected with the legal cause of action of the plaintiff, and the enforcement of the legal cause of action would necessarily involve a loss of the equitable right. When, however, the same subject-matter or transaction contains separate and distinct legal and equitable questions or causes of action, a court of equity, in taking jurisdiction over the equitable actions, will not be permitted to restrain proceedings at law on the legal cause of action.⁴

The second class of cases is of those in which the courts of equity and of law have concurrent jurisdiction to grant their several remedies, in cases of fraud, for example; and in actions upon instruments, whose execution has been procured by fraud, both courts of law and of equity have jurisdiction, but their remedies are different. A court of equity will not interfere with the prosecution of the action at law, whenever the legal remedy proves to be adequate to the protection of the interest of the parties at issue. It will only interfere where the court of law cannot furnish the protection required by the parties and a resort to the equitable remedy is necessary; and in that case, the court of equity will enjoin the prosecution of the action at law, and thus enable the matter to be brought before the court of equity for a full and complete settlement by the employment of the more effective

¹ *Moses v. Sanford*, 2 Lea. 655; *Breeden v. Grigg*, 8 Baxt. 163; *Deaderick v. Mitchell*, 6 *Id.* 35; *Franks v. Morris*, 9 W. Va. 684; *Hill v. Billingsly*, 53 Miss. 111; *Texas Land Co. v. Turman*, 53 Tex. 619; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484; *Lord Tredegar v. Windus*, L. R. 19 Eq. 607; *Crofts v. Middleton*, 8 De G. M. & G. 192; *Evans v. Bremridge*, 8 *Id.* 100; *Pollock v. Gilbert*, 16 Ga. 398; *Frith v. Roe*, 23 *Id.* 139; *Greenlee v. Gaines*, 13 Ala. 198; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Wycoff v. Victor*, &c. Co., 43 Mich. 309; *Scriven v. Hursh*, 39 *Id.* 98; *Detroit, &c. R. R. v. Brown*, 37 *Id.* 533; *Haescig v. Brown*, 34 *Id.* 503; *Pindell v. Quinn*, 7 Ill. App. 605; *Hager v. Buechler*, 6 *Id.* 462; *Hibbard v. Estman*, 47 N. H. 507; *Ross v. Harper*, 99 Mass. 175; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Skinner v. White*, 17 Johns. 357; *Varick v. Edwards*, Hoff. Ch. 382; 11 Paige, 289; 5 Denio, 684; *County of Armstrong v. Brinton*, 47 Pa. St. 367, 374; *Jones v. Slubey*, 5 Har. & J. 372; *White v. Crew*, 16 Ga. 416.

² *Jumel v. Jumel*, 7 Paige, 591; *Heyer v. Pruyn*, 7 *Id.* 465; *Marsh v. Pike*, 10 *Id.* 595; *Woodruff v. Fisher*, 17 Barb. 224; *Third Ave. R. R. v. The Mayor, &c.*, 54 N. Y. 159; *Paterson, &c. R. R. v. Jersey City*, 1 Stockt. Ch. 434; *Stevenson v. Black, Saxton, 338; Klapworth v. Dressler*, 2 Beasl. 62; *Woods v. Monroe*, 17 Mich. 238; *Scott v. Shreeve*, 42 Wheat. 605; *Oelrichs v. Spain*, 15 Wall. 211, 228; Penn., &c. Co. v. Delaware, &c. Co., 31 N. Y. 91; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Tice v. Annin*, 2 *Id.* 125; *Trustees, &c. v. Nicoll*, 3 Johns. 566; *West v. The Mayor, &c.*, 10 Paige, 539.

³ *Boughton v. Phillips*, 6 Paige, 433; *Kilg v. Clark*, 3 *Id.* 76; *Williams v. Harden*, 1 Barb. Ch. 298.

⁴ *Mitchell v. Oakley*, 7 *Id.* 68; *Ragsdale v. Hagy*, 9 Gratt. 409; *Justice v. Scott*, 4 Ired. Eq. 108; *Hill v. Billingsly*, 53 Miss. 111; see *Williams v. Earl of Jersey, Cr. & Ph.* 91; *Gridley v. Garri-son*, 4 Paige, 647.

equitable remedy.¹ Where, however, the original action is instituted in a court of equity, instead of being brought in a court of law, the question as to adequacy of the remedy would not arise; because the court of equity first took jurisdiction over the cause of action, it will be permitted, without question, to retain an exclusive control of the issues.² But where the court of law first assumed jurisdiction, then the justification for the intervention of a court of equity is to be found in the inadequacy of the legal remedy to furnish ample protection to the parties suffering from the wrongful acts of the other. Thus, for example, to prevent negotiable paper, which has been procured by fraud, from passing into the hands of a *bona fide* purchaser, a court of equity will assume jurisdiction and enjoin the further transfer of such paper.³

In the third class of cases are to be found all those cases in which a legal judgment has been obtained through some fraud, mistake or accident, or where the defendant, having a legal defense, has been prevented from making a successful use of such defense by fraud, mistake or accident; and even in cases of negligence or *laches* on his part or on the part of his attorney or agent, a court of equity will never be prevented from restraining the enforcement of the judgment. But in order that a court of equity may on this ground interfere, the judgment must have been rendered and the action at law terminated.⁴

¹ *Scott v. Scott*, 33 Ga. 102; *Coville v. Gilman*, 13 W. Va. 314; *Herwood v. Jarvis*, 27 N. J. Eq. 247; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215; *London, &c. Ins. Co. v. Seymour*, L. R. 17 Eq. 85; *Trall v. Baring*, 4 De G. J. & S. 318; *Athenæum L. Ass. Soc. v. Pooley*, 3 De G. & J. 294; *Camden, &c. R. R. v. Stewart*, 18 N. J. Eq. 489; *Gould v. Hayes*, 19 Ala. 438; *Bumpass v. Reams*, 1 Sneed, 595; *Mason v. Piggott*, 11 Ill. 85; *Ross v. Buchanan*, 13 Id. 55; *Southerland v. Harper*, 83 N. C. 200; *Glastenbury v. McDonald's Adm'r*, 44 Vt. 453; *Atlantic, &c. Co. v. Tredeick*, 5 R. I. 171; *Bissell v. Beckwith*, 33 Conn. 357; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Bushnell v. Harford*, 4 Id. 301; *Dale v. Roosevelt*, 5 Id. 174; *Metler v. Metler's Adm'r*, 19 N. J. Eq. 457; *Morris v. Barnwell*, 60 Ga. 147; *Mitchell v. Word*, 60 Id. 525; *Radcliffe v. Varner*, 56 Id. 232; see *ante*, §§ 220, 221, and cases cited; *Insurance Co. v. Bailey*, 13 Wall. 616; *Grand Chute v. Winegar*, 15 Id. 373; *Hipp v. Babin*, 19 How. (U. S.) 271; *Smith v. McIver*, 9 Wheat. 532; *Russell v. Clark's Ex'rs*, 7 Cranch, 69; *Bank of Bellows Falls v. Rutland, &c. R. R.*, 28 Vt. 470; *Hazard v. Irwin*, 18 Pick. 95; *Fleming v. Slocum*, 18 Johns. 403; *Roberts v. Anderson*, 3 Johns. Ch. 371; 18 Johns. 515; *Crane v. Bunnell*, 10 Paige, 333.

² *Winn v. Albert*, 2 Md. Ch. 42; *Merrill v. Lake*, 16 Ohio, 373; *Thompson v. Hill*, 3 Yerg. 167; *Mallett v. Dexter*, 1 Curtis, 178; *Stearns v. Stearns*, 16 Mass. 167, 171.

³ *Ferguson v. Fisk*, 28 Conn. 501; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Dalafield v. Illi-*

nois, 26 Wend. 192; *Van Doren v. The Mayor, &c.*, 9 Paige, 388; *Cox v. Clift*, 2 N. Y. 118; *Metler's Adm'r v. Metler*, 18 N. J. Eq. 270; 19 Id. 457; *Bell v. Gamble*, 9 Humph. 117; *Poor v. Carleton*, 3 Sumner, 70; *Glastenbury v. McDonald's Adm'r*, 44 Vt. 453; *Bank of Bellows Falls v. Rutland, &c. R.*, 28 Id. 470; *Franklin v. Green*, 2 Allen, 519; *Sherman v. Fitch*, 98 Mass. 59.

⁴ *Humphries v. Barte*, 10 Sm. & Mar. 282, 295; *Pelham v. Moreland*, 11 Ark. 442; *Nelson v. Rockwell*, 14 Ill. 375; *How v. Mortell*, 28 Id. 479; *New Orleans v. Morris*, 3 Woods, 103; *Smith v. McLain*, 11 W. Va. 654; *Shields v. McClung*, 6 Id. 79; *Crim v. Handley*, 4 Otto, 652; *Mann v. Worrall*, 16 Barb. 221; *Foster v. Wood*, 6 Johns. Ch. 87; *Tomkins v. Tomkins*, 3 Stockt. 512, 514; *Gifford v. Thorn*, 1 Id. 703; *Moore v. Gamble*, Id. 246; *Glover v. Hedges*, Saxton, 113, 119; *Bolton v. Scott's Adm'r*, 2 Green Ch. 231, 236, 241; *Wistar v. McManes*, 54 Pa. St. 318; *Webster v. Skipwith*, 26 Miss. 341; *Truly v. Wanzer*, 5 How. (U. S.) 141; *David v. Tileston*, 6 Id. 114; *Hendrickson v. Hinckley*, 17 Id. 440; 5 McLean, 211; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Robinson v. Wheeler*, 51 N. H. 384; *Wingate v. Haywood*, 40 Id. 437, 441; *Emerson v. Udall*, 13 Vt. 477; *Gainty v. Russl*, 40 Conn. 450; *Dobson v. Pearce*, 12 N. Y. 156; *Tomkins v. Tomkins*, 11 N. J. Eq. (3 Stockt.) 512; *Daugherty v. Scudder*, 17 N. J. Eq. 248; *Skillman v. Holcomb*, 12 N. J. Eq. (1 Beas.) 131; *Williamson v. Johnson*, 5 N. J. Eq. (1 Hals.) 537; *Smith v. Hays*, 1 Jones (N. Car.) Eq. 321; *Partin v. Lut-*

Among other examples of cases, where a judgment at law will be restrained, will be found those cases where the defendant has been prevented from defending in the suit by a false misrepresentation by the plaintiff, that the action would not be prosecuted.¹ So, also, where through sickness the defendant has been prevented from making a legal defense,² or where there has been a failure to properly serve the defendant with process.³ But in order that one suffering from the judgment wrongfully recovered at law may secure relief by injunction, he must exercise the utmost diligence in appealing to the court of equity for aid.⁴ And he must also be able to show that if he had

terlot, 6 Jones (N. Car.) Eq. 341; Habbard v. Martin, 8 Verg. (Tenn.) 498; Richmond, &c. R. Co. v. Shippen, 2 Patt. & H. (Va.) 327; Nunn v. Matlock, 17 Ark. 512; Jamison v. May, 13 Ark. 600; Bibend v. Kreutz, 30 Cal. 109; Carter v. Bennett, 6 Fla. 214; Nelson v. Rockwell, 14 Ill. 375; Hinrichsen v. Van Winkle, 27 Ill. 334; Pearce v. Chastain, 3 Ga. 226; Crumpton v. Baldwin, 42 Ill. 165; Dickerson v. Ripley Co., 6 Ind. 128; Porter v. Moffett, 1 Morr. (Iowa,) 108; Rooks v. Williams, 13 La. An. 374; Falls v. Robinson, 5 Md. 365; Ford v. Weir, 24 Miss. 563; Andrews v. Fenter, 1 Ark. 186; Watson v. Palmer, 5 Ark. 501; Conway v. Ellison, 14 Ark. 360; Nevins v. McKee, 61 Tex. 412; Wingate v. Haywood, 40 N. H. 437; Pearce v. Olney, 20 Conn. 544; Stanton v. Embry, 46 Conn. 595; Slack v. Wood, 9 Gratt. (Va.) 49; Cotton v. Hiller, 52 Miss. 7; Newman v. Morris, 52 Miss. 402; Collier v. Falk, 66 Ala. 223; Walton v. Bonham, 24 Ala. 513; Marriott v. Givens, 8 Ala. 694; Holmes v. Stateler, 57 Ill. 209; Bateman v. Willoc, 1 Sch. & Lef. 201; McClure v. Miller, Bailey's Eq. (S. Car.) 107; Graham v. Roberts, 1 Head, (Tenn.) 56; Comstock v. Henneberry, 66 Ill. 212; La Crosse, &c. Co. v. Reynolds, 12 Minn. 213; Wright v. Eaton, 7 Wis. 595; Ableman v. Roth, 12 Wis. 81; McCann v. Otoe Co., 9 Neb. 324; Little v. Price, 1 Md. Ch. 182; Dugan v. Cureton, 1 Ark. 31.

¹ Scriven v. Hursh, 39 Mich. 98; Harris v. Western & At. R. R., 59 Ga. 830; Baker v. Redd, 44 Iowa, 179; Markham v. Angier, 57 Ga. 43; Ellis v. Kelly, 8 Bush, 631, 631; Pearce v. Olney, 20 Conn. 544; Huggins v. King, 3 Barb. 616; Powers' Ex'rs v. Butler's Adm'r, 3 Green Ch. 465; Holland v. Trotter, 22 Gratt. 136; Booth v. Stamper, 6 Ga. 172; Brooks v. Whitson, 7 Sm. & Mar. 513; How v. Mortell, 28 Ill. 479; Perry v. Siter, 37 Mo. 273; Jarboe v. Kepler, 4 Ind. 177; McLeran v. McNamara, 55 Cal. 508; Miller v. Harrison, 32 N. J. Eq. 76; Cregar v. Cramer, 31 Id. 375; Purviance v. Edwards, 17 Fla. 140; Hickley v. Miles, 15 Hun, 170.

² Roach v. Duckworth, 61 How. Pr. 128; Beveridge v. Hewitt, 8 Ill. App. 467; Miller v. Harrison, 32 N. J. Eq. 76; Stanton v. Embry, 46 Conn. 65; Markham v. Angier, 57 Ga. 43; Smith v. Pearce, 6 Baxt. 72; Bell v. Cunningham, 1 Sumner, 89; Devoll v. Scales, 49 Me. 320; Carlington v. Holabird, 17 Conn. 530; 19 Id. 87;

Forrester v. Wilson, 1 Duer, 624; Griffith v. Brown, 3 Robt. 627; Aaron v. Baum, 7 Id. 340; Owen v. Ranstead, 22 Ill. 161; Rice v. R. R. Bank, 7 Humph. 39.

³ Harshey v. Blackmarr, 20 Iowa, 161; Walker v. Gilbert, Freem. (Miss.) Ch. 85; McNeill v. Edie, 24 Kans. 108; Ryan v. Boyd, 33 Ark. 778; Blakeslee v. Murphy, 44 Conn. 188; see Graham v. Roberts, 1 Head, 56, 59; Crafts v. Dexter, 8 Ala. 767; Stubbs v. Leavitt, 30 Id. 352; Bell v. Williams, 1 Head, 229; Ridgeway v. Bank of Tenn., 11 Humph. 523, 525; Owens v. Ranstead, 22 Ill. 161.

⁴ Earl of Matheney, 60 Ind. 202; Kern v. Strausberger, 71 Ill. 413; Higgins v. Bullock, 73 Id. 205; Fuller v. Little, 69 Id. 229; Newman v. Morris, 52 Miss. 402; New York, &c. R. R. v. Haws, 56 N. Y. 175; Richmond Enquirer Co. v. Robinson, 24 Gratt. 548; Rogers v. Parker, 1 Hughes, 148; Devinney v. Mann, 24 Kans. 682; Noble v. Butler, 25 Id. 645; Burke v. Wheat, 22 Id. 722; Wilson v. Coolidge, 42 Mich. 112; Hannon v. Maxwell, 31 N. J. Eq. 318; Jackson v. Bell, 31 Id. 554; 32 Id. 411; Holmes v. Steele, 28 Id. 173; Thompson v. Meek, 3 Sneed, 271; Smith v. Allen, 63 Ill. 474; Smith v. Powell, 50 Id. 21; Ruppertsberger v. Clark, 53 Md. 402; Kirby v. Pascual, 53 Id. 531; Hays v. Urquhars, 63 Ga. 323; Carolus v. Koch, 72 Mo. 645; Foster v. Wood, 6 Johns. Ch. 87; Duncan v. Lyon, 3 Id. 351; Graham v. Stagg, 2 Paige, 321; Vilas v. Jones, 1 N. Y. 274; Vaughn v. Johnson, 1 Stockt. 173; Bierre v. Mann, 5 Leigh, 364; Meem v. Rucker, 10 Gratt. 506; Bellamy v. Woodson, 4 Ga. 175; Robb v. Halsey, 11 Sm. & Mar. 140; Williams v. Jones, 10 Id. 108; Conway v. Ellison, 14 Ark. 360; Paynter v. Evans, 7 B. Mon. 420; Fletcher v. Warren, 18 Vt. 45; Emerson v. Udall, 13 Vt. 477; Warner v. Conant, 24 Id. 351; Floyd v. Jayne, 6 Johns. Ch. 479; Fuller v. Melrose, 1 Allen, (Mass.) 166; Russ v. Wilson, 22 Me. 207; Binney's Case, 2 Bland, (Md.) 99; Sedam v. Williams, 4 McLean, (U. S.) 51; Pillow v. Thompson, 20 Tex. 206; Callaway v. Alexander, 8 Leigh, (Va.) 114; Northern Pac. R. Co. v. St. Paul, &c. R. Co., 2 McCrary, (U. S.) 260; Jones v. Cameron, 81 N. Car. 154; American Dock and Imp. Co. v. School Trustees, 35 N. J. Eq. 181; Parker v. Spillin, 10 Phila. (Pa.) 8; Wynn v. Wilson, Hempst, (U. S.) 698; Gibson v. Moore, 22 Tex. 611; Fitzhugh v.

not been prevented by fraud, accident or mistake from presenting his defense to the cause of action, the judgment which had been rendered against him would have been denied to the plaintiff, and that a re-examination and a re-trial of the case, and an opportunity to make his defense would result in a refusal of the judgment. If the court is not satisfied that the re-trial of the case would produce different results, it would refuse to enjoin the enforcement of the judgment.¹ In these causes of action for avoiding the enforcement of judgment obtained through fraud, accident or mistake, the equitable jurisdiction is assumed for the purpose of supplementing the provisions which have been made for the granting of new trials at law, and the revision on appeal of errors made in the judgment. Where, therefore, the remedies for correcting errors by way of granting new trials or by appeals are sufficiently adequate to secure the ends of justice, a court of equity would not assume jurisdiction; so that it is very rarely employed at the present time in courts in the United States.

§ 491. **Equitable jurisdiction to restrain actions at law under modern procedure.**—It is very well known that under the modern procedure, both in England and in most of the American states, not only have the two courts of law and of equity become merged into the one court of general procedure, but also under the reformed procedure, which was first adopted in New York, all forms of action previously in use have been abolished, and the one single cause of action known as a civil action, has been made to take their place; and in that action the court has been authorized to entertain both legal and equitable causes of action and to consider legal and equitable defenses indiscriminately. In consequence of this radical change in the character of civil remedies and of the civil courts, very little opportunity is now presented for the intervention by injunction of courts of equity to

Orton, 12 Tex. 41; Musgrove v. Chambers, 12 Tex. 32; Crawford v. Winfield, 25 Tex. 414; Kidwell v. Masterson v. Masterson, 3 Cranch (U. S.) C. C. 52; Wells v. Wall, 1 Oreg. 295; Grey v. Ohio, &c. R. Co., 1 Gratt. Cas. (Pa.) 412; Pensacola, &c. R. Co. v. Jackson, 21 Fla. 146; Logansport v. La Rose, 99 Ind. 117; Brown v. Merrick Co. Comm'rs, 18 Neb. 355; Dierks v. Martin, 16 Neb. 120; Miller v. McGuire, Morr. (Iowa), 150; Kriebbaum v. Bridges, 1 Iowa, 14; Paynter v. Evans, 7 B. Mon. (Ky.) 420; Todd v. Fisk, 14 La. An. 13; Williams v. Jones, 18 Miss. (10 Smed. & M.) 108; Semple v. McGatagan, 18 Miss. 98; Bruner v. Planters' Bank, 23 Miss. 514; Shipp v. Wheelless, 33 Miss. 646; Jordan v. Thomas, 34 Miss. 73; Brandon v. Green, 7 Humph. (Tenn.) 130; Champion v. Miller, 2 Jones (N. Car.) Eq. 194; Vaughn v. Johnson, 9 N. J. Eq. (1 Stock.) 173; Schroepel v. Shaw, 3 N. Y. 446; Sample v. Barnes, 14 How. (U. S.) 70; Parker v. Winnipiseogee, &c. Co., 2 Black. (U. S.) 545; Burden v. Stein, 27 Ala. 104; Dibble v. Truelock, 12 Fla. 125; Traver v. McKay, 15 Ga. 560; Water Co. v. Bucks, 5 Ga. 315; Rogers v.

Kingsbury, 22 Ga. 60; Vaughn v. Fuller, 23 Ga. 366; Cleckley v. Beall, 37 Ga. 383; Ramsey v. Perley, 34 Ill. 504; Titcomb v. Potter, 11 Me. (2 Fairb.) 218; Faulkner v. Campbell, Morr. (Iowa), 148; Atty.-Gen. v. Sheffield, 3 De G. M. & G. 304; Dulin v. Caldwell, 28 Ga. 117; Griffin v. Augusta, &c. R. Co., 70 Ga. 164; Morris v. Edwards, 62 Tex. 205; Dana v. Valentine, 5 Met. (Mass.) 8; Central R. Co. v. Standard Oil Co., 33 N. J. Eq. 127; United Co. v. Standard Oil Co., 33 N. J. Eq. 123; Atty.-Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 379; Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 282; Reid v. Gifford, 6 Johns. Ch. (N. Y.) 19; Brafield v. Dewell, 48 Mich. 9; Hill v. Harris, 51 Ga. 628.

¹ Way v. Lamb, 15 Iowa, 79, 83; Stokes v. Knarr, 11 Wis. 389; Payne v. Dudley, 1 Wash. (Va.) 196; Sauer v. Kansas, 69 Mo. 46; Lemon Sweeney, 6 Ill. App. 507; Bradley v. Richardson, 23 Vt. 790; Tomkins v. Tomkins, 3 Stockt. 512, 514; Reeves v. Cooper, 1 Beasl. 223; Dawson v. Merch., &c. Bk., 30 Ga. 664; Saunders v. Albritton, 37 Ala. 716.

restrain actions at law; and the original importance of this equitable jurisdiction has, in consequence, been actually diminished. But it would be misleading and wrong to conclude that at the present time the injunction to restrain actions pending in other courts could never be profitably employed. There are some cases in which, nevertheless, the court of equity, or a court having equitable jurisdiction, would necessarily interfere by injunction in the restraint of actions at law, in order that substantial justice might be done between the parties. The cases in which the injunction of these courts may still be necessary may be divided into three classes: *First*, a court of equity may be called upon to enjoin the prosecution of actions in other courts, in order to avoid a multiplicity of suits, in which the same cause of action between different parties is adjudicated.¹ The second class of cases will be found to include those in which the action which is pending in the one court cannot be fully settled because it is necessary to bring in new parties; and in order that the new parties may be added to the cause of action, and a judgment in the one court may be made to bind them all, a resort to some other court having equitable jurisdiction is necessary, because the same judgment cannot be obtained in the court of limited jurisdiction in which the suit was first brought, then the court of equitable jurisdiction may restrain the further prosecution of the action in the other courts.² In the third class of cases will be included all those in which a resort to the equitable suit is required under the rules of procedure of the state, in which the question is raised, in order to make an equitable defense effective against the plaintiff's legal cause of action. In some of the states, in order that an equitable defense may be set up against a legal cause of action, it is necessary, as a foundation for such equitable defense, that the defendant should have a counterclaim against the plaintiff, which entitles him to an affirmative judgment against the plaintiff. And where he is not permitted by the court, on the equitable defense, to claim affirmative relief, under the reformed procedure of the state, he is not permitted to resist the prosecution of the plaintiff at law by setting up the equitable defense; in such a case, he would have to apply to a court of equity for an injunction against the further prosecution of the suit at law.³ This, however, is not the general rule of law in the states, in which the reformed procedure has been adopted. On the contrary, in some of the states, the equitable defense, which is permitted by the rules of the reformed procedure to be set up in actions at law, may be used not only in those cases, in

¹ *Erie Ry. v. Ramsey*, 45 N. Y. 637; *Uhlfelder v. Levy*, 9 Cal. 607, 615; *Engels v. Lubeck*, 4 *Id.* 31.

² See 3 *Pomeroy Eq. Jur.*, § 1372.

³ *Webster v. Bond*, 9 Hun, 437; *Quebec Bank v. Weyand*, 30 Ohio St. 126; *Hinkle v. Margerum*, 50 Ind. 240; *Winslow v. Winslow*, 52 *Id.* 8; *Hampson v. Fall*, 64 *Id.* 382; *Pennoyer v. Allen*, 51 Wis. 360; 50 *Id.* 308; *Lowe v. Hyde*, 39 *Id.* 345; *Kentfield v. Hayes*, 57 Cal. 409; *Hatcher*

v. Briggs, 6 Oreg. 31; *Ten Broeck v. Orchard*, 74 N. C. 409; *Follett v. Heath*, 15 Wis. 601; *Lombard v. Cowham*, 34 *Id.* 486, 492; *Du Pont v. Davis*, 35 *Id.* 631, 639; *Hicks v. Sheppard*, 4 *Lans.* 335, 337; *Cramer v. Benton*, 60 Barb. 216; *Dewey v. Hoag*, 15 *Id.* 365; *Conger v. Parker*, 29 Ind. 380; *Kenyon v. Quinn*, 41 Cal. 325; *Bruck v. Tucker*, 42 *Id.* 346, 352; *Miller v. Fulton*, 47 *Id.* 146; *McClane v. White*, 5 Minn. 178, 190.

which the equitable defense will furnish the foundation for affirmative relief, but also in those cases, in which such defense simply gives to the defendant the negative relief of putting an end to the plaintiff's cause of action.¹ In these latter states, of course, there would be no need to resort to the court of equity for an injunction to restrain the prosecution of the action at law in any case where the defendant has an equitable defense; for in those states such equitable defense can always be effectively applied in the ordinary legal action.

¹ *Dobson v. Pearce*, 12 N. Y. 156, 168; *Chase v. Peck*, 21 N. Y. 581, 586; *Wisner v. Ocumpaugh*, 71 *Id.* 113, 117; *Webster v. Bond*, 9 Hun, 437; *Wa Ching v. Conatantine*, 1 Idaho, 266; *Harrington v. Fortner*, 58 Mo. 468, 474; *Holland v. Johnson*, 51 Ind. 246; *Maxwell v. Campbell*, 45 *Id.* 360, 363; *Hammond v. Perry*, 38 Iowa, 217;

Crary v. Goodman, 12 N. Y. 266; *Seeley v. Engell*, 13 *Id.* 542; *N. Y. Cent. Ins. Co. v. Nat. Protec. Ins. Co.*, 14 *Id.* 85; *Despard v. Walbridge*, 15 *Id.* 374; *Carpenter v. Oakland*, 30 Cal. 439, 442; *Harris v. Vinyard*, 42 Mo. 568; *Kennedy v. Daniels*, 20 *Id.* 104; *Carman v. Johnson*, 20 *Id.* 108.

CHAPTER XXVIII.

SPECIFIC PERFORMANCE OF CONTRACTS AND FIDUCIARY OBLIGATIONS.

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§ 492. **General statement as to ground of jurisdiction.**—In determining the cases in which a court of equity will interfere, for the purpose of securing or compelling a specific performance of contracts and fiduciary obligations, we find the clear and satisfactory explanation in the inability of the parties litigant to find a complete and satisfactory remedy at law. Except in the case of actions for the recovery of the possession of specific property belonging to the plaintiff, and unlawfully withheld from him by the defendant, the common law does not know of any other remedy for the enforcement of contracts and other obligations than a judgment for damages for their breach. In many cases, probably in the majority of cases even at the present day, the judgment for damages would be considered a sufficient remedy; but there are many cases where the judgment for damages, or the common law action in general, would prove for some reason or other inadequate, and the necessity for equitable intervention be manifest. Whatever may be the cause for holding the action at law insufficient or impracticable, having assumed jurisdiction over the cause of action, it will apply whatever remedy may be found to furnish the best protection to the rights of the parties litigant.¹

§ 493. **Inadequacy of action for damages for breach of contract.—Distinction between sales of real estate and personal property.**—The most common ground for the intervention of equity

¹ *Hopper v. Hopper*, 16 N. J. Eq. 147; but see *Jones v. Newhall*, 115 Mass. 244; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Brown v. Haff*, 5 Paige, 235; *Schroeppel v. Hopper*, 40 Barb. 425; *Blanchard v. Detroit, &c. R. R.*, 31 Mich. 43; *Bogan v. Daughdrill*, 51 Ala. 312; *Willard v.*

Taylor, 8 Wall. 557; *Somerby v. Buntin*, 118; *Mass.* 279; *McGarvey v. Hall*, 23 Cal. 140; *Harnett v. Yielding*, 2 Sch. & Lef. 549, 553; *Phyfe v. Wardell* 2 Edw. Ch. 47; *Stuyvesant v. The Mayor, &c.*, 11 Paige, 414; *Richmond v. Dubuque, &c. R. R.*, 33 Iowa, 442.

to secure the specific performance of the contract is, as already explained, the inadequacy of the judgment for damages as a remedy for a breach of the contract. Whenever causes of action arise in which that conclusion is reached, the court of equity will generally assume jurisdiction and decree a specific performance, unless some special reason exists for the refusal of equitable relief in the particular case. In this connection, in the determination of the cases in which the judgment for damages would prove an inadequate relief, an important distinction is made between cases of contracts for the sale or purchase of real estate on the one hand, and of personal property on the other; *i. e.*, the law presumes in every case of a contract for the sale or purchase of real estate or of any interest in lands, that the judgment for damages at law is inadequate, and the very nature of the contract itself furnishes the justification for the intervention of a court of equity with the decree for specific performance, without any positive proof that in that particular case the judgment for damages would prove inadequate. In regard to contracts for the sale of lands, the presumption as to the inadequacy of the judgment for damages is conclusive.¹ The decree for specific performance will not only be given where the contract is for the sale of lands in fee, which, of course, is the ordinary case of the decree for specific performance,² but it will be found that the same presumption as to inadequacy of the judgment for damages, and the consequent necessity for the decree for specific performance, exists in the case of contracts to give or renew a lease,³ a marriage settlement,⁴ and contracts for mortgages.⁵ And a court of equity will also decree specific performance of contracts for the sale of lands, whether these lands be situated in the same state or country or in some foreign land; provided, of course, that the

¹ *Olney v. Eaton*, 66 Mo. 563; *Gartrell v. Stafford*, 12 Neb. 545; *Wormley v. Wormley*, 98 Ill. 544; *Bonner v. Little*, 38 Ark. 397; *Coffman v. Robbins*, 8 Oreg. 278; *Wright v. Pucket*, 22 Gratt. 370; *Ambrouse's Heirs v. Keller*, 22 *Id.* 769; *Chartier v. Marshall*, 51 N. H. 400; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *McClaskey v. Mayor, &c.*, 64 Barb. 310; *Warren v. Ewing*, 34 Iowa, 168; *Law v. Henry*, 39 Ind. 414; *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Williams v. McGuire*, 60 Mo. 254; *Kuhn v. Freeman*, 15 Kans. 423; *Reese v. Board of Police, &c.*, 49 Miss. 639; *Grier v. Rhyne*, 69 N. C. 346; *Rogers v. Williams*, 8 Phila. 123; *Green v. Richards*, 23 N. J. Eq. 32, 536; *Colgate's Ex'r v. Colgate*, 23 *Id.* 372; *Reynolds v. O'Neil*, 26 *Id.* 223; *Wynn v. Smith*, 40 Ga. 457; *Porter v. Allen*, 54 *Id.* 623; *Riddle v. Cameron*, 50 Ala. 263; *Warren v. Daniels*, 72 Ill. 272; *Yoakum v. Yoakum*, 77 *Id.* 85; *Page Co. v. American, &c. Co.*, 41 Iowa, 115; *Johnson v. Johnson*, 40 Md. 189; *McNamee v. Withers*, 37 *Id.* 171; *Bleakley's Appeal*, 66 Pa. St. 187; *Seichrist's Appeal*, 66 *Id.* 287; *Bogan v. Daughdrill*, 51 Ala. 312; *Barnes v. Barnes*, 65 N. C. 261; *Richmond v. Dubuque,*

&c. R. R., 33 Iowa, 422; *Blanchard v. Detroit, &c. R. R.*, 31 Mich. 43; *Willard v. Tayloe*, 8 Wall. 557; *Somerby v. Buntin*, 118 Mass. 279; *Harnett v. Yielding*, 2 Sch. & Lef. 549, 553, 554; *Adderley v. Dixon*, 1 S. & S. 607; *Cud v. Rutter*, 1 P. Wms. 570, 571; *Hollis v. Edwards*, 1 Vern. 159; *Duff v. Fisher*, 15 Cal. 375; *McGarvey v. Hall*, 23 *Id.* 140; *Kirksey v. Fike*, 27 Ala. 383.

² Under this heading will also be included the decree for specific performance of a bond to conveyed land. *Ewin v. Gordon*, 49 N. H. 444.

³ *Furnival v. Crew*, 3 Atk. 83, 87; *Tritton v. Foote*, 2 Bro. Ch. 636; *Burke v. Smith*, 3 Jo. & Lat. 193; *Moss v. Barton*, L. R. 1 Eq. 474; *Buckland v. Papillon*, L. R. 2 Ch. 67; *Clark v. Clark*, 49 Cal. 586; *Switzer v. Gardner*, 41 Mich. 164.

⁴ *Henry v. Henry*, 27 Ohio St. 121; *Wistar's Appeal*, 80 Pa. St. 484.

⁵ *Dean v. Anderson*, 34 N. J. Eq. 496; *McClinton v. Laing*, 23 Mich. 212; *St. Paul Division, &c. v. Brown*, 11 Minn. 356; *City, &c. Ins. Co. v. Olmsted*, 33 Conn. 476; *De Pierres v. Thorn*, 4 Bosw. 266; *Hermanns v. Hodges*, L. R. 16 Eq. 18; *Ashton v. Corrigan*, L. R. 13 Eq. 76.

court making the decree has jurisdiction over the person of the defendant.¹

But where the contract is for the sale or purchase of personal property in general, the presumption is that the judgment at law for damages is adequate, and consequently there is no need for the intervention of the court of equity with its decree for specific performance. In the ordinary case of a contract for the sale of personal property, if the proper judgment for damages is obtained, which, of course, would be the difference between the contract price and the market price of the goods contracted to be sold or bought, is recovered by the party plaintiff, he could with these damages thus recovered, *plus* the price which he had agreed to pay for the goods bought or sold, go into the market and there sell or buy similar goods, and obtain a value equivalent to the performance of the ordinary contract. It is therefore a presumption of the law that the judgment for damages is an all-sufficient remedy in contracts for the sale or purchase of personal property.² But this presumption is not conclusive; it may be rebutted by positive proof that the particular case of a sale of chattels falls within the requirements for the intervention of a court of equity, viz.: that the judgment for damages would prove inadequate, either because the value which the plaintiff justly places upon the thing is the appreciation of affection or attachment which finds no expression in a pecuniary estimation, or where the thing which constitutes the subject-matter of the contract is so rare and unique that it cannot be duplicated, as in the case of paintings or statuary. In either of these two cases, a special case of inadequacy of the judgment for damages is made out, and the court of equity will assume jurisdiction and decree specific performance.³ On the same general principle, a decree for specific performance will be given to compel a delivery to the lawful owner of deeds and other muniments of title.⁴ The same rule prevails in determining the circumstances, under which contracts for the sale or assignment of things in action, shall require a decree for specific performance, the decree being given whenever the judgment for damages at law would prove uncertain or inadequate.⁵ Whether a contract for the

¹ *Sutphen v. Fowler*, 9 Paige, 280; *Brown v. Desmond*, 100 Mass. 287; *Davis v. Parker*, 14 Allen, 94; *Penn v. Lord Baltimore*, 1 Ves. Sen. 44; *Lord Portarlington v. Soulbey*, 3 My. & K. 104.

² *Pierce v. Plumb*, 74 Ill. 326; *Collins v. Karatopsky*, 36 Ark. 316; *Bubier v. Bubier*, 24 Me. 42; *Cowles v. Whitman*, 10 Conn. 121, 124; *Gram v. Stebbins*, 6 Paige, 124; *Cud v. Rutter*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 159; *Adderley v. Dixon*, 1 S. & S. 607, 610; *Baxton v. Lister*, 3 Atk. 383; *Phillips v. Berger*, 2 Barb. 608; 8 *Id.* 527; *Scott v. Billgerry*, 40 Miss. 119; *McLaughlin v. Piatti*, 27 Cal. 451; *Ashe v. Johnson's Adm'r*, 2 Jones Eq. 149.

³ *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; *Fells v. Read*,

3 Ves. 70; *Sarter v. Gordon*, 2 Hill, 121; *Young v. Barton*, 1 McMull. Eq. 255; *Binney v. Annan*, 107 Mass. 95; *Cowles v. Whitman*, 10 Conn. 121; *Hill v. Rockingham Bk.*, 44 N. H. 567; *McGowin v. Remington*, 12 Pa. St. 56; *Abbott's Ex'r v. Reeves*, 49 *Id.* 494; *Peer v. Kean*, 14 Mich. 354; *Wood v. Rowcliffe*, 3 Hare, 304; 2 Phil. 382; *Pooley v. Budd*, 14 Beav. 34; *Stanton v. Percival*, 5 H. L. Cas. 257, 268; *Clark v. Flint*, 22 Pick. 231; *Corbin v. Tracy*, 34 Conn. 325; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Sumerby v. Buntin*, 118 Mass. 287.

⁴ *Brown v. Brown*, 1 Dick. 62; *Tanner v. Wise*, 3 P. Wms. 294, 296; *Cowles v. Whitman*, 10 Conn. 121; *Hill v. Rockingham Bk.*, 44 N. H. 567.

⁵ *Adderley v. Dixon*, 1 S. & S. 607; *Cutting v.*

sale or purchase of shares of stock of a corporation will be specifically enforced, has been differently decided by the different courts. It is generally held that in regard to securities in general the decree for specific performance will be denied.¹ In England and in some of the American states, it is held that contracts for the sale or purchase of corporation stock will be specifically enforced.² But in America the general rule seems to be that contracts for the sale or purchase of stocks and bonds of private corporations will not be specifically enforced, any more than contracts for the sale or purchase of government securities.³ Specific performance will also be decreed on a contract for the submission to arbitration and award, and in consequence specific enforcement of the award itself, whenever the contract which is submitted to arbitration and award is itself subject to or capable of specific performance; as, for example, where the award directs the conveyance of land.⁴ But if the award does not call for the performance of a contract which could itself be specifically enforced in equity, as where the award calls for or requires the payment of a sum of money; then, a court of equity will not grant a decree for specific performance. For such an award could be just as well enforced in a judgment at law for damages as in an equitable decree.⁵ A court of equity will also grant specific performance in any kind of contract, whatever may be its character, provided the legal remedy is inadequate and the party cannot secure substantial protection at law. The cases are very numerous and of great variety; but the general rule is as just stated.⁶ Among the examples of contracts which can be specifically enforced may be enumerated the following: ante-nuptial contracts concerning property;⁷ contracts for the support and main-

Dana, 25 N. J. Eq. 265; *Wright v. Bell*, 5 Price, 325; *Hughes v. Piedmont, &c. Ins. Co.*, 55 Ga. 111; *Tuttle v. Moore*, 16 Minn. 123; *Woodward v. Harris*, 3 Sandf. 272.

¹ *Dolorat v. Rothschild*, 1 S. & S. 590; *Shaw v. Fisher*, 5 De G. M. & G. 596.

² *Hawkins v. Maltby*, L. R. 3 Ch. 188; *Cheale v. Kenward*, 3 De G. & J. 27; *Shaw v. Fisher*, 5 De G. M. & G. 596; *Duncuft v. Albrecht*, 12 Sim. 189; *Baldwin v. Common'th*, 11 Bush, 417; *Treasurer v. Commercial, &c. Co.*, 23 Cal. 390; *Todd v. Taft*, 7 Allen, 571; *Ashe v. Johnson's Adm'rs*, 2 Jones Eq. 149; *Boardman v. Lake Shore, &c. Ry.*, 84 N. Y. 157; *Leach v. Fobes*, 11 Gray, 506; *Todd v. Loft*, 7 Allen, 371; *Frue v. Houghton*, 6 Col. 318; *Ashe v. Johnson*, 2 Jones Eq. 149; *Johnson v. Brooks*, 93 N. Y. 337.

³ *Gram v. Stebbins*, 6 Paige, 124; *Carpenter v. Mut., &c. Ins. Co.*, 4 Sandf. Ch. 408; *Lowry v. Muldrow*, 8 Rich. Eq. 241; *Fallon v. R. R. Co.*, 1 Dill. 121; *Ross v. Union Pac. Ry.*, 1 Woolw. 26, 36; *Bissell v. Farm. & Merch. Bk.*, 5 McLean, 495; *Cowles v. Whitman*, 10 Conn. 121, 124; *Strasburg R. R. v. Echternacht*, 21 Pa. St. 220; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Ferguson v. Paschall*, 11 Mo. 267.

⁴ *Davis v. Havard*, 15 S. & R. 165, 171; *Somer-*

ville v. Truman's Devisees, 4 Har. & McH. 43; *Cook v. Vick*, 2 How. (Miss.) 882; *Story v. Norwich, &c. R. R.*, 24 Conn. 94; *Kirksey v. Fike*, 27 Ala. 383; *McNeil v. Magee*, 5 Mason, 244; *Jones v. Boston Hill Corp.*, 4 Pick. 507; *Hall v. Hardy*, 3 P. Wms. 187; *Memphis, &c. R. R. v. Scruggs*, 50 Miss. 284; *Overby v. Thrasher*, 47 Ga. 10; *Blackett v. Bates*, L. R. 1 Ch. 117; *Norton v. Mascall*, 2 Vern. 24.

⁵ *Hall v. Hardy*, 3 P. Wms. 187; *Story v. Norwich, &c. R. R.*, 24 Conn. 94; *Bubier v. Bubier*, 24 Me. 42.

⁶ *Steward v. Winters*, 4 Sandf. Ch. 587; *Stuyvesant v. Mayor, &c.*, 11 Paige, 414; *Hall v. Hiles*, 2 Bush, 532; *McMullen v. Vanzant*, 73 Ill. 190; *Ashe v. Johnson's Adm'r*, 2 Jones Eq. 149; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Hall v. Joiler*, 1 S. C. 186; *Starnes v. Newsom*, 1 Tenn. Ch. 239; *Furman v. Clark*, 3 Stockt. 306; *Thorn v. Com'rs, &c.*, 32 Beav. 490; *Schotmans v. Lancashire, &c. Ry.*, L. R. 2 Ch. 332; *Very v. Levy*, 13 How. 345; *Kirksey v. Fike*, 27 Ala. 383; *McKnight v. Robbins*, 1 Halst. Ch. 229, 642.

⁷ *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316; *Sullings v. Sullings*, 9 Allen, 234; *Tarbell v. Tarbell*, 10 Allen, 278.

tenance of one;¹ contracts or agreements to cancel judgments;² an agreement to apply land for payment of debts;³ agreements to indemnify one against a possible or contingent loss;⁴ agreements between parties to pay off or discharge a mortgage;⁵ contracts to insure;⁶ agreements between riparian owners for diversion of the water.⁷

Contracts for personal service will be specifically enforced where the action for damage would prove an inadequate remedy, and the service required is of such a nature, that a court of equity may see to the rendition of the service; the general rule as to contracts for personal service being, that the court cannot enforce the decree and hence will refuse to grant it, as in the case of contracts for building and construction.⁸ But where there has been a part performance;⁹ or where an agreement to erect a building is definite and certain;¹⁰ or where the defendant has agreed to establish some definite or certain structure on his own land in which the plaintiff has a material interest;¹¹ or where the defendant has contracted to erect some structure on land acquired by him from the plaintiff;¹² in all these cases, the court will decree specific performance wherever the judgment for damages at law proves inadequate. At least, these exceptions are recognized by the English courts and a few of the American courts, as set forth and explained in the cases cited. The agreement of husband and wife for a separation will also, if valid, be specifically enforced.¹³

§ 494. **Impracticability, or want of a legal remedy.**—The cases, in which the decree for specific performance will be rendered under this heading, may be divided into two classes: *First*, where, on account of a failure to observe some legal formality or condition in the contract, no action at law can be maintained. *Second*, where from some peculiar characteristic, either in the subject-matter or the terms of the contract, or in the relations of the parties, it would be impossible to obtain any estimate at all of the damages suffered by them in the

¹ *Watson v. Smith*, 7 Oreg. 448.

² *Phillips v. Berger*, 2 Barb. 608; 8 *Id.* 527.

³ *Shields v. Whitaker*, 82 N. C. 516.

⁴ *Reybold v. Herdman*, 2 Del. Ch. 34.

⁵ *Stark v. Wilder*, 36 Vt. 752; *Howe v. Nickerson*, 14 Allen, 400; *Weir v. Mundell*, 3 Brews. 594; *Bennett v. Abrams*, 41 Barb. 619; *Barkley v. Barkley*, 14 Rich. Eq. 12.

⁶ *Neville v. Merch., &c. Ins. Co.*, 19 Ohio, 452; *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362; *Taylor v. Merch., &c. Ins. Co.*, 9 How. (U. S.) 390; *Carpenter v. Mut., &c. Ins. Co.*, 4 Sandf. Ch. 408.

⁷ *Coffman v. Robbins*, 8 Oreg. 278.

⁸ *South Wales Ry. v. Wythes*, 1 K. & J. 186; 5 De G. M. & G. 880; *Port Clinton R. R. v. Cleveland, &c. R. R.*, 13 Ohio St. 544; *Fallon v. R. R. Co.*, 1 Dillon, 121; *Ross v. Union Pac. Ry.*, 1 Woolw. 26; *Errington v. Aynesly*, 2 Bro. Ch. 341; *Lucas v. Commerford*, 3 *Id.* 166; *Paxton v. Newton*, 2 Sm. & Gif. 437; *Mosely v. Virgin*, 3 Ves. 184; *Booth v. Pollard*, 4 Y. & C. Ex. 61;

Marble Co. v. Ripley, 10 Wall. 339; *Pollard v. Clayton*, 1 K. & J. 462.

⁹ *Price v. Corpor. of Penzance*, 4 Hare, 506, 509; see, also, *Stuyvesant v. Mayor, &c.*, 11 Paige, 414; *Birchott v. Bolling*, 5 Munf. 442; *Whitney v. New Haven*, 23 Conn. 624; *Gregory v. Ingwersen*, 32 N. J. Eq. 199.

¹⁰ *Phillips v. Soule*, 9 Gray, 233; and see *Brace v. Wehnert*, 25 Beav. 348; *Mosely v. Virgin*, 3 Ves. 184, 185; *Flint v. Brandon*, 8 *Id.* 159, 164; *Cubitt v. Smith*, 10 Jur. n. s., 1123.

¹¹ *Storer v. Great W. Ry.*, 2 Y. & C. Ch. 48; *Sanderson v. Cockermouth, &c. Ry.*, 11 Beav. 497; *Franklyn v. Tuton*, 5 Madd. 469.

¹² *So. Wales Ry. v. Wythes*, 1 K. & J. 186, 200; *Price v. Corpor. of Penzance*, 4 Hare, 506; *Wilson v. Furness Ry.*, L. R. 9 Eq. 28; *Hood v. North East Ry.*, L. R. 5 Ch. 525; 8 Eq. 666.

¹³ *McCroeklin v. McCroeklin*, 2 B. Mon. 370; *Wilson v. Wilson*, 1 H. L. Cas. 538; 5 *Id.* 40; 14 Sim. 405; *Gibbs v. Harding*, L. R. 5 Ch. 336; 8 Eq. 490.

breach of the contract. Where the contract cannot be enforced at law, because the plaintiff has not performed and cannot perform all the conditions on his part, there are circumstances under which the court of equity may nevertheless treat the contract as binding more or less, and enforce such a contract as far as it can be performed, making allowance for compensation to the defendant for whatever possible damage he might suffer, from the failure of the plaintiff to strictly comply with the conditions of the contract.¹ And this is permitted in peculiar cases, even where the partial failure or inability of the plaintiff to fully perform his contract results from the plaintiff's own fault.² The most notable example of this intervention of a court of equity is in the case of a mortgagor's equity of redemption, which has been already fully explained in a preceding chapter.³ Decrees for specific performance are also granted in ordinary cases of contracts which are incomplete in their terms, and it is impossible to arrive at a legal measure of damages.⁴ And so, likewise, in respect to contracts of various sorts which are void according to the old common law, but which may be enforced in equity; as in the case of agreements to assign things in action, and contracts between a man and woman who subsequently intermarry.⁵ But the more common cases of specific performance are contracts which cannot be enforced at law because they are verbal contracts for the sale or purchase of land, which will be the subject of the next paragraph.

§ 495. **Specific performance of verbal contracts partly performed.**—It has long been settled in England, and in all of the American states, with a few exceptions,⁶ that while a verbal contract for the sale or leasing of lands, or a similar contract for a marriage settlement, cannot be enforced at law, because of the failure to conform to the requirements of the Statute of Frauds in respect to a memorandum of such contract in writing, yet if such contract has been partly performed by the party seeking an equitable remedy, under circumstances which the court of equity would consider a sufficient substitute for the conformity with the requirements of the Statute of Frauds, the court of equity will specifically enforce such verbal contract.⁷ The foundation for this equitable doctrine is the construction which the court of

¹ *Mortlock v. Buller*, 10 Ves. 292, 305, 306; *Stewart v. Alliston*, 1 Meriv. 26, 32.

² *Coale v. Barney*, 1 Gill & J. 324; *McCorkle v. Brown*, 9 Sm. & Mar. 167; *Davis v. Hone*, 2 Sch. & Lef. 341, 347; *Voorhees v. De Meyer*, 2 Barb. 37.

³ See *ante*, §§ 412, 433.

⁴ *Phillips v. Thompson*, 1 Johns. Ch. 131; *Doloret v. Rothschild*, 1 S. & S. 590; *Buxton v. Lister*, 3 Atk. 383.

⁵ *Cannel v. Buckle*, 2 P. Wms. 243; *Gould v. Womack*, 2 Ala. 83.

⁶ The doctrine was not recognized, until recent legislation, in Massachusetts and Maine; while, in North Carolina, Tennessee and Ken-

tucky, it is either altogether denied, or only admitted in very special cases.

⁷ *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Sherman v. Scott*, 27 Hun, 331; *Barnes v. Boston, &c. R. R.*, 130 Mass. 388; *Manly v. Howlett*, 55 Cal. 94; *Hanlon v. Willson*, 10 Neb. 138; *Hibbert v. Aylott*, 52 Tex. 530; *Juyd v. Gilbert*, 77 Ind. 96; *Lamb v. Hinman*, 46 Mich. 112; *Jamison v. Dimock*, 95 Pa. St. 52; *Newkumet v. Kraft*, 10 Phila. 127; *Marshall v. Peck*, 91 Ill. 187; *Laird v. Allen*, 82 Id. 43; *Wallace v. Rappleye*, 103 Id. 229; *Littlefield v. Littlefield*, 51 Wis. 23; *Seaman v. Aschermann*, Id. 678; *Northrop v. Boon*, 66 Ill. 368; *Fall v. Hazelrigg*, 45 Ind. 576; *Grant v. Ramsey*, 7 Ohio St. 157; *Ames*

equity places upon the attempt of the other party to the contract to receive the benefit obtained by the part performance of the contract, and escape his liabilities under the contract by pleading the Statute of Frauds. The court pronounces such an act to be itself a fraud, and denies the right of such a party to resort to the Statute of Frauds as a defense.¹ But it is not every part performance which would be considered by a court of equity as sufficient to take the case out of the Statute of Frauds, and justify the grant of a decree of specific performance. The mere payment of the consideration, or the measuring of the land or drawing up deeds or doing any other act, which is merely preparatory to the actual performance of the contract, would not of itself be sufficient to justify a court to decree specific performance; there must be something more than that. As a general rule, in order that the part performance of a contract for the sale of lands may furnish the foundation for the decree for specific performance of a contract, there must be an actual transfer of the possession of the land,² or the making of valuable improvements,³ or a combination of both. Under peculiar circumstances, special acts and personal service may serve as a sufficient justification of the court in decreeing specific performance.⁴

§ 496. **Jurisdiction discretionary.**—So far, it has been explained what is absolutely required as a justification for the assumption by a court of equity of jurisdiction for the specific performance of contracts. But it must now be noticed that, although the inadequacy of the judgment for damages or the impracticability or want of legal reme-

v. Bigelow, 3 McArth. 442; *Hiatt v. Williams*, 72 Mo. 214; *Bohanan v. Bohanan*, 96 Ill. 591; *McDowell v. Lucas*, 97 *Id.* 489; *Jefferson v. Jefferson*, 96 *Id.* 551; *Ford v. Finney*, 35 Ga. 258; *Johnson v. Bowden*, 37 Tex. 621; *Farrar v. Patton*, 20 Mo. 81; *Feusier v. Sneath*, 3 Nev. 120; *Morgan v. Bergen*, 3 Neb. 209; *Gregg v. Hamilton*, 12 Kans. 333; *Cole v. Cole*, 41 Md. 301; *Semmes v. Worthington*, 38 *Id.* 298; *Pierce's Heirs v. Catron's Heirs*, 23 Gratt. 483; *Lowry v. Buffington*, 6 W. Va. 249; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Tilton v. Tilton*, 9 N. H. 385; *Eaton v. Whitaker*, 18 Conn. 222; *Hall v. Whittier*, 10 R. I. 530; *Freeman v. Freeman*, 43 N. Y. 34; *Welsh v. Baynaud*, 21 N. J. Eq. 186; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Lester v. Foxcroft*, *Colles' P. C.*, 108, cited 2 Vern. 456; 1 Eq. Lead Cas. 1027, 1038, 1042 (4th Am. ed.); *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Newton v. Swazey*, 8 N. H. 9.

¹ *Pierce's Heirs v. Catron's Heirs*, 23 *Id.* 588; *Semmes v. Worthington*, 38 Md. 298; *Horn v. Ludington*, 32 Wis. 73; *Morgan v. Bergen*, 3 Neb. 209; *Clinan v. Cooke*, 1 Sch. & Lef. 413, 433; *Clinan v. Cooke*, 1 *Id.* 22, 41; *Mundy v. Jolliffe*, 5 My. & Cr. 167, 177; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Wright v. Pucket*, 22 Gratt. 270, 274; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Caton v. Caton*, L. R. 1 Ch. 137, 147; *Bond v. Hopkins*, 1 Sch. & Lef. 413, 433.

² *Tilton v. Tilton*, 9 N. H. 385, 390; *Malins v.*

Brown, 4 N. Y. 403; *Reed v. Reed*, 12 Pa. St. 117; *Danforth v. Laney*, 28 Ala. 274; *Cattlett v. Bacon*, 33 Miss. 269; *White v. Watkins*, 25 Mo. 423; *Anderson v. Simpson*, 21 Iowa, 399; *Pain v. Coombs*, 1 De G. & J. 34; *Shillibeer v. Jarvis*, 8 De G. M. & G. 79; *Coles v. Pilkington*, L. R. 19 Eq. 174.

³ *Gregg v. Hamilton*, 12 Kans. 333; *Poland v. O'Conner*, 1 Neb. 50; *Hoffman v. Fett*, 39 Cal. 109; *McCarger v. Rood*, 47 *Id.* 138; *Neales v. Neales*, 9 Wall. 1; *Green v. Finin*, 35 Conn. 178; *Mims v. Lockett*, 33 Ga. 9; *Wimberly v. Bryan*, 55 *Id.* 198; *Sackett v. Spencer*, 65 Pa. St. 89; *Moss v. Culver*, 64 *Id.* 414; *Ingles v. Patterson*, 36 Wis. 373; *Miller v. Tobie*, 41 N. H. 84; *Potter v. Jacobs*, 111 Mass. 32; *Freeman v. Freeman*, 43 N. Y. 34; *Cagger v. Lansing*, 43 *Id.* 550; *Adams v. Fullam*, 43 Vt. 592; *Peckham v. Parker*, 8 R. I. 17; *Wells v. Stradling*, 3 Ves. 378; *Stockley v. Stockley*, 1 V. & B. 23; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Surcome v. Penniger*, 3 De G. M. & G. 571; *Crook v. Corpor. of Seaford*, L. R. 6 Ch. 551; 10 Eq. 678; *Williams v. Evans*, L. R. 19 Eq. 547.

⁴ See *Twiss v. George*, 33 Mich. 253; *Johnson v. Hubbell*, 2 Stockt. Ch. 332; *Cronk v. Trumble*, 63 Ill. 482; *Edwards v. Estell*, 48 Cal. 194; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 284; *Davison v. Davison*, 2 Beasl. 246; *Vanduyne v. Vreeland*, 1 *Id.* 142, 151.

dies exists as a ground for assuming jurisdiction over the case, yet that circumstance alone will not enable the party plaintiff to ask of the court, as a matter of course, a decree for specific performance. It is still discretionary with the court, whether it will grant the decree, *i. e.*, there may be other circumstances in the case besides the want of a sufficient remedy at law, which would militate against the equitable claim of the plaintiff to specific performance. When it is stated that the exercise of jurisdiction for specific performance is discretionary, it is meant that a court will refuse to grant its decree, although the remedy at law may be inadequate, whenever the case is tainted with some inequitable feature or quality, and, in consequence, would make the specific enforcement of the contract inequitable or unjust, although the grounds for that conclusion are not such as would support the charge of fraud.¹

§ 497. **Essential elements to the exercise of jurisdiction.**—In further explanation of the doctrine, that it is discretionary with the court whether a decree for specific performance shall be granted, it must be explained that the court will refuse to grant the decree for specific performance, unless the contract contains certain essential elements. Some of these elements affect the validity of the contract, both at law and in equity; others are purely of an equitable character. Thus, the contract must be based upon a valuable and substantial consideration, and the seal of the contract would not so far import a consideration as to dispense with the necessity of proving its existence and character.² The contract must also be reasonably certain as to its subject-matter, and stipulations, and parties.³ It has also been held

¹ *Seaman v. Van Rensselaer*, 10 Barb. 81; *Plummer v. Keppler*, 26 N. J. Eq. 481; *Crane v. Decamp*, 21 *Id.* 414; *Merritt v. Brown*, *Id.* 401; *Smoot v. Rhea*, 19 Md. 398; *Godwin v. Collins*, 4 Houst. 28; *Humbar's Heirs v. Humbar's Heirs*, 3 Head, 100; *Lamare v. Dixon*, L. R. 6 H. L. 414, 423; *Tilley v. Thomas*, L. R. 3 Ch. 61, 72; *Mississippi, &c. R. R. v. Cromwell*, 1 Otto, 643; *Eastman v. Plumer*, 46 N. H. 464; *Sharp's Rifle M. Co. v. Rowan*, 35 Conn. 127; *Sherman v. Wright*, 49 N. Y. 227; *Cuff v. Dorland*, 55 Barb. 481; *Blackwilder v. Loveless*, 21 Ala. 371, 374; *Port Clinton R. R. v. Cleveland, &c. R. R.*, 13 Ohio St. 544, 549; *Rogers v. Saunders*, 16 Me. 92, 97; *Seymour v. Delancey*, 6 Johns. Ch. 222, 224; 3 Cow. 445; *Hale v. Wilkinson*, Gratt. 75, 80; *Cooper v. Pena*, 21 Cal. 403, 411; *Bruck v. Tucker*, 42 Cal. 346, 353; *Bogan v. Daughdrill*, 51 Ala. 312, 314; *Aston v. Robinson*, 49 Miss. 348, 351; *Daniel v. Frazier*, 40 *Id.* 507; *Welse's Appeal*, 72 Pa. St. 351, 354; *Snell v. Mitchell*, 65 Me. 48, 50; *Phillips v. Stauch*, 20 Mich. 369; *Bowman v. Cunningham*, 78 Ill. 48; *Auter v. Miller*, 18 Iowa, 405; *St. Paul Division, &c. v. Brown*, 9 Minn. 157; *Burke v. Seely*, 46 Mo. 334; *Taylor v. Williams*, 45 *Id.* 80; *Fish v. Leser*, 69 Ill. 394, 395; *Stone v. Pratt*, 25 *Id.* 25, 34; *Quinn Roath*, 37 Conn. 16, 24; *McComas v. Easley*, 21

Gratt. 23, 29; *Radcliffe v. Warrington*, 12 Ves. 326, 332; *Joynes v. Statham*, 3 Atk. 388; *Underwood v. Hitchcox*, 1 Ves. Sen. 279; *Willard v. Tayloe*, 8 Wall. 557, 565; *Marble Co. v. Ripley*, 10 *Id.* 339, 356; *Lowry v. Buffington*, 6 W. Va. 249, 255; *Fish v. Lighter*, 44 Mo. 268, 272.

² *Vasser v. Vasser*, 23 Miss. 378; *Estate of Webb*, 49 Cal. 541, 545; *Murphy v. Rooney*, 45 *Id.* 78; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Burling v. King*, 66 Barb. 633; *Butman v. Porter*, 100 Mass. 337; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Ord v. Johnston*, 1 Jur. n. s., 1063, 1065; *Houghton v. Lees*, 1 *Id.* 862, 863.

³ *Long v. Duncan*, 10 Kans. 294; *Agard v. Valencia*, 39 Cal. 292; *Odell v. Morin*, 5 Oreg. 96; *Lynes v. Hayden*, 119 Mass. 482; *Hyde v. Cooper*, 13 Rich. Eq. 250; *Bowman v. Cunningham*, 78 Ill. 48; *Miller v. Campbell*, 53 Ind. 125; *Munsell v. Loree*, 21 Mich. 491; *McClintock v. Laing*, 22 *Id.* 212; *Wright v. Wright*, 31 *Id.* 380; *Tiernan v. Gibney*, 24 Wis. 190; *Mastin v. Halley*, 61 Mo. 196; *Carr v. Passaic, &c. Co.*, 22 N. J. Eq. 85; 19 *Id.* 424; *Potts v. Whitehead*, 20 *Id.* 55; *Reese v. Reese*, 41 Md. 554; *Hardesty v. Richardson*, 44 *Id.* 617; *Pierce's Heirs v. Catron's Heirs*, 23 Gratt. 588; *Allen v. Webb*, 64 Ill. 342; *Marsh v. Milligan*, 3 Jur. n. s., 979; *Morrison v. Barrow*, 1 De G. F. & J. 633; *Taylor v.*

by some of the cases, that the contract must be mutual in its obligations;¹ but this is not to be understood as holding that there cannot be a specific performance of a unilateral contract.² It is also provided that no contract will be specifically enforced by equity, where such contract has been procured by fraud, or misrepresentation of any sort; or where it is the result of a mistake or accident, or is tainted with illegality. The right to specific performance as affected by fraud, mistake or illegality, has been already fully explained in preceding chapters on mistake and fraud.³ The court of equity will also refuse to grant a decree for specific performance whenever the contract is attended with some inequitable feature which would, nevertheless, not furnish a ground for avoidance or defense at law. Thus, in order that a court of equity may decree a specific performance, it is required that the contract must be perfectly fair, equal and just in all its terms. Any unfairness or inequality in such terms, which would be pronounced to be unjust or unfair by the court of equity, would be a justification for refusing the decree for specific performance, although the same contract will not be invalid at law on the same grounds.⁴ These, of course, are cases in which there is no charge of actual fraud, and where the non-performance of the contract would not operate as a breach of trust.⁵ Courts of equity will also refuse specific performance, where the performance of the contract will work an injury to third persons.⁶ Another requirement is, that the remedy of performance will not be harsh or oppressive. The oppression or hardship, which may furnish a reason for refusing specific performance, may either result from the fact that the contract itself is an unconscionable bargain, or from the very nature of the terms of such contract or the circumstances surrounding the parties or the subject-matter of the contract.⁷ A com-

Portington, 7 De G. M. & G. 328; Pearce v. Watts, L. R. 20 Eq. 492; Tallman v. Franklin, 14 N. Y. 584; Stanton v. Miller, 58 Id. 192; Nichols v. Williams, 22 N. J. Eq. 63; McGuire v. Stevens, 42 Miss. 724; Bell v. Bruen, 1 How. (U. S.) 169; Hopkins v. Roberts, 54 Md. 312; McCornack v. Sage, 87 Ill. 484.

¹ Butman v. Porter, 100 Mass. 337; Sullings v. Sullings, 9 Allen, 234; Moore's Adm'rs v. Fitz Randolph, 6 Leigh, 175; Flight v. Bolland, 4 Russ. 298; Blanchard v. Detroit, & C. R. R., 31 Mich. 43; Maynard v. Brown, 41 Id. 298; Hopkins v. Roberts, 54 Md. 312; Beard v. Linthicum, 1 Md. Ch. 345; Reese v. Reese, 41 Md. 554; Benedict v. Lynch, 1 Johns. Ch. 370; German v. Machin, 6 Paige, 288; Meason v. Kaine, 63 Pa. St. 335; Bromley v. Jeffries, 2 Vern. 415; Rogers v. Saunders, 16 Me. 92; Duvall v. Meyers, 2 Md. Ch. 401.

² Ewins v. Gordon, 49 N. H. 444; Jones v. Robbins, 29 Me. 351; Barnard v. Lee, 97 Mass. 92; Palmer v. Scott, 1 Russ. & My. 391.

³ As to accident and mistake, see § 198. As to fraud, see § 216.

⁴ Osgood v. Franklin, 2 Johns. Ch. 1, 23; Minturn v. Seymour, 4 Id. 497; St. John v. Bene-

dict, 6 Id. 111; Acker v. Phoenix, 4 Paige, 305; Howard v. Moore, 4 Sneed, 317; Bowman v. Cunningham, 78 Ill. 48; Twining v. Morrice, 2 Bro. Ch. 326; Revell v. Hussey, 2 Ball & B. 280, 288; Willard v. Tayloe, 8 Wall. 557; Marble Co. v. Ripley, 10 Id. 339; Jackson v. Ashton, 11 Peters, 229; McNeil v. Magee, 5 Mason, 244; Margraf v. Muir, 57 N. Y. 155; see Vigers v. Pike, 8 Cl. & Fin. 562, 645, *per* Lord Cottenham; Willan v. Willan, 16 Ves. 72, 83; Savage v. Brooksopp, 18 Id. 335; Tam v. Lavalle, 92 Ill. 263; Foll's Appeal, 91 Pa. St. 434; Brake v. Bal-lou, 19 Kans. 397; Nims v. Vaughn, 40 Mich. 356; Fitzpatrick v. Dorland, 27 Hun, 291; Schuessler v. Hatchett, 59 Ala. 181; Race v. Weston, 86 Ill. 91; Shriver v. Seiss, 49 Md. 384; Abbott v. L'Hommiedieu, 10 W. Va. 677; White v. McGannon, 29 Gratt. 511; Shaddle v. Dis-borough, 30 N. J. Eq. 370; Coe v. N. J. Midland Ry., 31 Id. 105; Tillotson v. Gesner, 33 Id. 313; Chicago, & C. R. v. Schoeneman, 90 Ill. 258.

⁵ Harnett v. Yielding, 2 Sch. & Lef. 548, 553; White v. Cuddon, 8 Cl. & Fin. 766.

⁶ Thomas v. Dering, 1 Keen, 729; Curran v. Holyoke W. Co., 116 Mass. 90.

⁷ Cannaday v. Shepard, 2 Jones Eq. 224; Bar-

mon explanation of the refusal of a court of equity to grant specific performance on account of the hardness of the remedy in the particular case, will be shown in the attitude of a court of equity in respect to the enforcement of conditions or forfeitures. It is an invariable rule of equity, in respect to conditions, that it will never enforce a forfeiture.¹

§ 498. **Performance by plaintiff, how far a condition precedent.**—It is a fundamental rule of law and of equity that, in order that a plaintiff may sustain an action for the breach of a contract of the defendant, the plaintiff must either have actually performed his part of the contract or must be ready, willing, and able to do so. If he is unwilling or unable to do all the acts required of him under the contract, then he cannot lay claim to any specific performance of such contract by the other party; for the performance of at least some of his obligations under the contract is a condition precedent to his claim for specific performance of the contract by the defendant.² Among the illustrations of a failure or inability of the plaintiff to perform the contract, which would be considered as a bar to the action for specific performance of contracts, is in the sale of lands, where the vendor fails to make a good title to the land or is unable to do so. His failure of title to the subject-matter of the contract would be a bar to a decree of specific performance; the vendee, in other words, is not compelled to take a defective title to the property.³ But if the defect or failure of title is partial and immaterial, so that the title which he tenders in the performance of his contract is substantially what is agreed upon by the parties, the court may, nevertheless, grant the decree with compensation to the purchaser for that partial defect or

nett v. Spratt's Adm'r, 4 Ired. Eq. 171; *Stone v. Pratt*, 25 Ill. 25; *Chicago, &c. R. R. v. Schoeneman*, 90 Ill. 258; *Coe v. N. J. Midland Ry.*, 31 N. J. 105; *Cathcart v. Robinson*, 5 Peters, 263; *Tobey v. County of Bristol*, 3 Story, 800; *Margraf v. Muir*, 57 N. Y. 155; *Clark v. Rochester, &c. R. R.*, 18 Barb. 350; *Weise's Appeal*, 72 Pa. St. 351; see cases cited *ante*, under § 1404; *Gould v. Kemp*, 2 My. & K. 304, 308; *Kimberley v. Jennings*, 6 Sim. 340; *Willard v. Tayloe*, 8 Wall. 557; *Marble Co. v. Ripley*, 10 Id. 339.

¹ See *ante*, § 37.

² *Ludlum v. Buckingham*, 35 N. J. Eq. 71; *Kinney v. Redden*, 2 Del. Ch. 46; *Rogers v. Taylor*, 40 Iowa, 193; *Wass v. Mugridge*, 128 Mass. 394; *Jenkins v. Harrison*, 66 Ala. 345; *Selleck v. Tallman*, 87 N. Y. 106; *McHugh v. Wells*, 39 Mich. 175; *Russell v. Nester*, 46 Id. 290; *Secrest v. McKenna*, 1 Strobb. Eq. 356; *Brown v. Hayes*, 33 Ga. (Supp.) 136; *Tyler v. McCardle*, 9 Sm. & Mar. 230; *Richardson v. Linney*, 7 B. Mon. 571; *O'Kane v. Kiser*, 25 Ind. 168; *Allen v. Atkinson*, 21 Mich. 351; *Lloyd v. Collett*, 4 Bro. Ch. 469; 4 Ves. 690 n; *Harrington v. Wheeler*, 4 Ves. 698; *Merritt v. Brown*, N. J. Eq. 401; *Earl v. Halsey*, 1 McCart. 332; *Buchanan v. Lorman*, 3 Gill, 51, 77; *McComas v. Easley*, 21 Gratt. 23;

Vail v. Nelson, 4 Rand. 478; *Blackmer v. Phillips*, 67 N. C. 340; *King v. Ruckman*, 21 N. J. Eq. 599; *Thorp v. Pettit*, 16 Id. 488; *Crane v. Decamp*, 21 Id. 414; *Longworth v. Taylor*, 1 McLean, 395; *Sullings v. Sullings*, 9 Allen, 234; *Wood v. Perry*, 1 Barb. 114; *Burling v. King*, 66 Id. 633; *Van Campen v. Knight*, 63 Id. 205; *Reeves v. Kimball*, 40 N. Y. 299; *Murray v. Spicer*, L. R. 5 Eq. 527, 537; *Colson v. Thompson*, 2 Wheat. 336; *Watts v. Waddle*, 6 Pet. 389; *Boone v. Mo. Iron Co.*, 17 How. (U. S.) 340; *McNeil v. Magee*, 5 Mason, 244.

³ *Lyles v. Kirkpatrick*, 9 S. C. 265; *Rader v. Neal*, 13 W. Va. 373; *Hymers v. Branch*, 6 Mo. App. 511; *Chrisman v. Partee*, 38 Ark. 31; *Mitchell v. Steinmetz*, 97 Pa. St. 251; *Jenkins v. Fahey*, 73 N. Y. 355; *Bensel v. Gray*, 80 Id. 517; *Swepson v. Johnston*, 84 N. C. 449; *Hancock v. Bramlett*, 85 Id. 393; *Cunningham v. Sharp*, 11 Humph. 118, 121; *Jeffries v. Jeffries*, 117 Mass. 184; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Vreeland v. Blauvelt*, 23 Id. 483; *Cornell v. Andrews*, 35 Id. 7; *King v. Knapp*, 59 N. Y. 462; *Hepburn v. Auld*, 5 Cranch, 262; *Hoover v. Calhoun*, 16 Gratt. 109; *Jackson v. Ligon*, 3 Leigh, 160; *Bryan v. Read*, 1 Dev. & Bat. Eq. 78.

failure of the subject-matter of the contract.¹ But the defect or failure must be immaterial in extent or quantity, as in the case of a quantity of land, in order that such failure may not operate as a bar to the decree for specific performance. If the failure in the amount of land, or the defect of title to such land, is material, and under the circumstances a decree for specific performance would work a positive injury to the defendant, then a decree would be refused.² In order that the defendant might successfully resist the decree for specific performance of a contract for the sale of land, it is not necessary for such defendant to show a proof positive of a material defect in the title or quantity of such land. It is sufficient, as a defense to the plaintiff's cause of action, if upon the face of the pleadings, or by the evidence introduced by the plaintiff, there is a reasonable doubt as to the character or extent of the plaintiff's title to the land; the existence of a reasonable doubt in itself is a reasonable objection to the decree for specific performance. The burden is on the plaintiff, in all suits for a decree for specific performance, of proving that he has the perfect title to the land; and as long as there is any reasonable doubt remaining, as to his title to the property, the decree for specific performance will be denied.³

§ 499. **When tender of performance by plaintiff is necessary.**—The rules of equity, in respect to the necessity of the tender or performance of a contract by the plaintiff, are generally not so stringent as in law. Where the stipulations of the contract are mutual and actually dependent upon the other; as, for example, where the deed is to be delivered upon the payment of the price; there is no breach of the contract by one until there has been a tender of performance of the contract by the other: and hence it is necessary for such tender or demand of performance to be shown as a ground for application to equity for specific performance.⁴ And so, also, where the time of payment by the vendee is made an essential element, so that if the payment is not actually made on the day mentioned or within the time agreed

¹ *Halsey v. Grant*, 13 Ves. 73, 77; *Guest v. Homfray*, 5 *Id.* 818; *Mortlock v. Buller*, 10 *Id.* 292, 306; *McQueen v. Farquhar*, 11 *Id.* 467; *Foley v. Crow*, 37 Md. 51.

² *Havens v. Bliss*, 26 N. J. Eq. 363; *Gregory v. Perkins*, 40 Iowa 32; *Walsh v. Barton*, 24 Ohio St. 28; *Bogan v. Daughdrill*, 51 Ala. 312; *Peers v. Lambert*, 7 Beav. 546; *Howard v. Kimball*, 65 N. C. 175; *Griffin's Ex'r v. Cunningham*, 19 Gratt. 571; *Smith v. Turner*, 50 Ind. 367.

³ *Chrisman v. Partee*, 38 Ark. 31; *Hymers v. Branch*, 6 Mo. App. 511; *Luse v. Deltz*, 46 Iowa, 205; *Rader v. Neal*, 13 W. Va. 373; *Swepson v. Johnston*, 84 N. C. 449; *Hancock v. Bramlett*, 85 N. C. 393; *Lyles v. Kirkpatrick*, 9 S. C. 265; *Watts v. Waddle*, 1 McLean, 200; *Jenkins v. Fahey*, 73 N. Y. 355; *Cornell v. Andrews*, 35 N. J. Eq. 7; *Mitchell v. Steinmetz*, 97 Pa. St. 251; *Kostenbader v. Spotts*, 80 Pa. St. 430; *Pratt v.*

Eby, 67 *Id.* 396; *Walsh v. Hall*, 66 N. C. 233; *Allen v. Atkinson*, 21 Mich. 351; *Powell v. Conant*, 33 *Id.* 296; *Morgan's Heir's v. Morgan*, 2 Wheat. 290; *Longworth v. Taylor*, 1 McLean, 395; *Bates v. Delavan*, 5 Paige, 299; *Seymour v. Delancey*, Hopk. Ch. 436; *Jeffries v. Jeffries*, 117 Mass. 184; *Sturtevant v. Jaques*, 14 Allen, 523; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Dobbs v. Norcross*, 24 *Id.* 327; *Pyrke v. Wadingham*, 10 Hare, 1; *Radford v. Willis*, L. R. 7 Ch. 7; *Alexander v. Mills*, L. R. 6 Ch. 124; *Beioley v. Carter*, L. R. 4 Ch. 230; *Collier v. McBean*, L. R. 1 Ch. 81; *Rede v. Oakes*, 4 De G. J. & S. 505; *Bensel v. Gray*, 30 N. Y. 517.

⁴ *Van Campen v. Knight*, 63 Barb. 205; *Irvin v. Bleakley*, 67 Pa. St. 24, 28; *Crabtree v. Leavings*, 53 Ill. 526; *Hubbel v. Von Schoening*, 49 N. Y. 326, 331 *Leaird v. Smith*, 44 *Id.* 618.

upon, the vendee may treat the contract as at an end; in such a case, the actual tender of payment within the time agreed upon is essential, and must be proved before the decree for specific performance can be granted.¹ Where time is not essential in the performance of the contract, and the stipulations are not exclusively dependent one upon the other, but only presumptively so, the cases are conflicting as to whether a tender of performance is required to be made by the plaintiff before bringing his suit. Some maintain that a tender must be made and performance demanded by the plaintiff before he brings his suit, whether the suit be brought by the vendee,² or by the vendor.³ Some of the cases, however, cited in the preceding notes, require tender but dispense with the necessity of a demand of performance by the vendee.

According to another set of decisions, an actual tender or demand by the plaintiff, prior to the bringing of his suit for specific performance, is not necessary, where the time of performance is not stipulated, and he is ready and willing at the time of bringing his suit to perform his part of the contract; and this is the rule, as maintained by those cases, whether the action for specific performance is brought by the vendee,⁴ or by the vendor.⁵ An actual tender of performance is never required by the plaintiff prior to the institution of the action for specific performance, where the acts of the defendant, or the situation of the property, show that such tender would be altogether useless or impossible. Thus, for example, if the defendant has openly refused to perform his part of the contract, it would be useless for the plaintiff to make the required tender of performance on his part.⁶ So, also, if, at the time stipulated, the vendor was unable to convey title on account of a defect of title, the tender would not be required,⁷ unless the terms of the contract made the time of performance of the contract essential.⁸

¹ *Heuer v. Rutkowski*, 18 Mo. 216; *Duffy v. O'Donovan*, 46 N. Y. 223; *Tobey v. Foreman*, 79 Ill. 489; *Gale v. Archer*, 42 Barb. 320; *Wells v. Smith*, 2 Edw. Ch. 78; *Kimball v. Tooke*, 70 Ill. 553; *Phelps v. Illinois Cent. R. R.*, 63 *Id.* 468.

² *Deichmann v. Deichmann*, 49 Mo. 107; *Brock v. Hidy*, 13 Ohio St. 306, 310; *Rogers v. Taylor*, 40 Iowa, 193; *Bearden v. Wood*, 1 A. K. Marsh. 450; *Hall v. Whittier*, 10 R. I. 530; *Duff v. Fisher*, 15 Cal. 375, 381; *Mather v. Scoles*, 35 Ind. 1; *Fall v. Hazelrigg*, 45 *Id.* 576; *Lynch v. Jennings*, 43 *Id.* 276, 286; *Hart v. McClellan*, 41 Ala. 251; *Bell v. Thompson*, 34 *Id.* 633; *Klyce v. Broyles*, 37 Miss. 524; *Mhoon v. Wilkerson*, 47 *Id.* 633; *Gray v. Dougherty*, 25 Cal. 266, 278, 282; *Jones v. Petaluma*, 36 *Id.* 230, 232; *Marshall v. Caldwell*, 41 *Id.* 611, 615.

³ *Klyce v. Broyles*, 37 Miss. 524; *Ex parte Hodges*, 24 Ark. 197; *Corbas v. Teed*, 69 Ill. 205; *Thompson v. Smith*, 63 N. Y. 301.

⁴ *Freeson v. Bissell*, 63 N. Y. 168, 170; *Chess' Appeal*, 4 Barr. 52; *Smoot v. Rea*, 19 Md. 398, 410; *Maughlin v. Perry*, 35 *Id.* 352; *Morris v. Hoyt*, 11 Mich. 9, 18; *Seeley v. Howard*, 13 Wis.

336; *St. Paul's Division, &c. v. Brown*, 9 Minn. 157; *Wells v. Smith*, 2 Edw. Ch. 78; 7 Paige, 22; *Irvine v. Gregory*, 13 Gray, 215, 218; *Park v. Johnson*, 4 Allen, 259; *Stevenson v. Maxwell*, 2 N. Y. 408, 415; *Bruce v. Tilson*, 25 *Id.* 194, 197, 203.

⁵ *Winton v. Sherman*, 20 Iowa, 295; *Seeley v. Howard*, 13 Wis. 336; *Woodson's Adm'rs v. Scott*, 1 Dana, 470; *Stevenson v. Maxwell*, *Bruce v. Tilson*, *Freeson v. Bissell*, *supra*; *Hawk v. Greensweig*, 2 Barr. 295.

⁶ *Waite v. Dobson*, 17 Gratt. 262; *Brock v. Hidy*, 13 Ohio St. 306, 310; *Brown v. Eaton*, 21 Minn. 409, 411; *Gill v. Newell*, 13 *Id.* 462, 473; *Deichmann v. Deichmann*, 49 Mo. 107; *Gray v. Dougherty*, 25 Cal. 266, 280, 281; *Hunter v. Daniel*, 4 Hare, 420, 433; *Mattocks v. Young*, 66 Me. 459, 467; *Crady v. Smith*, 2 N. Y. 60, 65; *Kerr v. Purdy*, 50 Barb. 24; *Maxwell v. Pittenger*, 2 Green Ch. 156.

⁷ *Young v. Daniels*, 2 Iowa, 126; *Gray v. Dougherty*, 25 Cal. 266, 280; *Karker v. Haverly*, 50 Barb. 79; *Delavan v. Duncan*, 49 N. Y. 485, 487; *Hall v. Whittier*, 10 R. I. 530.

⁸ *Kimball v. Tooke*, 70 Ill. 553.

§ 500. **How far right to specific performance is affected by time.**—Delay in the performance of a contract by the plaintiff will affect the right to its specific enforcement more or less, according to the character of the provision of the contract, in respect to the time in which the contract must be performed; and in this connection, the stipulations as to time of performance will vary in effect and value, according to whether such stipulation is pronounced to be essential, material, or immaterial. In all ordinary cases, as in contracts for the sale of lands, if there is nothing special in its terms which would make it necessary or reasonable for a court to presume that the time of performance is essential, the court of equity will rather presume the stipulation as to time to be more formal than essential; and will permit the party, who has allowed the period of performance to pass by, to perform such acts after the lapse of such time, and to compel the performance by the other party, notwithstanding the delay.¹ Mere delay, in other words, in the performance of a contract by the plaintiff, will not in itself ordinarily furnish any ground for refusing specific performance, unless such delay was unreasonably long or was intentional. Where the delay is accounted for, and is shown to have worked no injury to the other party which is beyond the means of reparation, a court of equity will, notwithstanding such delay, decree specific performance and grant in such decree an allowance to the defendant, for whatever injury he might have suffered from or through such delay.² The time of performance is essential, whenever the intention of the parties to make it so is clear; and when that is the case, the performance of the contract within the time stipulated is absolutely essential, and a failure to perform within that time will defeat the right to a decree for specific performance.³ The intention to make the time of performance essential may be shown by the express stipulations of the contract; but no particular form of expression is required to manifest that intention, provided the contract shows in its terms the intention

¹ *Van Campen v. Knight*, 63 Barb. 205; *Sharp v. Trimmer*, 24 N. J. Eq. 422; *King v. Ruckman*, 20 *Id.* 316; *Smoot v. Rea*, 19 Md. 399; *Scarlett v. Stein*, 40 *Id.* 512; *Brock v. Hidy*, 13 Ohio St. 305; *Keller v. Fisher*, 7 Ind. 718; *Shafer v. Niver*, 9 Mich. 253; *Snyder v. Spaulding*, 57 Ill. 480; *Seton v. Slade*, 7 Ves. 265, *per* Lord Eldon; *Decamp v. Feay*, 5 Serg. & R. 323, *per* Gibson, J.; *Vyse v. Foster*, L. R. 7 H. L. 318; *Spaulding v. Alexander*, 6 Bush, 160; *Walton v. Wilson*, 30 Miss. 576; *Morgan v. Bergen*, 3 Neb. 209; *Prince v. Griffin*, 27 Iowa, 514; *Knott v. Stephens*, 5 Oreg. 235; *Steele v. Branch*, 40 Cal. 3; *Hull v. Sturdivant*, 46 Me. 34; *Dresel v. Jordan*, 104 Mass. 407; *Quinn v. Roath*, 37 Conn. 16; *Edgerton v. Peckham*, 11 Paige, 352; *Hubbell v. Von Schoening*, 49 N. Y. 326.

² *Parsons v. Gilbert*, 45 Iowa, 33; *Chadwell v. Winston*, 3 Tenn. Ch. 110; *Henderson v. Hicks*, 58 Cal. 364; *Burton v. Adkins*, 2 Del. Ch. 125;

Davison v. Jersey Co. Ass., 71 N. Y. 333; *Wonson v. Fenno*, 129 Mass. 405; *Snider v. Lehnerr*, 5 Oreg. 385; *Peck v. Brighton Co.*, 69 Ill. 200; *Beach v. Dyer*, 93 *Id.* 295; *Tilton v. Stein*, 87 *Id.* 122; *Jones v. Jones*, 11 Phila. 559; *Russell v. Baughman*, 94 Pa. St. 400; *Converse v. Blumrich*, 14 Mich. 109, 114; *Shortall v. Mitchell*, 57 Ill. 161; *Decamp v. Feay*, 5 Serg. & R. 323, 327; *Edgerton v. Peckham*, 11 Paige, 352, 359; *McClartey v. Gokey*, 31 Iowa, 505; *Grey v. Tubbs*, 43 Cal. 359; *Longworth v. Taylor*, 1 McLean, 395; 14 Peters, 172, *per* Story, J.; *Moote v. Scriven*, 33 Mich. 500; *Brassell v. McLemore*, 50 Ala. 476; *Sharp v. Timmer*, 24 N. J. Eq. 422; *Pritchard v. Todd*, 38 Conn. 413.

³ *King v. Ruckman*, 20 N. J. Eq. 316; *Prince v. Griffin*, 27 Iowa, 514; *Knott v. Stephens*, 5 Oreg. 235; *Grey v. Tubbs*, 43 Cal. 359; *Hipwell v. Knight*, 1 Y. & C. Ex. 401; *Quinn v. Roath*, 37 Conn. 16; *Miller's Adm'r v. Miller*, 25 N. J. Eq. 354.

of the party to consider such contract null and void, unless it be performed within the stipulated time.¹ So, also, time may be made essential by a notice given by one party to the other, subsequent to the execution of the contract, that if the contract is not performed within a prescribed period, it will be abandoned.² But the time of performance may also be considered essential, and the intention of the parties to make it so may be inferred from the subject-matter and object of the contract; as, for example, where the market price of the subject-matter of the contract fluctuates rapidly, and any delay would involve great damage or injury to the parties through these fluctuations in value. Time may be inferred, from this circumstance, to have been intended by the parties as an essential element of the contract.³ Distinction must be made here between the stipulations as to time of performance which are essential, and those which are material. Although the time of performance is not ordinarily essential, or in the nature of an absolute condition precedent, yet it is, as a general rule, material; and where it is material, it is necessary for the party plaintiff, who is charged with delay in the performance of his part of the contract, to give a reasonable account of the cause of such delay, in order to lay claim to the right to the decree for specific performance. If the delay is not shown by the plaintiff to be reasonable, the court will refuse the specific performance; for the plaintiff must show himself to have been ready, desirous and able to perform his part of the contract.⁴

§ 501. **The effect of events occurring without the agency of the parties in contracts for the sale of lands.**—In contracts for the sale of lands, the court of equity applies the doctrine of equitable

¹ *Goldsmith v. Guild*, 10 Allen, 239; *Hoyt v. Tuxbury*, 70 Ill. 331; *Holt v. Rogers*, 8 Pet. 420; *Brashier v. Gratz*, 6 Wheat. 528; *Hepburn v. Auld*, 5 Cranch, 262; *Jennisons v. Leonard*, 21 Wall. 302; *Jones v. Robbins*, 29 Me. 351; *Hipwell v. Knight*, 1 Y. & C. Ex. 491, 496; *Doloret v. Rothschild*, 1 S. & S. 590; *McKay v. Carrington*, 1 McLean, 50.

² *Thompson v. Dulles*, 5 Rich. Eq. 370; *Smith v. Lawrence*, 15 Mich. 499; *Reed v. Breeden*, 61 Pa. St. 460; *Reynolds v. Nelson*, 6 Madd. 18; *Eads v. Williams*, 4 De G. M. & G. 674; *Rogers v. Saunders*, 16 Me. 92; *Wiswell v. McGowan*, Hoff. Ch. 125.

³ *Phelps v. Ill. Cent. R. R.*, 63 Ill. 468; *Peck v. Brighton Co.*, 69 Ill. 200; *Kimball v. Tooke*, 70 Id. 553; *Davis v. Stevens*, 3 Iowa, 158; *O'Fallon v. Kennerly*, 45 Mo. 124; *Morgan v. Bergen*, 3 Neb. 209; *Snider v. Lehnher*, 5 Ore. 385; *Grey v. Tubbs*, 43 Cal. 359; *Baldwin v. Van Vorst*, 2 Stockt. Ch. 577; *Bullock v. Adams' Ex'rs*, 20 N. J. Eq. 367, 371; *Reed v. Breeden* 61 Pa. St. 460; *Jackson v. Breeden*, 61 Pa. St. 460; *Jackson v. Ligon*, 3 Leigh, 160, 187; *Kirby v. Harrison*, 2 Ohio St. 326, 332; *Scott v. Fields*, 7 Ohio, 424; *Hudson v. Bartram*, 3 Madd. 440; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Wells v.*

Smith, 2 Edw. Ch. 76; 7 Paige, 22; *Barnard v. Lee*, 97 Mass. 92; *Goldsmith v. Guild*, 19 Allen, 239; *Quinn v. Roath*, 37 Conn. 16.

⁴ *Henderson v. Hicks*, 58 Cal. 364; *Burton v. Adkins*, 2 Del. Ch. 125; *Wonson v. Fenno*, 129 Mass. 405; *Russell v. Baughman*, 94 Pa. St. 400; *Jones v. Jones*, 11 Phila. 559; *Lloyd v. Collett*, 4 Bro. Ch. 469; *Alley v. Deschamps*, 13 Ves. 225; *McMurray v. Spicer*, L. R. 5 Eq. 527, 537; *Hubbell v. Von Schoening*, 58 Barb. 498; 49 N. Y. 326; *Eppinger v. McGreal*, 31 Tex. 147; *Campbell v. Hicks*, 19 Ohio St. 433; *Mix v. Baldue*, 78 Ill. 215; *Kinney v. Redden*, 2 Del. Ch. 46; *Russell v. Nester*, 46 Mich. 290; *Beach v. Dyer*, 93 Ill. 295; *Tilton v. Stein*, 87 Id. 122; *Parsons v. Gilbert*, 45 Iowa, 33; *Chadwell v. Winston*, 3 Tenn. Ch. 110; *Peck v. Brighton Co.*, 69 Ill. 200; *McDermid v. McGregor*, 21 Minn. 111; *Ritson v. Dodge*, 33 Mich. 463; *Delaven v. Duncan*, 49 N. Y. 485; *Finch v. Parker*, Id. 1; *Hawley v. Jelly*, 25 Mich. 94; *McLaurie v. Barnes*, 72 Ill. 73; *Roby v. Cossit*, 78 Id. 638; *Ludlum v. Buckingham*, 35 N. J. Eq. 71; *Davidson v. Jersey Co. Ass.*, 6 Hun, 470; 71 N. Y. 333; *Boyd v. Schlesinger*, 59 N. Y. 301, 305; *Williams v. Hart*, 116 Mass. 513; *Steele v. Branch*, 40 Cal. 3; *Green v. Covillaud*, 10 Cal. 817.

conversion and treats the vendor of such contract as trustee for the vendee, who bears to the land and the vendor the character of a *cestui que trust*; while the vendee is trustee for the vendor, in respect to the purchase price, and the vendor the *cestui que trust* as to such purchase price.¹ The performance of this executory contract then operates only to transfer to the vendee the legal title to the land, and to the vendor the legal title to the purchase price; hence, the vendee, in respect to the equitable ownership in the land acquired through the executory contract of sale, assumes all of the risks of losses or damages that might befall the subject-matter of the contract. And such loss, therefore, falls upon him whenever it occurs either through fire or other damage due to the elements, and cannot, under a claim of being a failure of the subject-matter of the contract, serve as a defense to the action for specific performance, as long as such loss cannot be laid to the negligence of the plaintiff in the performance of his duty as a trustee; in other words, the destruction of the subject-matter, wholly or in part, pending the completion of the contract of sale, will not be a defense to the action for specific performance of such a contract, as long as such losses are not the consequence of the negligence, or default, or unwarrantable delay of the vendor.²

A right to a decree for specific performance also depends upon the ability of the court to enforce its decree. Not only will a court of equity refuse its relief in cases where the legal remedy is adequate, but it will also refuse to make a decree where, either on account of its character or on account of the character of the contract, the decree for specific performance would be nugatory. There are three classes of cases in which the nugatory character of the decree for specific performance would be a ground for refusing such equitable relief: One class includes the cases where, by the other terms of the contract, the defendant would be entitled at any time to terminate the agreement, and thus avoid the performance of the contract in obedience to the decree of the contract; as in the case of partnership agreements,³ and agreements for submission of contracts to arbitration, before an award has been made.⁴ The second class of cases includes those

¹ See *ante*, § 166; *Coman v. Lakey*, 80 N. Y. 345, 350; *Pelton v. Westchester F. Ins. Co.*, 77 *Id.* 605, 607.

² *Paine v. Meller*, 6 Ves. 349; *Cass v. Rudele*, 2 Vern. 280; *Mortimer v. Capper*, 1 Bro. Ch. 156; *Jackson v. Lever*, 3 *Id.* 605; *Richter v. Selin*, 8 Serg. & R. 425, 440; *Brewer v. Herbert*, 30 Md. 301; *Robb v. Mann*, 1 Jones, (Pa.) 300; *Wyvill v. Bp. of Exeter*, 1 Price, 292; *Paine v. Meller*, 6 Ves. 349; *Christian v. Cabell*, 29 Gratt. 82; *Griffin's Ex'r v. Cunningham*, 19 *Id.* 571; *Booten v. Sheffer*, 21 *Id.* 474; *Merritt v. Brown*, 19 N. J. Eq. 286; *Kirby v. Harrison*, 2 Ohio St. 326; *Andrews v. Bell*, 56 Pa. St. 343; *Lee v. Kirby*, 104 Mass. 420, 428; *Ewing v. Beauchamp*,

6 B. Mon. 422; *Cooper v. Pena*, 21 Cal. 403; *Willard v. Tayloe*, 8 Wall. 558, 571; *Marble Co. v. Ripley*, 10 *Id.* 339; *Hale v. Wilkinson*, 21 Gratt. 75; *Ambrouse's Heirs v. Keller*, 23 *Id.* 769.

³ *Meason v. Kaine*, 63 Pa. St. 335; *Manning v. Wadsworth*, 4 Md. 59; *Reed v. Vidal*, 5 Rich. Eq. 289; and see *Rust v. Conrad*, 47 Mich. 449; *Scott v. Rayment*, L. R. 7 Eq. 112; *Hercy v. Birch*, 9 Ves. 357; *Sheffield, &c. Co. v. Harrison*, 17 Beav. 294; *England v. Curling*, 8 *Id.* 129; *Tobey v. Co. of Bristol*, 3 Story, 800; *Buck v. Smith*, 29 Mich. 166.

⁴ *Noyes v. Marsh*, 123 Mass. 286; *Conner v. Drake*, 1 Ohio St. 166; *King v. Howard*, 27 Mo. 21; *Price v. Williams*, cited 6 Ves. 818; *Street*

in which the defendant is not at the time of the decree in a position to carry out the decree of the court. The common illustration of this class of cases is where the contract is for the sale of a specific property, and the decree is for a specific performance of that contract; and at the time, when the decree was rendered, the vendor or defendant had neither the possession nor title of such property, and thus was unable to comply with the decree for specific performance. The fact that the defendant did not know or possess the subject-matter of the contract when that contract was made, is no ground for refusing a decree for specific performance, if such property and its possession is acquired prior to the rendition of the decree.¹ But if, at the time the decree is asked for, the vendor has not the title and possession, as where he has sold the same and transferred it to another *bona fide* purchaser, the court will not decree specific performance, on the ground that the superior title to the property has thus been acquired by a *bona fide* purchaser, which would supersede the claim of the plaintiff to the same property under the executory contract of sale.² But if a vendor, after the execution of his contract of sale, should undertake to transfer or sell the same property to another, who takes it with the knowledge of the prior contract of sale of the same property, he cannot claim to be a *bona fide* purchaser, although he pays full value for the same. It is a case of constructive fraud upon the prior vendee, which would enable such vendee to claim a superior right to such property; and the fact that this subsequent sale was made under these circumstances would not be any ground for refusing the decree for specific performance, which would operate not only against the vendor, but against the second purchaser. In order that a subsequent sale of the subject-matter of the contract, for which specific performance is asked, may operate as a bar to the decree for specific performance, the second sale must have been made to one who can strictly call himself a *bona fide* purchaser for value.³ Finally, the third class of cases in which the court of equity will refuse to grant a decree for specific performance, on account of the nugatory character of the decree, would include all those cases in which the decree would call for the rendition of personal service, the successful performance of which would require the exercise of skill and good faith on the part of the defendant, or where the performance of the

v. Rigby, Ves. 815; Tobey v. Co. of Bristol, 3 Story, 800, 820, 823.

¹ Hallett v. Middleton, 1 Russ. 243; Greenaway v. Adams, 12 Ves. 395, 401; Phillips v. Stauch, 20 Mich. 369; Burke v. Seely, 46 Mo. 334; Burton v. Shotwell, 13 Bush, 271; Green v. Smith, 1 Atk. 572; Columbine v. Chichester, 2 Phil. 27.

² Warren v. Richmond, 53 Ill. 52; Gupton v. Gupton, 47 Mo. 337; Denton v. Stewart, 1 Cox,

258; Greenaway v. Adams, 12 Ves. 395, 400; Ferguson v. Wilson, L. R. 2 Ch. 77; Smith v. Kelley, 56 Me. 64; Little v. Thurston, 58 Id. 86.

³ Bryant v. Booze, 55 Ga. 438; Johnson v. Bowden, 37 Tex. 621; Bird v. Hall, 30 Mich. 374; Youell v. Allen, 18 Id. 107; Gregg v. Hamilton, 12 Kans. 333; Snowman v. Harford, 57 Me. 397; Fullerton v. McCurdy, 4 Lans. 123; Haughwout v. Murphy, 22 N. J. Eq. 531; 21 Id. 118; Cole v. Cole, 41 Md. 301.

contract would require such a supervision by the court or an officer of the court as to make it impracticable for the court to attempt the enforcement of the contract. The single fact, that the court is unable to secure an enforcement of its decree for specific performance, is the explanation in every one of these cases of a refusal to issue a decree. Thus, contracts for personal service will not ordinarily be specifically enforced by a court of equity; that is, affirmatively, because it is impossible for a court to compel one to employ his skill or powers successfully in the performance of such a contract.¹ But in the chapter on injunctions, it has been already explained to what extent, by the means of an injunction, such contracts may be enforced,² and nothing further need be stated here.

For the same reason, contracts for the sale of the good-will of a business, separate from and unconnected with the business or the premises in which the business is conducted, are not the subject of a decree for specific performance.³ But where the good-will of a business is sold in connection with the transfer of the business itself, while a specific performance cannot be secured affirmatively, the contract is negatively enforced by means of an injunction.⁴ A court of equity also refuses to grant a decree for specific performance, where the contract which is to be specifically enforced relates to the manufacture of goods, which are composed of ingredients which are required by the parties to be kept a secret. The court could not specifically enforce such a contract except in express violation of its provision as to secrecy.⁵ Finally, courts will refuse to grant a decree for specific performance in the case of continuing covenants,⁶ where such contract calls for a continuing performance of a more or less protracted character, and requires a long-continued supervision and direction by the court, as in the case of contracts for building, for construction of bridges, and railroads and the like; the ground for refusal being the inability of the court of equity to undertake a business of such character.⁷

¹ *Randall v. Latham*, 36 Conn. 48; *Richmond v. Dubuque, &c. R. R.*, 33 Iowa, 422; *De Rivafinoli v. Corsetti*, 4 Paige, 264; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Haight v. Badgely*, 15 Barb. 499; *Palmer v. Scott*, 1 Russ. & My. 391; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411; *Marble Co. v. Ripley*, 10 Wall. 339; *Ford v. Jermon*, 6 Phila. 6; *Cooper v. Pena*, 21 Cal. 403, 411.

² See *ante*, § 482.

³ *Bozon v. Farlow*, 1 Meriv. 459; *Baxter v. Conolly*, 1 J. & W. 576; *Coslake v. Till*, 1 Russ. 376.

⁴ *Darbey v. Whitaker*, 4 Drew. 134, 139, 140; *Chissum v. Dewes*, 5 Russ. 29; *Whittaker v. Howe*, 3 Beav. 383.

⁵ *Hallett v. Middleton*, 1 Russ. 243; *Greenaway v. Adams*, 12 Ves. 395, 401; *Phillips v. Stauch*, 20 Mich. 269; *Burke v. Seely*, 46 Mo.

334; *Burton v. Shotwell*, 13 Bush, 271; *Green v. Smith*, 1 Atk. 572; *Columbine v. Chichester*, 2 Phil. 27.

⁶ *Collins v. Plumb*, 16 Ves. 454; *City of London v. Nash*, 3 Atk. 512, 515; *Caswell v. Gibbs*, 33 Mich. 331; *Earl of Darnley v. London, &c. Ry.*, 3 De G. J. & S. 24; L. R. 2 H. L. 43; *Hopkins v. Gilman*, 22 Wis. 476.

⁷ *Atlanta, &c. R. R. v. Speer*, 32 Ga. 550; *Cincinnati, &c. R. R. v. Washburn*, 25 Ind. 259; *Columbus, &c. R. R. v. Watson*, 26 Id. 50; *Gregory v. Ingwersen*, 32 N. J. Eq. 199; *Danforth v. Philadelphia, &c. Ry.*, 30 Id. 12; *Beck v. Allison*, 56 N. Y. 366; *Mastin v. Halley*, 61 Mo. 196; *Randall v. Latham*, 36 Conn. 48; *Starnes v. Newsom*, 1 Tenn. Ch. 239; *Columbia Water Co. v. Columbia*, 5 S. C. 225; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Roberts v. Kelsey*, 38 Mich. 602.

§ 502. **Damages when given in place of decree for specific performance.**—Where it is impossible, on the ground explained in the preceding paragraph, for a court of equity to decree specific performance, and the inability to render a decree for specific performance is not disclosed until the hearing of the cause; and the vendor had commenced his suit for specific performance in good faith and under the belief, that it was a cause in which the court of equity could grant the remedy asked for; in such a case, instead of dismissing the suit and forcing the plaintiff to proceed in an independent action for damages, it will at once award to the plaintiff the damages which he could have obtained in the action at law. This is especially the case, where the contract is for the sale of lands, and the vendee brings the action for specific performance, without knowing that the vendor has sold and transferred such land to someone else.¹ But if the plaintiff was aware of the inability of a court of equity to grant the decree for specific performance when he brought his suit, he will not be entitled to the award for damages in the same suit; but the court of equity would dismiss such suit and compel the plaintiff to resort to his remedy at law.² It will, of course, be remembered that this distinction between actions at law and in equity, and the necessity of the vendee to resort to the action at law for the recovery of damages for the breach of the contract, when he knows that the vendor has disposed of the property to a *bona fide* purchaser, has been modified in the states in which the modern or reformed civil procedure has been adopted. Under that procedure, there is but one civil action, in which the plaintiff will secure every relief, legal and equitable, to which he may be able to show himself entitled in the presentation of his case. Under the reformed procedure, of course, the principle referred to has no application.⁷

§ 503. **Specific performance of trustees.**—The ordinary cases, in which the decree for specific performance is rendered, are those of ordinary contracts involving the prayer for the performance of an executory contract; but the same relief, or practically the same relief, is accorded to the *cestui que trust* against the trustee; in other words, the *cestui que trust* may secure from the court of equity a decree against the trustee for the specific performance of the trust. That is necessarily the appropriate remedy in every attempt of a court of equity to compel the performance of a trust by a trustee.³ This application of the remedy for specific performance does not need any

¹ Woodman v. Freeman, 25 Me. 531, 532, 543; Tenney v. State Bk., 20 Wis. 152; McQueen v. Chouteau's Heirs, 20 Mo. 232; Hamilton v. Hamilton, 59 Id. 232; Gupton v. Gupton, 47 Id. 37, 47; Harrison v. Deramus, 33 Ala. 463; Carroll v. Wilson, 22 Ark. 32; Foley v. Crow, 37 Md. 51; Milkman v. Ordway, 106 Mass. 232, 253; Charter v. Marshall, 56 N. H. 478; Wiswall v. McGowan, Hoff. Ch. 125; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Morss v. Elmendorf, 11

Paige, 277; Berry v. Van Winkle, 1 Green Ch. 269; Hopkins v. Gilman, 22 Wis. 476.

² Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Id. 193; Smith v. Kelley, 56 Me. 64; Sternberger v. McGovern, 56 N. Y. 12, 20.

³ Cowles v. Whitman, 10 Conn. 121; Hill v. Rockingham Bk., 44 N. H. 567; McGowin v. Remington, 12 Pa. St. 56; Abbott's Ex'r v. Reeves, 49 Id. 494; Peer v. Kean, 14 Mich. 354; Wood v. Rowcliffe, 3 Hare, 304; 2 Phil. 383;

more specific or detailed explanation; the same principles attain here, as in the case of specific performance of contracts, in determining when, and under what circumstances, the decree will be made.

§ 504. **Suits against corporations to compel transfer or issue of stock.**—It often occurs that the directors, and other officers of a corporation, will refuse to recognize the rights of assignees of stock to the transfer of such stock on the books of the company in their names, and to a participation of the business of such corporation. In such a case, it is well settled that, although the common law remedy for damages is available, it is inadequate; the only effective remedy is an order of the court of equity to compel such officers to make the transfer of the stock on the books of the company to the assignee, and thus enable such assignee to enjoy all of the rights of the stockholder in such corporation; and likewise to compel such officers to issue new certificates of stock upon the surrender of the old ones.¹ So, also, where the corporation has wrongfully cancelled old certificates of stock and issued new certificates of stock in place of them to one who is not a lawful assignee, the old stockholder may, under these circumstances, obtain a decree from the court, compelling the officers of the corporation to replace the old stock upon the books of the company and issue new stock to the original owners, or if this cannot be done, to pay to them the value of such stock.² In the latter class of cases, the remedy would be applied whenever there has been an issue of new certificates to one who claims to be the lawful assignee and represents himself to be so entitled on the forged assignment of such stock. There is no lawful transfer in such a case; and hence the cancellation of the old certificate and issue of the new certificate to the assignee would be in violation of the rights of the old stockholder, for which there is no effective remedy at law.

Pooley v. Budd, 14 Beav. 34; Stanton v. Percival, 5 H. L. Cas. 257, 268; Clark v. Flint, 22 Pick. 231; Peyser v. Wendt, 87 N. Y. 322; §§ 1089-1096; Brinkerhoff v. Bostwick, 88 N. Y. 52; Van Dyck v. McQuade, 86 Id. 38, 45, 46.

¹ Cushman v. Thayer Man. Co., 76 N. Y. 365; Middlebrook v. Merchants' Bank, 41 Barb. 481; 3 Abb. App. Dec. 295; Purchase v. N. Y. Exch. Bk., 3 Robt. 164; Burrall v. Bushwick R. R., 75 N. Y. 211.

² Sewall v. Boston, &c. Co., 4 Allen, 277; Pratt v. Taunton Copper Co., 123 Mass. 110; Pratt v. Boston, &c. R. R., 126 Id. 443; Telegraph Co. v. Davenport, 7 Otto, 369; Taylor v. Midland Ry. Co., 28 Beav. 287; 8 H. L. Cas. 751; Pollock v. National Bk., 7 N. Y. 274; Chew v. Bk. of Baltimore, 14 Md. 299; Hildyard v. South Sea Co., 2 P. Wms. 77; Ashby v. Blackwell, 2 Eden, 299; Sloman v. Bk. of England, 14 Sim. 475.

CHAPTER XXIX.

REFORMATION AND CANCELLATION OF LEGAL INSTRUMENTS.

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§ 506. **General statement as to the nature and object of the remedy.**—The application to a court of equity for either the reformation or cancellation of a legal instrument is never made for the purpose of securing thereby any definite settlement or enforcement of rights; the remedy is rather auxiliary to the determination of the fact that the instrument as it appears either does not represent the true condition of the rights of the parties or their intention, or that the instrument itself is void or invalid, and as such should not be permitted to continue in existence. The two classes of remedies discussed in this connection are reformation and cancellation; the one is affirmative in its relief, the other is negative. The general grounds upon which reformation and cancellation will be decreed are, that the transaction through accident, mistake or fraud does not represent the intention of the parties. The general subject of accident, mistake and fraud, and other effects upon the contract which result therefrom, have been already fully explained in preceding chapters.¹

§ 507. **Reformation and re-execution of instruments.**—A legal instrument is a proper subject for reformation or re-execution, whenever the instrument itself does not show and reproduce the actual contract of the parties; but it is only possible for a written contract to be reformed, when the parties have actually made a contract which is different in its terms from the contract which has been reduced to writing. In other words, in order that an instrument may be reformed, the error or mistake, which has been committed in reducing the contract to writing, must be either a mutual mistake of both parties, or it must be a mistake on the part of one of them, accompanied by the fraud of the other party.² The cases in which instruments

¹ As to accident and mistake, see Chapt. XI. As to fraud, see Chaps. XII and XIII.

² *Whittemore v. Farrington*, 76 N. Y. 452; *Moran v. McLarty*, 75 *Id.* 25; *Paine v. Jones*, 75 *Id.* 593; *Ramsey v. Smith*, 32 N. J. Eq. 28; *Real Estate Trust Co. v. Balch*, 13 J. & S. 528; *Robertson v. Walker*, 51 Ala. 484; *Kilmer v. Smith*, 77 N. Y. 226; *Albany Sav. Inst. v. Burdick*, 87 *Id.* 40; *Paine v. Upton*, 87 *Id.* 327; *Arthur v. Homestead F. Ins. Co.*, 78 *Id.* 462; *Ford v.*

Joyce, 78 *Id.* 618; *Steinbach v. Relief F. Ins. Co.*, 77 *Id.* 498; *Sutherland v. Sutherland*, 69 Ill. 481; *Evarts v. Steger*, 5 Oreg. 147; *Bradford v. Bradford*, 54 N. H. 463; *Botsford v. McLean*, 42 Barb. 445; 45 *Id.* 478; *Snell v. Insurance Co.*, 8 Otto, 85; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *McIntosh v. Saunders*, 68 Ill. 128; *Toops v. Snyder*, 70 Ind. 554; *Witthaus v. Schack*, 57 How. Pr. 310; *Sable . Maloney*, 48 Wis. 331; *McFadden v. Rogers*,

can be reformed are numerous. All sorts of legal instruments may be reformed by equity, when the errors, which have been committed in the execution of them, are mutual mistakes or a mistake of one party combined with the fraud of the other. Thus, reformation has been decreed of all kinds of deeds of conveyance,¹ including leases,² mortgages,³ deeds of trust,⁴ marriage and family settlements.⁵ Likewise, bonds of all kinds,⁶ policies of insurance,⁷ assignments or release of mortgages,⁸ executory contracts for the sale of lands,⁹ the indorsement of a note,¹⁰ agreements for the establishment of a highway,¹¹ military orders.¹² So may, also, judgments and other records be corrected or be reformed.¹³

§ 508. **Cancellation and surrender of instruments.**—A court of equity also has the authority to order a cancellation and surrender of any legal instrument, whenever such a decree is necessary to the protection of the rights and interests of the parties which are threatened by the continued existence of an instrument, inconsistent with such

70 Mo. 421; *Snyder v. Ives*, 42 Iowa, 157; *Nicoll v. Mason*, 49 Ill. 358; *Hutson v. Fumas*, 31 Iowa, 154.

¹ *Froman v. Froman*, 13 Ind. 317; *Randall v. Ghent*, 19 *Id.* 271; *Hunt v. Frazier*, 6 Jones Eq. 90; *Heaton v. Fryberger*, 38 Iowa, 185; *Leonis v. Lazzarovich*, 55 Cal. 52; *Styers v. Robbins*, 76 Ind. 547; *Purcell v. Goshorn*, 17 Ohio, 105; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Bloomer v. Spitale*, L. R. 13 Eq. 427; *White v. White*, L. R. 15 Eq. 247; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Gerald v. Elley*, 45 Iowa, 322; *Parish v. Scott*, 10 Heisk. 438; *Dart v. Barbour*, 32 Mich. 287; *Cummings v. Freer*, 26 Mich. 128; *Burr v. Hutchinson*, 61 Me. 514; *Huss v. Morris*, 63 Pa. St. 367; *Blakeman v. Blakeman*, 39 Conn. 320; *Clayton v. Freet*, 10 Ohio St. 544; *Deford v. Mercer*, 24 Iowa, 118; *Mattingly v. Speak*, 4 Bush, 316; *Lestrade v. Barth*, 19 Cal. 660; *Brown v. Balen*, 33 N. J. Eq. 469; *Weston v. Wilson*, 31 *Id.* 51; *Day v. Day*, 84 N. C. 408; *Johnson v. Johnson*, 8 Baxt. 261; *Blackburn v. Randolph*, 33 Ark. 119; *Michel v. Tinsley*, 69 Mo. 442; *Baker v. Massey*, 50 Iowa, 399; *Bullentine v. Clark*, 38 Mich. 395; *Pasman v. Montague*, 30 N. J. Eq. 385; *Fly v. Brooks*, 64 Ind. 50; *Nicholson v. Caress*, 59 *Id.* 39; *Sawyer v. Hanson*, 48 Wis. 611; *Kilmer v. Smith*, 77 N. Y. 226; *Jackson v. Andrews*, 59 *Id.* 244; *Bush v. Hicks*, 60 *Id.* 298; *Albany Sav. Inst. v. Burdick*, 87 N. Y. 40; *Crippen v. Baums*, 15 Hun, 136.

² *Henry v. Smith*, 76 N. C. 311; *Mays v. Dwight*, 82 Pa. St. 462; *Murray v. Dake*, 46 Cal. 644; *Campbell v. Hatchett*, 55 Ala. 548.

³ *Baskins v. Calhoun*, 45 Ala. 582; *Alexander v. Rea*, 50 *Id.* 450; *Goodman v. Randall*, 44 Conn. 321; *Milmine v. Burnham*, 76 Ill. 362; *Quivey v. Baker*, 37 Cal. 465; *Ruhling v. Hackett*, 1 Nev. 360; *Petesich v. Hambach*, 48 Wis. 443; *First Nat. Bk. v. Gough*, 61 Ind. 147; *Wilson v. Stewart*, 63 *Id.* 294; *Exchange Bk. v. Russell*, 50 Mo. 331; *Schwickerath v. Cooksey*, 53 *Id.* 75; *Parlin v. Stone*, 1 McCrary, 443; *Mil-*

ler v. Davis, 10 Kans. 541; *Albany Sav. Inst. v. Burdick*, 87 N. Y. 40; *Coe v. N. J. Midland Ry.*, 31 N. J. Eq. 105; *Wilson v. King*, 27 *Id.* 374; *Wheeler v. Kirtland*, 23 *Id.* 13.

⁴ *Allen v. McGaughy*, 31 Ark. 252; *Young v. Coleman*, 45 Mo. 179; *Haynes v. Seachrest*, 13 Iowa, 455. *Negotiable instruments*, *Otteneheimer v. Cook*, 10 Heisk. 309; *Loomis v. Freer*, 4 Ill. App. 547; *Potter v. Potter*, 27 Ohio St. 84; *Druff v. Lord Parker*, L. R. 5 Eq. 131; *Bostford v. McLean*, 42 Barb. 445; 45 *Id.* 478; *Talley v. Courtney*, 1 Heisk. 715; *Gammage v. Moore*, 42 Tex. 170.

⁵ *Clark v. Girdwood*, L. R. 7 Ch. D. 9; *Lovesey v. Smith*, L. R. 15 Ch. D. 655; *Welman v. Welman*, L. R. 15 Ch. D. 570; *Hanley v. Pearson*, L. R. 13 Ch. D. 545; *Lister v. Hodson*, L. R. 4 Eq. 30; see *Pomeroy Eq. Jur.*, Vol. 2, §§ 850, 855, 871.

⁶ *Pickersgill v. Lahens*, 15 Wall. 140; *Garnar v. Bird*, 57 Barb. 277; *Emery v. Mohler*, 69 Ill. 221; *Evarts v. Sterger*, 5 Oreg. 147; *Craft v. Dickens*, 78 Ill. 131; *State v. Frank's Adm'r*, 51 Mo. 98; *Schwear v. Haupt*, 49 Mo. 225.

⁷ *National Traders Bk. v. Ocean Ins. Co.*, 62 Me. 519; *Keith v. Globe Ins. Co.*, 52 Ill. 513; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun, 321; *Mackenzie v. Coulson*, L. R. 8 Eq. 368; *Brugger v. State Invest. Ins. Co.*, 5 Sawy. 304; *Hay v. Star F. Ins. Co.*, 77 N. Y. 235; *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199; *Mead v. Westchester, &c. Ins. Co.*, 64 N. Y. 453; *Knox v. Lyeoming F. Ins. Co.*, 50 Wis. 671; *Hearn v. Equitable, &c. Ins. Co.*, 4 Cliff. 192; *Dean v. Equitable F. Ins. Co.*, 4 *Id.* 575.

⁸ *Moran v. McLarty*, 75 N. Y. 25; *Hervey v. Savery*, 48 Iowa, 313.

⁹ *Kelley v. McKinney*, 5 Lea, 164.

¹⁰ *Stafford v. Fettes*, 55 Iowa, 484.

¹¹ *Mastelar v. Edgerton*, 44 Iowa, 495.

¹² *Thomas v. Raymond*, 4 S. C. 347.

¹³ *Snyder v. Ives*, 42 Iowa, 157; *Cohen v. Duhose*, *Harp. Eq.* 102; *Partridge v. Harrow*, 27 Iowa, 96.

legal rights and interests. The common cases, in which decree for cancellation may be rendered, are those in which through accident, mistake or fraud, an instrument has been executed which did not represent the real intentions of the parties and whose continued existence threatened to affect such injured parties injuriously. The subject of cancellation, as a remedy for contracts and other legal instruments executed by mistake or tainted with fraud, has been already fully discussed in the preceding chapters.¹ It was supposed at one time that it was impossible for the decree of cancellation to be made when the instrument was absolutely void at law and not merely voidable, on the ground that the legal defense of invalidity would be sufficient in such cases.² But the general rule as now laid down by the courts is, that the jurisdiction will be exercised in all cases of void deeds and other legal instruments, whenever the invalidity does not appear upon the face of the instrument.³

As in the case of reformation, cancellation of legal instruments will be decreed in behalf of the parties to all sorts of legal instruments, including deeds of conveyance of land in general,⁴ leases,⁵ mortgages,⁶ and all other contracts which affect or concern lands.⁷ So, also, will the decree for cancellation be given in the case of negotiable paper

¹ See §§ 175, 186, 222.

² *Bromley v. Holland*, 5 Ves. 610, 618; *Franco v. Bollon*, 3 *Id.* 368; *Ryan v. Mackmath*, 3 Bro. Ch. 15; *Hilton v. Barrow*, 1 Ves. 284.

³ *Ryan v. Mackmath*, cited 13 Ves. 584; *Jackman v. Mitchell*, *Id.* 581; *Peirsoll v. Elliott*, 6 Pet. 95, 98; *Chennel v. Churchman*, 3 Bro. Ch. 16 n; *Minshaw v. Jordon*, *Id.* 16 n; *Pierce v. Webb*, *Id.* 16 n; *Lisle v. Liddle*, 3 Anstr. 649; *Hamilton v. Cummings*, 1 Johns. Ch. 517, 520; *Lord St. John v. Lady St. John*, 11 Ves. 526; *Jervis v. White*, 7 *Id.* 413; *Simpson v. Lord Howden*, 3 My. & Cr. 97, 102; *Mayor of Colchester v. Lowten*, 1 V. & B. 226, 244; *Bromley v. Holland*, 7 Ves. 316; *Hayward v. Dimsdale*, 17 *Id.* 111; *In re Cooper*, L. R. 20 Ch. D 611; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Strausburgh v. Mayor, &c.*, 87 N. Y. 452; *Dederer v. Voorhies*, 81 N. Y. 153; *Wells v. Buffalo*, 80 *Id.* 253; *Townsend v. Mayor, &c.*, 77 *Id.* 542; *Gray v. Mathias*, 5 Ves. 286; *Simpson v. Lord Howden*, 3 My. & Cr. 97; *Smyth v. Griffin*, 13 Sim. 245; *Bromley v. Holland*, 7 Ves. 3, 21; *Van Doren v. Mayor, &c.*, 9 Paige, 388.

⁴ *Lindsey v. Lindsey*, 50 Ill. 79; *Bayliss v. Williams*, 6 Coldw. 440; *Parrott v. Parrott*, 1 Heisk. 681; *Bogle v. Hammons*, 2 *Id.* 136; *Hyer v. Little*, 20 N. J. Eq. 443; *Benson v. Cowell*, 52 Iowa, 137; *Cook v. Moore*, 39 Tex. 255; *Mattair v. Payne*, 15 Fla. 682; *Morrison v. Morrison*, 27 Gratt. 190; *Stearns v. Beckham*, 31 *Id.* 379; *Biglow v. Leabo*, 8 Or. 147; *Bishop v. Aldrich*, 48 Wis. 619; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Reid v. Burnes*, 13 Ohio St. 49; *Hamilton v. Batlin*, 8 Minn. 403; *Woodruff*

v. Garner, 27 Ind. 4; *Shewmake v. Williams*, 54 Ga. 206; *Walton v. Tusten*, 49 Miss. 569; *Case v. Case*, 26 Mich. 484; *Ritter v. Ritter*, 42 *Id.* 108; *Rath v. Vanderlyn*, 44 *Id.* 597; *Smith v. Rowley*, 66 Barb. 502; *Larsen v. Burke*, 39 Iowa, 703; *Montgomery v. Shockey*, 37 *Id.* 107; *Warnock Campbell*, 25 N. J. Eq. 485; *Mead v. Coombs*, 28 *Id.* 173; *Lyons v. Van Riper*, 26 *Id.* 337; *Yard v. Yard*, 27 *Id.* 114; *Turner v. Turner*, 44 Mo. 535; *Davis v. Fox*, 59 *Id.* 125; *Hightower v. Nuber*, 26 Ark. 604; *Freeman v. Reagan*, *Id.* 373; *Seymour v. Belding*, 83 Ill. 223; *Stone v. Wilbern*, *Id.* 105; *Hough v. Cook, &c. Co.*, 73 *Id.* 23; *Wiley v. Ewalt*, 66 *Id.* 26; *Pickrell v. Morss*, 97 *Id.* 220; *Hollocher v. Hollocher*, 62 Mo. 267; *Davis v. Luster*, 64 *Id.* 43; *Dean v. Younelt's Adm'r*, 8 Wall. 14 n; *Murphy v. Paynter*, 1 Dill. 333; *Allore v. Jewell*, 4 Otto, 506; *Barfield v. Price*, 40 Cal. 535; *Hearst v. Pujol*, 44 *Id.* 230.

⁵ *Wilson v. Deen*, 74 N. Y. 531; *Watson, &c. Co. v. Casteel*, 68 Ind. 476; *Wood v. Hubbell*, 10 N. Y. 479; *Field v. Herrick*, 5 Ill. App. 54; *Arnold v. Bright*, 41 Mich. 207.

⁶ *Connelly v. Fisher*, 3 Tenn. Ch. 382; *Schenck v. O'Neill*, 23 Hun, 209; *Foote v. Beecher*, 78 N. Y. 155; *Schaper v. Schaper*, 84 Ill. 603; *Starr v. Ellis*, 6 Johns. Ch. 393; *Spurgin v. Traub*, 65 Ill. 170; *Burlington Tp. v. Cross*, 15 Kans. 74; *Dolan v. Kehr*, 9 Mo. App. 351.

⁷ *McGuire v. Bowman*, 6 Bush, 550; *Belknap v. Sealey*, 14 N. Y. 143; *Young v. Hughes*, 32 N. J. Eq. 372; *Roy v. Haviland*, 12 Ind. 364; *Matlock v. Todd*, 25 *Id.* 128; *Wambaugh v. Bimer*, *Id.* 398; *Brainard v. Holsapple*, 4 Greene, (Iowa,) 485.

before maturity,¹ of bonds of all sorts,² policies of insurance,³ judgments which have been issued or procured through fraud,⁴ and fraudulent sales under a judicial decree.⁵

¹ *Crowe v. Peters*, 63 Mo. 429; *Hosleton v. Dickinson*, 51 Iowa, 244; *Fuller v. Percival*, 126 Mass. 381; *Fowler v. Palmer*, 62 N. Y. 533; *Hughes v. United States*, 4 Wall. 232; *Ferguson v. Fisk*, 28 Conn. 501; *Lewis v. Tobias*, 10 Cal. 574; *Smith v. Smith's Adm'r*, 30 N. J. Eq. 564; *Town of Wellsborough v. N. Y. & C. R. R.*, 76 *Id.* 182; *Western R. R. v. Bayne*, 75 *Id.* 1; *Gould v. Cayuga Co., &c. Bk.*, 86 *Id.* 75; *Metler's Adm'r's v. Metler*, 18 N. J. Eq. 270; 19 *Id.* 457; *Minshaw v. Jordan*, 3 Bro. Ch. 17 n; *Jervis v. White*, 7 Ves. 413; *Bishop of Winchester v. Fournier*, 2 Ves. Sen. 445; *Wynne v. Callander*, 1 Russ. 293; *Town of Springport v. Teutonia Sav. Bk.*, 75 N. Y. 397.

² *Town of Springport v. Teutonia Sav. Bk.*, 75 N. Y. 297; *Town of Wellsborough v. N. Y.*

& C. R. R., 76 *Id.* 182; *Western R. R. v. Bayne*, 75 *Id.* 1; *Gould v. Cayuga Co., &c. Bk.*, 86 *Id.* 75; *Jackman v. Mitchell*, 13 Ves. 581; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Town of Venice v. Woodruff*, 62 N. Y. 462.

³ *Tabor v. Mich., &c. Ins. Co.*, 44 Mich. 324; *Globe, &c. Ins. Co. v. Reals*, 48 How. Pr. 502; 79 N. Y. 202; *Commercial, &c. Ins. Co. v. McLoon*, 14 Allen, 351; *Insurance Co. v. Bailey*, 13 Wall. 616; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Life Ins. Co. v. Bangs*, 13 Otto, 780; *Whittingham v. Thornburgh*, 2 Vern. 206; *Trall v. Baring*, 4 De G. J. & S. 318.

⁴ *United States v. Throckmorton*, 8 Otto, 61; *Kelly v. Christal*, 81 N. Y. 619.

⁵ *Pomeroy Eq. Jur.*, Vol. 2, §§ 871, 914, 919; *Fisher v. Hersey*, 78 N. Y. 387.

CHAPTER XXX.

BILLS OF PEACE, OR CASES OF EQUITABLE JURISDICTION IN AVOIDANCE OF A MULTIPLICITY OF SUITS.

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§ 511. **Multiplicity of suits as a ground for equitable jurisdiction.**—In a previous connection,¹ it has already been stated in general terms, that a court of equity will assume jurisdiction over a cause of action in order to secure a joinder of many distinct causes of action in one equitable suit, and thus avoid a multiplicity of suits that would follow the relegation of these causes of action to the common law jurisdiction. The prevention of this multiplicity of suits is recognized as a distinct ground for the assumption by the court of equity of jurisdiction, even though the causes of action be legal and the remedies sought for be purely of a legal character, such as the recovery of damages or of a sum of money. But when the jurisdiction is once acquired for the purpose of preventing this multiplicity of suits, the court of equity proceeds to consider the rights of the parties and administers whatever relief the court may deem necessary, irrespective of the kind of remedy or relief which the common law courts would have afforded in the same suit. The cases, in which the multiplicity of suits will furnish the ground for the assumption of jurisdiction by a court of equity, have been enlarged and the principles applied by modern courts to a great variety of cases; with, however, considerable confusion and contradiction among the modern cases, as to the extent to which the principle might be judiciously applied, in the extension of the equity jurisdiction.

§ 512. **Original application of the principle.—Bills of peace and to quiet title.**—The original case, in which a court of equity assumed jurisdiction, simply to prevent a multiplicity of suits, is that of a dispute between the landlord of the manor and his tenant, in determining and settling the rights of the parties, which rest upon the customs of the manor, or to determine the conflicting rights of the tenants of two adjoining manors. The court of equity would entertain a bill, which was known as a “bill of peace,” at the instance of

¹ See *ante*, § .

one of the parties, who were interested in the settlement of the legal question involved in the controversy; and in that one suit the entire controversy as to all parties would be settled, and thus a multiplicity of suits be prevented, and peace restored to the agricultural community.¹ The other early application of the principle was to the case of repeated ejectment suits being brought by one party against the possessor of the land, in which the same question of title was raised and contended. When the action of ejectment was introduced as a substitute for the old common law real action, as a remedy for the recovery of the possession of lands which were illegally withheld from the true owner, a wide difference was effected in respect to the consequence of the judgment of the court. In the common law real action, as in all other common law actions involving questions of title, the judgment of the court constituted a decision on the question of title which became then *res adjudicata*, and precluded any further litigation over the same question of title between the same parties. But when the action of ejectment, which was first instituted as a remedy for the tenant for years to resist all attempts at disturbance of his possession, was by a fiction made applicable to all questions of dispute over the right of possession of lands, irrespective of the relation of landlord and tenant, the form of the action remained the same, and the declaration continued to state that the plaintiff was entitled on a given date to the possession of the land in question, and that the defendant was unlawfully withholding the possession from him. The judgment in the action of ejectment, if it were favorable to the plaintiff, announced the fact that the plaintiff was entitled to the possession on the day in question, and called for a surrender of the possession of the plaintiff in compliance with that judgment. And, on the other hand, if the verdict were against the plaintiff, the result of such verdict was simply that the plaintiff was not entitled on the date mentioned to the possession of the land in question. After the result of such an action the party plaintiff or defendant, who was unsuccessful in the first action, could institute a second action of ejectment in respect to the possession of the same land, only changing the time when he claimed to be entitled to the possession, and the judgment in the prior action against his claim would not operate as any defense in the second suit. These actions of ejectment could be instituted in great numbers successively in respect to the same land, and by and between the same parties, without limitation, so far as any rules of the common law are concerned. In order to prevent the vexatious resort to the

¹ 1 Spence Eq. Jurisd. 657. In *Lord Tenham v. Herbert*, 2 Atk. 483, Lord Hardwicke thus described these bills: "It is certain that where a man sets up a general and exclusive right, and where the persons who controvert it are very numerous, and he cannot by one or two actions at law quiet that right, he may come into this court first, which is called a bill of

peace; and the court will direct an issue to determine the right, as in disputes between lords and manors and their tenants, and between tenants of one manor and another; for, in these cases there would be no end in bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and the defendant."

action of ejectment and the annoyance resulting to the lawful owner from such a multiplicity of suits, at a very early day a court of equity entertained a bill which was known as a "bill to quiet title," the decree of which was an injunction restraining the opposite party from further actions at law in ejectment.¹

§ 513. **Cases in which the principle will now be applied.**—As has been already stated in a preceding paragraph, the court of equity has extended the range of the doctrine, that a court of equity will assume jurisdiction for the purpose of avoiding a multiplicity of suits, and applies the principle to a great variety of cases which did not originally fall within the scope of the doctrine. But the same principle underlies all the cases, and the assumption of jurisdiction rests upon a similar state of facts, as in the original cases. Without at present referring to a cause of dispute and contradiction between the authorities, which will be explained in a subsequent connection, it may be stated that in all these cases, in which a court of equity grants relief in order to prevent a multiplicity of suits, the jurisdiction is assumed only where the successive suits at law, which are to be prevented by the equitable action, involve the consideration of the same question of law and a similar state of facts, so that the one judgment in the one equitable suit would necessarily have the effect of substantially settling the cause of dispute in each of the successive suits, and in respect to each individual litigant. But the court will not assume jurisdiction in any case, where the parties litigant have no cause of action independently of the equitable jurisdiction, *i. e.*, if the cause of dispute is purely of a legal character, and it is of such a character that a court of law does not recognize in connection therewith any legal cause of action, then a court of equity will not assume jurisdiction for the purpose of preventing a multiplicity of suits, because under that state of facts no suit whatever could be entertained by any one of the parties concerned in a court of law. Thus, for example, where a common injury is caused by a public nuisance and no particular individual has suffered any special injury from the existence of such public nuisance, no suit at law can be maintained by any one individual, the only common law remedy being a public action for the abatement or removal of the public nuisance; and hence there would be no multiplicity of suits to be prevented by a bill of peace, brought in a court of equity. The court, therefore, would in such a case refuse to entertain a bill of peace for the abatement of a public nuisance, where there is no special injury suffered by any number of individuals.² If there be a legal cause of action, the fact that the needed relief in equity would

¹ Mitford (Lord Redesdale) on Eq. Pl., pp. 143, 144; 1 Spence's Eq. Jurisd., p. 658; Earl of Bath v. Sherwin, Prec. Ch. 261; 10 M&D. 1; 1 Bro. P. C. 286, 270; 2 Id. 217.

² Doolittle v. Supervisors, 18 N. Y. 155; Roosevelt v. Draper, 23 Id. 318; Sargent v. Ohio &

Miss. R. R., 1 Handy, 60 Ohio, 25; Carpenter v. Mann, 17 Wis. 180; Kittle v. Fremont, 1 Neb. 329, 337; Craft v. Comm'rs, &c., 5 Kans. 518; 2 Story Eq. Jur., § 358, citing Hilton v. Lord Scarborough, 2 Eq. Cas. Abr. 171, pl. 2; Mitford's Eq. Pl., (ed. by Jeremy,) p. 148.

be different from what could be obtained in a court of law, would not be a circumstance in any way controlling the power of the court of equity either to assume jurisdiction, or to determine what kind of relief should be granted to the parties. The cases in which equity will assume jurisdiction for the purpose of preventing a multiplicity of suits may be divided, as has been done by Mr. Pomeroy, into four classes, which will be explained in regular order.

§ 514. **First class of cases.**—The first class of cases, according to this subdivision, includes all those cases of litigation between the same individual parties, in which the plaintiff would be obliged, for the protection of his interests against the wrongful acts of the defendant, to institute a succession of actions at law, in order to obtain the desired relief and secure full protection to his rights. They are cases in which there is a continuance or repetition on the part of the defendant of the wrongful act which produces the injury, and the action at law is inadequate, inasmuch as the judgment which may be thereby obtained involves only the recovery of damages for the injury sustained by the past wrongful act, but supplies no means to prevent its further commission.

The more common class of such cases is the equitable action to restrain and abate private nuisances, particularly when the nuisance consists of an infringement upon some easement.¹ Actions to restrain the continuous waste,² suits to restrain continuous trespass,³ and to settle disputed boundaries between adjoining properties.⁴

Under the same heading may be classified suits where the plaintiff would be compelled to bring several actions at law against the same adversary, and in respect to the same subject-matter, in order to recover all that he is entitled to.⁵ It is, however, in this case as else-

¹ *Sheldon v. Rockwell*, 9 Wis. 166, 179; *Eastman v. Amoskeag, &c. Co.*, 47 N. H. 71, 79, 80; *Corning v. Troy Iron Factory*, 39 Barb. 311, 327; *a. c.*, 34 Barb. 485, 492; *Webb v. Portland Man. Co.*, 3 Sumner, 189; *Lyon v. McLaughlin*, 32 Vt. 423, 425, 426; *Sheetz's Appeal*, 35 Pa. St. 88, 95; *Holsman v. Bolling Spring Co.*, 1 McCarter, 335; *Parker v. Winnipiseogee, &c. Co.*, 2 Black. (U. S.) 545, 551; *Carlisle v. Cooper*, 21 N. J. Eq. (6 C. E. Green.) 576, 579; *McRoberts v. Washburne*, 10 Minn. 23, 30; *Letton v. Goodden, L. R.* 2 Eq. 123, 130; *Reid v. Gifford, Hopk.* 416, 419, 420; *Cardigan v. Brown*, 120 Mass. 493, 495; *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324, 328; *Murray v. Hay*, 1 Barb. Ch. 59.

² *Hughlett v. Harris*, 1 Del. Ch. 349, 352.

³ *Hanson v. Gardiner*, 7 Ves. 305, 309, 310; *Livingston v. Livingston*, 6 Johns. Ch. 497, 500; *Hacker v. Barton*, 84 Ill. 313.

⁴ *Hill v. Proctor*, 10 W. Va. 59, 77.

⁵ *Richmond v. Dubuque, &c. R. R.*, 33 Iowa, 422, 487, 488; *Black v. Shreeve*, 3 Halst. Ch. 440, 456, 457; *Biddle v. Ramsey*, 52 Mo. 153, 159. In *Biddle v. Ramsey*, the facts were as follows: Plaintiff had leased the premises to the de-

fendant, between whom it was stipulated at the close of the term that the landlord and tenant would each select an appraiser, and the two appraisers thus select a third, who should unanimously assess the value of the improvements which the tenant had made to the estate and yearly rental. After such assessments, the plaintiff should have the option of either paying for such improvements or granting a new lease of the premises for the defendant, and the rental determined by the appraisers. The plaintiff in the suit alleged, that the defendant by his fraud had prevented any unanimous action of the appraisers, and had retained possession in this unsettled condition of affairs for three years after the termination of the lease without paying any rent. If the plaintiff had been forced to resort to legal actions in order to acquire full relief, he would have been obliged, in the first place, to institute an action of ejectment to recover the possession, and then other cases would have had to follow for the purpose of settling the question as to the rights of the parties in and to the improvements. The

where, the rule of equity, that the court of equity will not undertake to try disputed questions of legal title to the property. If, therefore, there be any dispute as to the legal titles of the parties to the land, they must first be settled in a common law action, before the court of equity would entertain a suit for the purpose of preventing a multiplicity of suits. It is, however, not required that there should be a number of successful successive actions at law; or, for that matter, it is not to be taken as an iron-cast rule that a judgment at law, even when in settlement of a disputed title, should be had before the court of equity would assume jurisdiction. This statement must be taken only as a declaration of the policy which has been established by the court of equity, but which may, under extraordinary cases, be dispensed with.¹

§ 515. **Second class.**—The second class of cases consists of two branches: the first of them has been already explained, in respect to the bill to quiet title and to restrain the institution of successive actions in ejectment, for the recovery of the possession of the same tract of land, and involving the same question of title. That has been the frequent source of the equitable jurisdiction. But a court of equity will never interfere in this class of cases, until at least there has been one judgment between the parties in an action of ejectment, in favor of the rights of the party who applies to a court of equity for protection.²

In analogous cases the same principle would be applied; as for example, where the city officials had assessed property of the railroad for taxes both in state, county and city, and the supreme court, on a writ of *certiorari*, had held that these taxes were invalid; but the authorities, notwithstanding that decision, proceeded to levy the same taxes in successive years, when the court of equity was asked to restrain this levy which was declared to be invalid by the judgment in a previous cause of action between the same parties.

court held that under the equitable jurisdiction for the prevention of a multiplicity of suits, the court may entertain a bill for the settlement of all those questions between the parties. The facts of this case have been set forth somewhat in detail in order to point out to what an extreme the principle involved in this phase of equitable jurisdiction has been applied. In *Black v. Shreeve*, the case was one of complicated and numerous claims of contribution between parties which would have involved the institution of many actions at law, had not the court of equity assumed jurisdiction and maintained one suit for the settlement of the rights of all the parties.

¹ See *Lyon v. McLaughlin*, 32 Vt. 423, 425, 426; *Sheetz's Appeal*, 35 Pa. St. 88, 95; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Sheldon v. Rockwell*, 9 Wis. 166, 179; *McRoberts v. Washburne*, 10 Minn. 23, 30; *Letton v. Goodden*, L. R. 2 Eq. 123, 130; *Eastman v. Amoskeag*, &c. Co., 47 N. H. 71, 79, 80; *Hughlett v.*

Harris, 1 Del. Ch. 349, 352; *Parker v. Winnipiseogee, &c. Co.*, 2 Black, 545, 551; *Hanson v. Gardiner*, 7 Ves. 305, 309, 310; *Livingston v. Livingston*, 6 Johns. Ch. 497, 500; *Hacker v. Barton*, 84 Ill. 313; *Carlisle v. Cooper*, 21 N. J. Eq. (6 C. E. Green,) 576, 579; *Corning v. Troy Iron Factory*, 39 Barb. 311, 327; s. c., 34 *Id.* 485, 492, 493; *Webb v. Portland Man. Co.*, 3 Sumner, 189.

² *Trustees of Huntington v. Nicoll*, 3 Johns. 566, 589, 591, 601, 602; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Woods v. Monroe*, 17 Mich. 238; *Knowles v. Inches*, 12 Cal. 212; *Patterson v. McCamant*, 28 Mo. 210; *Bond v. Little*, 10 Ga. 395, 400; *Harmer v. Gwynne*, 5 McLean, 313, 315; *Leighton v. Leighton*, 1 P. Wms. 671; *Earl of Bath v. Sherwin*, Prec. Ch. 261; 10 Mod. 1; 1 Bro. P. C. 266, 270; 2 *Id.* 217 (Toml. ed.); *Devonsher v. Newenham*, 2 Sch. & Lef. 208, 209; *Weller v. Smeaton*, 1 Cox, 102; 1 Bro. Ch. 573; *Earl of Darlington v. Bowes*, 1 Eden, 270, 271, 272; *Alexander v. Pendleton*, 8 Cranch, 462, 468.

In the second branch of this second class of cases, the single defendant has simultaneously brought a number of actions at law against the defendant, involving the same legal question and resting upon similar facts and circumstances. In these cases a court of equity may, and does interfere, on the ground of preventing a multiplicity of suits, to restrain the prosecution of these actions, and to compel the plaintiff at law to bring all of these cases into the one equitable proceeding, and have these matters finally settled between the parties. The equitable jurisdiction, of course, would only apply where these actions could not be joined in one common law action.¹

§ 516. **Third and fourth classes.**—The third class of cases includes all those in which a number of persons, having separate and distinct interests of a similar character against one party, bring an action jointly against that party, for the purpose of settling all of the individual claims of the plaintiffs against such defendant in one suit.

The fourth class includes all those cases in which one party has distinct and separate claims against two or more parties affecting each of them individually; but each individual claim rests upon a similar statement of facts and involves the same question of law; and for that reason the one suit is brought by the claimant against all of them, for the settlement of his claims against each, without the resort to successive suits against each of them. Manifestly, this cause for the assumption of the equitable jurisdiction could only exist, where the joinder of action was impossible at common law. In this connection, we find a serious contradiction of the authorities as to the extent to which the questions of law, and the rights of the parties, should be common to each other, in order that a court may entertain an equitable suit for the settlement of all of the claims, or refer the parties to their individual causes of action. Some of the cases maintain that, in order that the court of equity may assume jurisdiction and settle the controversies in which the parties are interested in one suit, and thus avoid a multiplicity of suits, the same cause of action must be raised against all of them on the same principle of law, and on the same statement of facts. On the other hand, the other cases hold that, in order that the equitable action may be instituted against all of them for the purpose of preventing a multiplicity of suits, it is not necessary that there should be any common tie binding them, as long as the same question of law is raised between them on a similar state of facts, so that the judgment of the court in one of these cases, as applied to the particular

¹Third Ave. R. R. v. Mayor of N. Y., 54 N. Y. 159, 162, 163; Kensington v. White, 3 Price, 164, 167; West v. Mayor of N. Y., 10 Paige, 539. In Kensington v. White, *supra*, five different actions at law had been instituted by the defendant against the plaintiff on five different policies of insurance between the same parties at the same time, and the same question of law and the same state of facts constituted the

cause of dispute between the parties in all of the cases, viz.: the fraud of the surety and the effect of such fraud on the obligation of the insurer on the policy of insurance. A court of equity entertained a bill of peace in that case, in order to compel all of the actions at law and all facts involved in the controversy to be settled by one suit.

facts of that case, will establish the rule of law, by which the rights of all of them may be determined without further controversy. The fact, that their interests are absolutely distinct and separate instead of being joint, will not interfere with the equitable jurisdiction, as long as the one judgment in the determination of the one question of law furnishes the means of settling the cause of contention between all of them. In the one class of cases, a community of interests in the cause of action is required; while, according to the other set of cases, nothing more is required than a community of interest in the consequence of the judgment, as an adjudicated rule of law.¹ These cases are more clearly distinguished in the succeeding paragraphs.

§ 517. **Several proprietors injured by the one wrong.**—The court of equity has quite frequently interfered, with a bill of peace, for the settlement of controversies between one wrong-doer and several claimants, where each of them in their separate and distinct interests has suffered damage from the same wrong, in order that the annoyance from a multiplicity of suits may thereby be avoided; for example, where a number of different owners of mills, upon the banks of some stream, have been individually injured by the erection by another party of a dam across the stream, in consequence of which the water has been diverted from the regular channel. In this case the one unlawful act has resulted in separate causes of action, on the part of each one of the individual mill owners. If they were confined to their common law remedies, each would be obliged to enter a separate action against the wrong-doer for the recovery of the damages which he has suffered; but the court of equity would assume jurisdiction, in order that all of them may secure redress in the one action, in which they would appear as joint plaintiffs against the same defendant. And, after the establishment of the tort by the defendant, the court of equity would proceed to furnish to each a judgment for damages, or whatever relief may be needed for the due protection of his rights.² In this case there

¹ Mr. Pomeroy explains the point of dispute between the authorities as follows: "Is it necessary that the common bond, element, or feature should inhere in the very rights, interests, or claims themselves which subsist between the body of persons on the one side, and a single party on the other, and should affect the nature and form of those rights, interests, or claims to such an extent that they create some positive and recognized existing legal relation or privity between the individual members of the group of persons, as well as between each of them and the single determined party to whom they all stand in an adversary position? Or, is it enough that the common bond or element consisting solely in the fact that all the rights, interests, or claims subsisting between the body of persons and the single party have arisen from the same source, from the same event, or the same trans-

action, and in fact that they all involve or depend upon similar questions of fact, and the same question of law; so that while the same positive legal relation exists between the single determined party on the one side, and each individual of the body of persons on the other, no such legal relation exists between the individual members themselves of that body; as among themselves, their respective rights, interests, and claims against the common adversary party, otherwise than above stated, are wholly separate and distinct?" See Pomeroy Equity Jurisprudence, Vol. I, § 255.

² *Kensington v. White*, 3 Price, 164; *Mills v. Campbell*, 2 Y. & C. Exch. 389; *Reid v. Gifford*, Hopk. 416; *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Cadigan v. Brown*, 120 Mass. 493, 495; *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324, 328; *Murray v. Hay*, 1 Barb. Ch. 59; but see *Marselis v. Morris Canal Co.*, Saxton, 31.

is a community of interest, resting upon the fact that the injurious consequences have been suffered by each of them, resulting from the commission of the one wrong.

§ 518. **Equitable relief from illegal taxes and assessments.**—The more common cases, in which the equitable relief in one suit is given as a substitute for a multiplicity of common law actions between several parties, are those of illegal taxation or assessment against property for local improvements. The authorities provide for the levy of a tax or an assessment which is illegal, because it violates some provision of the general law of the state, or of the constitution. The enforcement of these legal taxes against a great number of citizens would involve the infliction of a separate injury upon each one of them; and if they were compelled to resort to the common law remedies, each would be obliged to procure protection against the enforcement of the unlawful levy of taxes in a separate action. There is, of course, in such a case, a community of interest between the parties who have thus suffered, resulting from the fact that each has suffered an injury in consequence of the same unlawful act, or from the exercise of the same unlawful power. In those states in which the court declares the true rule to be, that a court of equity can assume jurisdiction for the purpose of preventing a multiplicity of suits, whenever the parties are interested in the general result of the successive suits at law, which they would bring in a court of law for the redress of wrongs suffered from the one wrongful act, it is held that the equity court could assume jurisdiction for the purpose of deciding, for all the tax-payers who have suffered from the illegal levy, the extent to which such levy has been unlawful, and furnishing to each of them in the one action the appropriate remedy for the recovery of the money which has been illegally obtained from them, and for the protection of each of them against the further attempt at enforcement of such illegal taxation. These equitable suits have been entertained, where the suit was by a number of tax-payers as plaintiff, or by one suing on behalf of all the others;¹ and, also, where the suit was instituted by only one tax-payer, purporting to sue for himself alone.² There are, how-

¹ *Vieley v. Thompson*, 44 Ill. 9, 13; *Allison v. Louisville, &c. R. R.*, 9 Bush, 247, 252; *Lane v. Schomp*, 5 C. E. Green, (20 N. J. Eq.) 82, 89; *Noesen v. Port Washington*, 37 Wis. 168; *Webster v. Town of Harwinton*, 32 Conn. 131, 140; *Terrett v. Town of Sharon*, 34 Id. 105; *Scotfield v. Eighth District School*, 27 Id. 499, 504; *Colton v. Hanchett*, 13 Ill. 615, 618; *Robertson v. City of Rockford*, 21 Id. 451; *Perkins v. Lewis*, 24 Id. 208; *Butler v. Dunham*, 27 Id. 474; *Drake v. Phillips*, 40 Id. 388, 393; *Sharpless v. Philadelphia*, 21 Penn. St. 148; *Moers v. Reading*, 21 Id. 188; *Bull v. Read*, 13 Gratt. 78, 86, 87; *Mayor of Baltimore v. Gill*, 31 Md. 375, 392-395; *Barr v. Deniston*, 19 N. H. 170, 180; *Merrill v. Plainfield*, 45 Id. 126, 134; *New London v. Brainard*, 22 Conn. 552, 556, 557; *Hanson v. Vernon*, 27 Ia.

28; *Zorger v. Township of Rapids*, 36 Id. 175, 180; *Board of Commissioners v. Brown*, 28 Ind. 161; *Lafayette v. Fowler*, 34 Id. 140; *Noble v. Vincennes*, 42 Id. 125; *Board of Commissioners v. Markle*, 46 Id. 96, 103-105; *Galloway v. Chat-ham R. R.*, 64 N. C. 147, 149, 150; *Brod-nax v. Groom*, 64 Id. 244, 246, 247; *Vanover v. Davis*, 27 Ga. 354, 358; *Mott v. Penn. R. R.*, 30 Penn. St. 9; *Newmeyer v. Mo. and Miss. R. R.*, 52 Mo. 81, 84-89; *Rice v. Smith*, 9 Ia. 570, 576; *Stokes v. Scott Co.*, 10 Id. 166; *McMillan v. Boyles*, 14 Id. 107; *Rock v. Wallace*, 14 Id. 593; *Ten Eyck v. Keokuk*, 15 Id. 486; *Chamberlain v. Burlington*, 19 Id. 395; *Williams v. Peinny*, 25 Id. 436.

² *Williams v. Peinny*, 25 Ia. 436; *Hanson v. Vernon*, 27 Id. 28; *Zorger v. Township of Rapids*, 36 Id. 175, 180; *Merrill v. Plainfield*, 45 N. H.

ever, on the other hand, a great many cases which have declared that the court of equity cannot assume jurisdiction for the purpose of relieving a number of tax-payers from the enforcement of an illegal assessment, on the ground that a multiplicity of suits may thereby be prevented, for the reason that there is no community of interest of the several tax-payers, where each is declared to have a different and separate cause of action at law. In some of the cases, the general doctrine is laid down that an equitable suit may be entertained for the purpose of preventing an illegal taxation on the ground of avoiding a multiplicity of suits; but the courts, instead of deciding when, and under what circumstances, a case would fall within the general rule which they recognize, have held that, in the particular case in which there was an illegal levy affecting a number of tax-payers, there was not such a community of interests as would justify the entertainment of a suit in equity to which all of them were made parties.¹ But other cases have gone beyond that position, and have declared the inability of a court of equity to entertain suits in any case where the public action of some officer has involved injury to many, there being held to be no community of interests sufficient to enable the court of equity to assume jurisdiction.² This rule has been applied to cases concerning local assessments brought by numerous lot-owners.³ So, likewise, cases concerning illegal taxation, whether brought by a number of tax-payers⁴ or by a single tax-payer.⁵ It is impossible to secure any reconciliation of the

126, 134; *Webster v. Town of Harwinton*, 32 Conn. 131, 140; *Terrett v. Town of Sharon*, 34 *Id.* 105; *Board of Commissioners v. Templeton*, 51 Ind. 266; *Board of Commissioners v. McClintock*, 51 *Id.* 325, 328; *Board of Commissioners v. Markle*, 46 *Id.* 96, 103-105; *Lafayette v. Cox*, 5 *Id.* 38; *Nill v. Jenkinson*, 15 *Id.* 425; *Pretymen v. Supervisors*, 19 Ill. 406; *Clarke v. Supervisors*, 27 *Id.* 305, 311; *Taylor v. Thompson*, 42 *Id.* 9; *Cleghorn v. Postlewaite*, 43 *Id.* 428, 431; *Veiley v. Thompson*, 44 *Id.* 9, 13; *Allison v. Louisville*, &c. R. R., 9 Bush, 247, 252; *Coffman v. Keightley*, 24 Ind. 509; *Oliver v. Keightley*, 24 *Id.* 514; *Nave v. King*, 27 *Id.* 356; *Board of Commissioners v. McCarty*, 27 *Id.* 475; *Harney v. Indianapolis*, &c. R. R., 32 *Id.* 244, 247, 248; *English v. Smook*, 34 *Id.* 115.

¹ *Bouton v. Brooklyn*, 15 Barb. 375, 387, 392; *Ewing v. St. Louis*, 5 Wall. 413, 418; *Doas v. Chicago*, 11 *Id.* 108, 110, 111; *Scribner v. Allen*, 12 Minn. 148; *Minnesota Oil Co. v. Palmer*, 20 *Id.* 468; *White v. Sulphur Springs Co. v. Holley*, 4 W. Va. 597; *Harkness v. Bd. of Pub. Works*, 1 McArthur, 121, 131-133; *Mayor v. Mererole*, 26 Wend. 132, 140; *Heywood v. Buffalo*, 14 N. Y. 534, 541; *Guest v. Brooklyn*, 69 *Id.* 506.

² *Doolittle v. Supervisors*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 *Id.* 318.

³ *Howell v. City of Buffalo*, 2 Abb. App. Dec. 412, 416; *Bouton v. Brooklyn*, 15 Barb. 375, 387, 392-394; *Dodd v. Hartford*, 25 Conn. 232, 238.

⁴ *Kilbourne v. St. John*, 59 N. Y. 21, 27; *Ayres*

v. Lawrence, 63 Barb. 454; *Tift v. Buffalo*, 1 T. & C. 150; *Comins v. Supervisors*, 3 *Id.* 296; *Barnes v. Beloit*, 19 Wis. 93; *Newcomb v. Horton*, 18 Wis. 566, 568, 569; *Cutting v. Gilbert*, 5 Blatch. 259, 261-263; *Youngblood v. Sexton*, 32 Mich. 406; *Sheldon v. School District*, 25 Conn. 224, 228; *Harkness v. Bd. of Pub. Works*, 1 McArthur, 121, 127-133.

⁵ *Phelps v. Watertown*, 61 Barb. 121, 123; *Ayers v. Lawrence*, 63 *Id.* 454; *White Sulphur Springs Co. v. Holley*, 4 W. Va. 597. In *Youngblood v. Sexton*, Judge Cooley explains the position of this class of courts as follows: "The jurisdiction cannot be rested on the doctrine of preventing a multiplicity of suits, because the principles that govern that jurisdiction have no application in this case. It is sometimes admissible when many parties are alike affected or threatened by one illegal act, that they shall unite in a suit to restrain it; and this has been done in this state in the case of an illegal assessment of lands (*Scofield v. Lansing*, 17 Mich. 437). But the cases are very few and very peculiar, unless each of the complainants has an equitable action on his own behalf. Now, the nature of this case is such that each of these complainants, if the tax is invalid, has a remedy at law; which is as complete and ample as the law gives in any other cases. He may resist the sheriff's process as he might any other trespass; or he may pay the money under protest, and at once sue

authorities on any common ground; their contradiction is profound and radical; and each court, when the question is raised before it, must decide for itself which of the two principles it will adopt and follow, in determining upon its jurisdiction. It seems, however, manifest that those courts, which recognize and adopt the broader rule as to the equity jurisdiction, are more rational in their position, and furnish to parties litigant a more complete remedy than they can obtain under the narrower doctrine of the opposing courts. Certainly, nothing but technical objections can be raised to the accuracy of the position taken by the more liberal courts.

§ 519. **Additional cases under the third and fourth classes.**—In addition to the cases already referred to—in illustrating the principle involved in the third and fourth classes of cases, in which the court of equity will assume jurisdiction for the purpose of preventing a multiplicity of suits—may be mentioned suits by a number of judgment creditors to reach the property of the same judgment debtor and to enforce their judgment against him;¹ suits for setting aside and restraining the collection of an illegal assessment for local improvements in municipal communities;² suits by a corporation, public or private, against the holder of a fraudulent issue or certificate of stock, or of bonds, for the recovery and surrender and cancellation of such illegal issue;³ and for other similar causes of action where the one party, like a municipality, has similar claims for relief against several persons, who have no other common tie between them than that of being liable to claims of the same character and origin.⁴ It may be stated in conclusion, that in two of the states, viz.: California and Dakota, and perhaps in others, provisions have been added to the codes of procedure, which declare the prevalent rule, as to the power to entertain one action for the settlement of several separate controversies between different parties. The declaration, found in these codes, is hardly more than a confirmation of the general doctrine, in respect to the

and recover it back. But no other complainant has any joint interest with him in resisting this tax. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interest the parties have is a joint interest in a question of law; just such an interest as might exist in any case where separate demands are made of several persons."

¹ *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, 151, 156.

² *Ireland v. City of Rochester*, 51 Barb. 415, 435; *Scofield v. City of Lansing*, 17 Mich. 437; *City of Lafayette v. Fowler*, 34 Ind. 110; *Kennedy v. City of Troy*, 14 Hun, 308, 312; *Clark v. Village of Dunkirk*, 12 *Id.* 181, 187; but see per *contra*, *Dodd v. Hartford*, 25 Conn. 232, 238; *Howell v. City of Buffalo*, 2 Abb. App. Dec. 412, 416; *Bouton v. City of Brooklyn*, 15 Barb. 375, 387, 392-394.

³ *New York & N. H. R. R. v. Schuyler*, 17 N. Y. 592, 599, 600, 605-608; 34 *Id.* 30, 44-46.

⁴ *Sheffield Water Works v. Yeomans*, L. R. 2 Ch. 8, 11; *Black v. Shreeve*, 3 Halst. Ch. 440, 456, 457; *Board of Supervisors v. Deyoe*, 77 N. Y. 219, 225; *Mayor of New York v. Pilkington*, 1 Atk. 282; *City of London v. Perkins*, 3 Bro. P. C. 602 (Toml. ed.); 4 *Id.* 157; per *contra*, *Dilley v. Doig*, 2 Ves. 486; *Rudge v. Hopkins*, Eq. Cas. Abr. 170, pl. 27; *Pawlet v. Ingres*, 1 Vern. 308; *Weeks v. Staker*, 2 *Id.* 301; *Arthington v. Fawkes*, 2 *Id.* 356; *Conyers v. Abergavenny*, 1 Atk. 284; *Poor v. Clarke*, 2 *Id.* 515; *Duke of Norfolk v. Myers*, 4 Magd. 83; *Bouverine v. Prentice*, 1 Bro. Ch. 200; *Lord Tenham v. Herbert*, 2 Atk. 483; *How v. Tenants of Bromsgrove*, 1 Vern. 22; *Ewelme Hospital v. Andover*, 1 *Id.* 266; *Corp'n of Carlisle v. Wilson*, 13 Ves. 276, 279; *New River Co. v. Graves*, 2 Vern. 431; *Brown v. Vermuden*, 1 Chan. Cas. 272.

equitable jurisdiction, that such jurisdiction rests upon the principle of avoiding a multiplicity of suits.¹

¹ *Gorham v. Toomey*, 9 Cal. 77; *Anthony v. Dunlap*, 8 *Id.* 28; *Rickett v. Johnson*, 8 *Id.* 34, 36; *Revalk v. Kraemer*, 8 *Id.* 68, 71; *Chipman v. Hibbard*, 8 *Id.* 268, 270; *Agard v. Valencia*, 39

Id. 292, 303; *Flaherty v. Kelly*, 51 *Id.* 145; *Uhlfelder v. Levy*, 9 Cal. 607, 614, 615; *Crowley v. Davis*, 39 *Id.* 268, 269; *Pixly v. Huggins*, 15 *Id.* 184; *Hockstacker v. Levy*, 11 *Id.* 76.

CHAPTER XXXI.

CONCURRENT EQUITABLE REMEDIES FOR THE ENFORCEMENT AND RECOVERY OF LEGAL RIGHTS AND INTERESTS.

	SECTION		SECTION
General statement	521	Partition of personal property	524
Assignment of dower	522	Establishment of disputed boundaries	525
Partition of lands	523		

§ 521. **General statement.**—In this connection will be discussed those equitable remedies, whereby legal interests and rights are protected and enforced; the remedies being of the same character as the legal remedies, with the single difference that, on account of the superiority of the technics of the equitable jurisdiction, the courts of equity can furnish a remedy of a similar character, but more adequate and satisfactory in its results. The inadequacy of the similar common law remedy is the ground for the assumption of jurisdiction over these causes of action. Four such remedies are found within this group, viz.: *First*, suits for assignment of dower. *Second*, partition of joint estates in land. *Third*, partition of personal property. *Fourth*, establishment of disputed boundaries.

§ 522. **Assignment of dower.**—The common law action for the assignment of the widow's right of dower, like all the early common law actions, was extremely cumbersome and poorly adapted to the rendition of justice and a thorough settlement of the rights of the widow. Not only on that account, but also because the title deeds of the property of the deceased father and husband were in the possession of the heir, and for that reason it was impossible for the widow to prove the extent of her claim of dower, except by obtaining access to these title deeds. In order that she may accomplish this purpose, a bill of discovery would frequently be filed in equity; and having acquired jurisdiction for the purpose of discovery, the court of equity claimed the right to retain jurisdiction for the purpose of setting out the dower thus ascertained.¹ If her title to the dower was denied, then it was incumbent upon her to establish it in an action at law; but pending the result of the action at law, the court of equity would retain the bill for assignment for a reasonable time and, at the termination of the action at law in favor of the widow, would proceed to administer final relief.² The jurisdic-

¹ *Shute v. Shute*, Prec. Ch. 111; *Wallis v. Everard*, 3 Ch. Rep. 161; *Moor v. Black*, Cas. temp. Talb. 126; *Curtis v. Curtis*, 2 Bro. Ch. 620, 631, 632.

² *Dormer v. Fortescue*, 3 Atk. 124, 130; *Chase's Case*, 1 Bland Ch. 206; *Wells v. Beall*, 2 Gill & J. 458; *Keith v. Trapier*, Bailey Eq. 63; *Hazen v. Thurber*, 4 Johns. Ch. 604; *Curtis v. Curtis*, 2

tion, therefore, at the present time in regard to the assignment of dower is concurrent; both courts of law and of equity having the right to proceed to a final settlement.¹ But the equitable procedure has the advantage over the action at common law in very many respects. It is more advantageous where an outstanding term of years has to be removed and satisfied before the assignment of dower,² or where fraudulent conveyances have to be set aside,³ or a partition is first to be decreed;⁴ and where all sorts of antagonistic claims of title to the land have to be settled. The general principle for the assumption of jurisdiction in all these cases is the avoidance of a multiplicity of suits.⁵ The equitable remedy is also superior to the action at law, in that equity could award damages for the delay in the assignment of the dower, even where a similar recovery could not be had at law. Thus, if the tenant dies after the rendition of the judgment, and the damages have been assessed, the widow at law loses her claim to damages. And so, also, if she dies before the damages have been assessed, her personal representative could not recover the same. In both these instances, however, the widow, or her personal representative, as the case may be, may in equity proceed to obtain an assessment of the damages and to recover the same.⁶ It is also an important reason for a court of equity to assume jurisdiction over suits for assignment of dower, that the dower interest attaches to both legal and equitable interests, and, as a matter of course, the action for assignment of dower in equitable estates could be entertained only in courts of equity, or a court having equitable jurisdiction. Thus, a court of equity, or one having equitable jurisdiction, can alone entertain a suit for the assignment of dower, in the absence of statutory modifications, where the estate of the husband, out of which the dower claim issued, was an equity of redemption;⁷ or where the husband's estate was in an interest in a piece of partnership property;⁸ or where the property of the husband had to be, for any purpose, converted into money and the dower interest attached to the proceeds of sale.⁹ The assignment of dower is usually accomplished by a reference of the case to a master or referee, who ascertains the best mode of an assignment and

Bro. Ch. 620, 631, 632; *Mundy v. Mundy*, 2 Ves. 122, 128; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Swaine v. Perine*, 5 Johns. Ch. 482; *Hartshorne v. Hartshorne*, 1 Green Ch. 349; *Rockwell v. Morgan*, 2 Beasl. 384.

¹ *Mundy v. Mundy*, 2 Ves. 122; *Pulteny v. Warren*, 6 Ves. 73, 89; *Strickland v. Strickland*, 6 Beav. 77; *Herbert v. Wren*, 7 Cranch, 370; *Powell v. Monson*, &c. Man. Co., 3 Mason, 347; *Hazen v. Thurber*, 4 Johns. Ch. 604; *Swaine v. Perine*, 5 *Id.* 482; *Badgley v. Bruce*, 4 Paige, 98; *Hartshorne v. Hartshorne*, 1 Green Ch. 349.

² *Dormer v. Fortescue*, 3 Atk. 124, 130.

³ *Swaine v. Perine*, 5 Johns. Ch. 482.

⁴ *Hill v. Gregory*, 56 Miss. 341; *Nye v. Patterson*, 35 Mich. 413; *Herbert v. Wren*, 7 Cranch, 370.

⁵ *Goodburn v. Stevens*, 1 Md. Ch. 420.

⁶ *Dormer v. Fortescue*, 3 Atk. 124, 130; *Mordant v. Thorold*, 3 Lev. 275; *Curtis v. Curtis*, 2 Bro. Ch. 620, 632.

⁷ *Farwell v. Cotting*, 8 Allen, 211; *Chiswell v. Morris*, 1 McCarter, 101; *Eldridge v. Eldridge*, *Id.* 95; *Dawson v. Bank of Whitehaven*, L. R. 4 Ch. D. 639; *Anderson v. Pignet*, *Id.* 11 Eq. 339; *Gibson v. Crehore*, 3 Pick. 475; *Danton v. Nanny*, 8 Barb. 618; *Thompson v. Cochran*, 7 Hump. 72; *Daniel v. Leitch*, 13 Gratt. 195.

⁸ *Goodburn v. Stevens*, 1 Md. Ch. 420.

⁹ *Lawrence v. Miller*, 1 Sandf. 516; *In re Hall's Estate*, L. R. 9 Eq. 179; *Higbie v. Westlake*, 14 N. Y. 281.

reports to the court his conclusion. The court will then render a decree, in accordance with the conclusion of the master or referee or commissioner, unless objections are raised against his proposition for the assignment. It is not necessary, in this connection, to give any fuller explanation of the assignment of a dower. A fuller discussion of such matter would be found in works upon real property.¹

§ 523. **Partitions of lands.**—At common law, the action for partition could only lie in case of lands held in coparcenary, but subsequently this remedy was extended by statute to all joint estates, except tenancies in entirety.² But notwithstanding this statutory extension of the common law writ of partition, the legal action was still inadequate, in consequence of the inability of the court of law to deal fully and adequately in the same suit with all the conflicting claims which arose in the course of the action; and for that reason at an early day, viz.: in the reign of Elizabeth, the court of equity assumed jurisdiction; and since then the jurisdiction has become established as a matter of right, in both England and in this country.³ The remedy in equity is not confined to the tenant in possession, but is so extended as to enable the parties interested in the property, either as tenant in possession, in remainder or in expectancy, to be made parties to the suit and to be bound by the decree of partition thus obtained.⁴ But while all persons who are interested in the land, whether in possession or in expectation, may be made parties defendant to the suit for partition, and therefore bound by the decree, yet all actions for partition can only be instituted by one in possession.⁵ In general, if tenants in common or joint tenants should be made parties, then one or more will be required to appear as plaintiff, and those objecting to partition must be made parties defendant.⁶ Mortgagees and joint creditors are not necessary parties, but they may be made parties, so that the decree for partition will be binding upon

¹ See Tiedeman's Real Prop., par. 134-146.

² Tiedeman's Real Prop., § 361.

³ *Harwood v. Kirby*, 1 Paige, 469; *Teal v. Woodworth*, 3 *Id.* 470; *Wilkinson v. Parish*, 3 *Id.* 653; *Burhams v. Burhams*, 2 Barb. Ch. 398; *Van Arsdale v. Drake*, 2 Barb. 599; *Green v. Putnam*, 1 *Id.* 500; *Tanner v. Niles*, 1 *Id.* 560; *Scott v. Guernsey*, 60 *Id.* 163; 48 N. Y. 106; *Agar v. Fairfax*, 17 Ves. 533; 2 Eq. Lead Cas. 865, 880 894 (4th Am. ed.); *Baring v. Nash*, 1 V. B. 551; *Parker v. Gerard*, Ambl. 236; *Wood v. Little*, 35 Me. 107; *Gregory v. High*, 29 Ind. 527; *Milligan v. Poole*, 35 *Id.* 64; *Larned v. Renshaw*, 37 Mo. 458; *Waugh v. Blumenthal*, 28 *Id.* 462; *Reinhardt v. Wendecck*, 40 *Id.* 577; *De Uprey v. De Uprey*, 27 Cal. 329; *Gates v. Salmon*, 35 *Id.* 576; *Bailey v. Sisson*, 1 R. L. 233, *Donnell v. Mateer*, 7 Ired. Eq. 94; *Holmes v. Holmes*, 2 Jones Eq. 334; *Howey v. Goings*, 13 Ill. 95; and see *Wotten v. Copeland*, 7 Johns. Ch. 140; *Sebring v. Mersereau*, Honk. Ch. 501; 9 Cow. 344; *Mead v. Mitchell*, 17 N. Y. 210; *Clemens v. Clemens*, 37

Id. 59; *Gregory v. Gregory*, 69 N. C. 522; *Tabler v. Wiseman*, 2 Ohio St. 207; *Williams v. Van Tuyl*, 2 *Id.* 336.

⁴ *Wotten v. Copeland*, 7 Johns. Ch. 140; *Mead v. Mitchell*, 17 N. Y. 210, 214; *Clemens v. Clemens*, 37 *Id.* 59; *Striker v. Mott*, 2 Paige, 387, 389; *Woodworth v. Campbell*, 5 *Id.* 518; *Gaskell v. Gaskell*, 6 Sim. 643; see *Pomeroy on Remedies*, § 254; *Lord Brook v. Lord Hertford*, 2 P. Wms. 518; *Hobson v. Sherwood*, 4 Beav. 184; *Wills v. Slade*, 6 Ves. 498.

⁵ *Wotten v. Copeland*, 7 Johns. Ch. 140; *Evans v. Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. 340; *Agar v. Fairfax*, 2 Eq. Lead. Cas. 880, 894.

⁶ *Sullivan v. Sullivan*, 4 Hun, 198; *Baring v. Nash*, 1 V. & B. 551; *Heaton v. Dearden*, 16 Beav. 147; *Anon.*, 3 Swanst. 139 n; *Cornish v. Gest*, 2 Cox, 27; *Brashear v. Macey*, 3 J. J. Marsh. 89; *Baker v. Devereaux*, 8 Paige, 513; *Borah v. Archers*, 7 Dana, 176; *Rosekrans v. White*, 7 Lans. 486; *Scott v. Guernsey*, 60 Barb. 163, 181.

them.¹ If the mortgagee holds a mortgage over an undivided share of one of the co-tenants, and he is made a party to the suit, the decree in partition will transfer the lien of the incumbrance to the part allotted to the tenant, whose share in the joint estate was incumbered. Another advantage of the equitable action over the legal action for partition is the fact, that in the action for partition it is necessary to prove the title of the plaintiff and of the defendant; and that was often impossible in the action at law, inasmuch as the auxiliary remedy of discovery could only be employed in the court of equity. By means of the bill of discovery, the complainant was enabled to furnish the proof of title of the defendant as well as of himself, and thus establish his claim to partition; and the court of equity, having assumed jurisdiction for the purpose of discovery, would retain it until the final relief had been granted.² If, however, the complainant's title to the property was disputed, then the court of equity would, as in the case of the assignment by dower, refuse to proceed to the settlement of the case and of the dispute, and suspend the equitable action for partition, until the party plaintiff had in an action at law settled this dispute as to his title in his favor, when the further prosecution of the equitable suit would be resumed and carried to completion.³ Of course, if the dispute as to title relates to an equitable estate or title, it being an interest cognizable solely in equity, the court of equity would itself determine the question and not wait for a settlement in a court of law.⁴

Another reason for the assumption of jurisdiction by equity, in cases of partition of lands, is to be found in the necessity at times of making a pecuniary compensation, in addition to the allotment of a part of the land, when an equal partition of such land is an impossibility. In such a case, the court of equity is empowered to make the assignment as equal as possible, and equalize the partition by decreeing the *owelty of partition*, which was a charge of a sum of money upon the larger share of the land partitioned in favor of the co-tenant who receives the smaller share of land, and which was sufficient in amount to equalize the value of the allotments. This could not be done in the action at law.⁵ So, also, could the court of equity direct an accounting to be

¹ *Whitton v. Whitton*, 38 N. H. 127, 135.

² *Jope v. Morsherd*, 6 Beav. 213; *Parker v. Gerard*, Amb. 236; *Agar v. Fairfax*, 2 Eq. Lead. Cas. 880, 894.

³ *Hardy v. Mills*, 35 Wls. 141; *Hoffman v. Beard*, 22 Mich. 59; *Wilkin v. Wilkin*, 1 Johns. Ch. 111, 118; *Manners v. Manners*, 1 Green Ch. 384; *Currin v. Sprauell*, 10 Gratt. 145; *Slade v. Barlow*, L. R. 7 Eq. 296; *Giffard v. Williams*, L. R. 5 Ch. 546; *Bolton v. Bolton*, L. R. 7 Eq. 298 n; *Potter v. Waller*, 2 De G. & Sm. 410; *Simpson v. Wallace*, 83 N. C. 477; *Mattair v. Paine*, 15 Fla. 682.

⁴ *Hitchcock v. Skinner*, Hoff. Ch. 21; *Crosier v. McLaughlin*, 1 Nev. 348; *Levertton v. Waters*,

7 Coldw. 20; *Ross v. Cobb*, 48 Ill. 111; *Foust v. Moorman*, 2 Ind. 17; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Carter v. Taylor*, 3 Head, 30; *Obert v. Obert*, 2 Stockt. 98; *Longwell v. Bentley*, 23 Pa. St. 99.

⁵ *Norwood v. Norwood*, 4 Har. & J. 112; *Warfield v. Warfield*, 5 Id. 459; *Cox v. McMullin*, 14 Gratt. 82; *Wynne v. Tunstall*, 1 Dev. Eq. 23; *Graydon v. Graydon*, McMull. Eq. 63; *Oliver v. Jerrigan*, 46 Ala. 41; *Mole v. Mansfield*, 15 Sim. 41; *Smith v. Smith*, 10 Paige, 470; *Larkin v. Mann*, 2 Id. 27; *Phelps v. Green*, 3 Johns. Ch. 302; *Haywood v. Judson*, 4 Barb. 228; *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Turner v. Morgan*, 8 Ves. 143; *Story v. Johnson*, 2 Y. &

made in the same suit, where one of the joint owners had received more than his share of the rents and profits,¹ or where one of these parties had made improvements upon the land, for which he had received no special return or compensation. In the last case, the court would award the pecuniary judgment, sufficient in amount to equalize the pecuniary returns from the joint property of all the co-tenants.² Any inconvenience or difficulty in attaining the partition is never any ground for refusing this relief.³ It is also impossible, at times, to effect an actual partition of the land between the two co-tenants without materially destroying the value of the property of both, and the best results can only be attained by a sale of the property, and the partition or division between them of the proceeds of sale. In the action at law that was impossible; but the court of equity claimed and exercised the power to decree a sale of the whole property, which would be binding on the co-tenants and other persons interested in the joint estate, who had been properly made parties to the suit for partition.⁴ Originally, the assent of the parties *sui juris* to such a partition by sale was necessary.⁵ But this was not long the rule, either in England or in the United States, the requirement of the consent of such parties to the decree of sale having been abolished by statute.⁶ Where, however, it is possible for a partition to be made without sale and by actual division of the land, it is the duty of the court of equity to decree an actual partition instead of a sale.⁷

§ 524. **Partition of personal property.**—Personal property can be held in common as well as real property; but at common law no power was recognized in the co-tenant of personal property to compel a partition of the same. He could bring an action against the co-tenant for damages, in case of the loss or destruction or sale of the joint property, but the common law did not give him any right whatever to maintain an action for partition.⁸ The court of equity, however, recognized, in regard to the joint holding of personal property, the

C. Ex. 586; *Horncastle v. Charlesworth*, 11 Sim. 315.

¹ *Hitchcock v. Skinner*, Hoff. Ch. 21; *Early v. Friend*, 16 Gratt. 21; *Carter's Ex'r v. Carter*, 5 Munf. 108; *Backler v. Farrow*, 2 Hill Ch. 111; *Rozier v. Griffith*, 30 Mo. 171; *Lorimer v. Lorimer*, 5 Madd. 363; *Hill v. Fulbrook*, Jac. 574; *Story v. Johnson*, 2 Y. & C. Ex. 586; *Leach v. Beattie*, 33 Vt. 195.

² *Sneed's Heirs v. Atherton*, 6 Dana, 276; *Borah v. Archers*, 7 Id. 176; *Respass v. Breckenridge's Heirs*, 2 A. K. Marsh. 581; *Dean v. O'Meara*, 47 Ill. 120; *Martindale v. Alexander*, 26 Ind. 104; *Swan v. Swan*, 8 Price, 518; *Green v. Putnam*, 1 Barb. 500; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Brookfield v. Williams*, 1 Green Ch. 341; *Obert v. Obert*, 1 Halst. Ch. 397.

³ *Turner v. Morgan*, 1 Ves. 143; *Hobson v. Sherwood*, 4 Beav. 184; *Warner v. Baynes*, Amb. 589; *Parker v. Gerard*, Id. 236.

⁴ *Davis v. Turvey*, 32 Beav. 554; *Hubbard v. Hubbard*, 2 Hem. & M. 38; *Thackeray v. Parker*, 1 N. R. 567.

⁵ *Codman v. Tinkham*, 15 Pick. 364; *Wood v. Little*, 35 Me. 107; *Griffies v. Griffies*, 11 W. R. 943.

⁶ *Graham v. Graham*, 8 Bush, 334; *Welsh v. Freeman*, 21 Ohio St. 402; *Royston v. Royston*, 13 Ga. 425; *Wilson v. Duncan*, 44 Miss. 642; *Higinbottom v. Short*, 25 Id. 160; *Thompson v. Hardman*, 6 Johns. Ch. 436; *McCall's Appeal*, 56 Pa. St. 363; *Matter of Skinner's Heirs*, 2 Dev. & Bat. Eq. 63; *Steedman v. Weeks*, 2 Strobb. Eq. 145.

⁷ *Thruston v. Minke*, 32 Md. 571; *Graham v. Graham*, 8 Bush, 334; *Davidson v. Thompson*, 22 N. J. Eq. 83.

⁸ *Cowles v. Garrett's Adm'rs*, 30 Ala. 341; *Hinds v. Terry*, Walker, (Miss.) 80; *Gilbert v. Dickerson*, 7 Wend. 449; *Tinney v. Stebbins*, 28 Barb. 290.

same reason for conceding the right of compulsory partition, as in the case of joint ownership of lands. Here, it is not simply the question of inadequacy of the legal remedy; there was no legal remedy at all, so that in regard to personal property, the court of equity, in the absence of modern statutes, has exclusive jurisdiction. The court of equity will decree the partition of personal property under the same circumstances, as it would give a similar decree in the case of joint estates in lands.¹ It has been explained in the preceding paragraph, that a court of equity will not entertain an inquiry into the title of the plaintiff of the suit for partition where his title is disputed by the defendant, and it is a case of joint ownership of lands. Inasmuch, however, as the right of partition of joint ownership of personal property is not recognized at all by the common law, if there is a dispute raised as to the title of the plaintiff, in an equitable action for partition of personal property, instead of referring such suit for settlement to a court of law, the court of equity would proceed to settle such dispute; and if it is settled in favor of the plaintiff, grant the decree in partition.²

§ 525. **Establishment of disputed boundaries.**—Where the boundaries between two parcels of land have become obscure or confused, equity assumed jurisdiction to settle them at a very early date.³ But it is not simply because of the existence of a dispute as to such boundaries, that a court of equity can assume such jurisdiction. If nothing more than a dispute can be shown in respect to them, the parties would be left to their remedies at law. But in order that the court of equity will interpose to determine such dispute, there must, in addition to such doubt as to the true boundary, be some peculiar equity connected with the controversy, which arises out of the conduct or relation of the parties.⁴ A fraudulent changing of boundaries is one ground for the assumption of equitable jurisdiction.⁵ And in England, it has been held to be a sufficient ground for the assumption of jurisdiction by equity, where one of the parties, like a tenant, or the owner of land, in the case of a rent charge, has the duty imposed upon him of maintaining the boundaries, and he fails to do so; and it becomes necessary

¹ *Tripp v. Riley*, 15 Barb. 333, *Fobes v. Shattuck*, 22 *Id.* 568; *Tinney v. Stebbins*, 28 *Id.* 290; *Wetmore v. Zabriskie*, 29 N. J. Eq. 62; *Crapster v. Griffith*, 2 Bland, 525; *Smith v. Smith*, 4 Rand. 95, 102; *Kerley v. Clay*, 4 Bibb, 241; *Marshall v. Crow's Adm'r*, 29 Ala. 278; *Conover v. Earl*, 26 Iowa, 167.

² *Weeks v. Weeks*, 5 Ired. Eq. 111; *Edwards v. Bennett*, 10 Ired. 365; *Smith v. Dunn*, 27 Ala. 315.

³ *Mullineux v. Mullineux*, Toth. 39; *Peckering v. Kimpton*, *Id.* 39; *Boteler v. Spelman*, Finch, 96; *Perry v. Pratt*, 31 Conn. 433; *Wake v. Conyers*, 1 Eden, 331; 2 Eq. Lead. Cas. 850, 853, 860 (4th Am. ed.).

⁴ *Fraley v. Peters*, 12 Bush, 469; *Doggett v. Hart*, 5 Fla. 215; *Wolfe v. Scarborough*, 2 Ohio St. 361; *Hale v. Darter*, 5 Ilumph. 79; *Topp v. Williams*, 7 *Id.* 569; *Wetherbee v. Dunn*, 38

Cal. 249; *Tillmes v. Marsh*, 67 Pa. St. 507; *Merriman v. Russell*, 2 Jones Eq. 470; *Hill v. Proctor*, 10 W. Va. 59; *St. Luke's v. St. Leonard's*, cited 2 Anstr. 395; *Perry v. Pratt*, 31 Conn. 433; *Wolcott v. Robbins*, 26 *Id.* 236; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Norris' Appeal*, 64 Pa. St. 275; *Wake v. Conyers*, 1 Eden, 331; *Miller v. Warmington*, 1 J. & W. 484; *Speer v. Crawler*, 2 Meriv. 410, 417; *Atkins v. Hatton*, 2 Anstr. 386; *O'Hara v. Strange*, 11 Ir. Eq. R. 262; *Ireland & Wilson*, 1 Ir. Ch. R. 623.

⁵ *Duke of Leeds v. Earl of Stafford*, 4 Ves. 180; *Grierson v. Eyer*, 9 *Id.* 341, 345; *Pratt v. Bryant*, 20 Vt. 333; *Perry v. Pratt*, 31 Conn. 433; *Fraley v. Peters*, 12 Bush, 469; *Atkins v. Hatton*, 2 Anstr. 386; *Rous v. Barker*, 4 Bro. P. C. 660; *Speer v. Crawler*, 2 Meriv. 410, 418.

for the court of equity to compel such party to perform his duty in regard to such boundary.¹ In all these suits for the establishment of the boundary, one essential requirement is that some portion of the land, in respect to which the relief for the establishment of the boundaries is sought, is possessed by the defendant.²

¹ *Kennedy v. Trott*, 7 Moo. P. C. 449, 467; *Bowman v. Yeat*, cited 1 Ch. Cas. 145; *Duke of Leeds v. Powell*, 1 Ves. Sen. 171; *North v. Earl of Stafford*, 3 P. Wms. 148; *Duke of Leeds v. Corp. of New Radnor*, 2 Bro. Ch. 338; *Atty.-Gen. v. Stephens*, 6 De G. M. & G. 111; *Mayor, &c. v. Lord Bolton*, 1 Drew. 270, 289; *Aston v. Lord Exeter*, 6 Ves. 288; *Miller v. Warmington*, 1 J. & W. 484; *Atty.-Gen. v. Fullerton*, 2 V. &

B. 263; *Speer v. Crawter*, 17 Ves. 216; *Duke of Leeds v. Earl of Stafford*, 4 *Id.* 180; *Godfrey v. Littel*, 1 Russ. & My. 59; 2 *Id.* 630; *Clayton v. Cookes*, 2 Atk. 449; *Spike v. Harding*, L. R. 7 Ch. D. 871.

² *Speer v. Crawter*, 2 Meriv. 410, *Atty.-Gen. v. Stephens*, 6 De G. M. & G. 111; *Pope v. Melone*, 2 A. K. Marsh. 239; *Godfrey v. Littel*, 1 Russ. & My. 59; 2 *Id.* 630.

CHAPTER XXXII.

EQUITABLE SUITS FOR THE RECOVERY OF PECUNIARY RELIEF.

	SECTION		SECTION
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§ 527. **Subdivision of subject.**—Under the heading of the present chapter will be included all those suits of various sorts, in which the relief prayed for is the recovery of money due to the complainant. The fact that the relief prayed for is what ordinarily can be recovered in an action at law, necessitates the presence in the equitable suit of some peculiar circumstance which, by pointing out a substantial defect in the action at law, furnishes to the court of equity a satisfactory ground for assuming jurisdiction. These suits may be divided into two classes: *First*, those in which the recovery of money is to be obtained by the enforcement of a lien or charge upon some specific fund or property. The *second class*, would include all those suits in which a similar relief is obtained, but only by the enforcement of a general pecuniary obligation. The first class includes all foreclosure suits, creditor's suits, and suits for the marshaling of securities. The second class includes all suits for exoneration, contribution, subrogation and accounting.

§ 528. **Suits for foreclosure.**—The character of these suits has been already explained in the chapters upon real estate and chattel mortgages. It is a remedy by which a court of equity undertakes to foreclose or cut off the title or right of redeeming the property which he has subjected to the mortgage, lien or charge. The property is sold under the decree, and the proceeds of sale applied by the officers of the court to the liquidation of the debt, the surplus proceeds, if any, being turned over to the debtor. A full and ample explanation has been given of these suits for foreclosure in the preceding chapters, in which the mortgages, liens or charges, recognized by equity, have been explained, and with a reference to these various chapters, nothing more need be added concerning the subject of foreclosure in the present connection.¹

§ 529 **Creditor's suits.**—The ordinary remedy, which the creditor has at his command in a court of common law, is generally ample and

¹ See *ante*, Foreclosure of mortgages of lands, §§ 440-450; Of chattel mortgages, § 469; Pledges, § 470; Equitable liens, §§ 391, 404.

adequate to his needs, but there are cases in which this remedy will prove unavailing. Whenever the inadequacy of the common law remedy is established, the court of equity will readily assume jurisdiction, and entertain what is known as a creditor's bill. There are three cases, in which it is possible for the common law remedies to prove inadequate: *First*, where the creditor cannot discover any property upon which to levy for the satisfaction of his judgment, but he desires to subject to his claim equitable and other interests, which cannot be reached by a levy and sale under execution.¹ *Secondly*, where the property of the debtor has been fraudulently conveyed to others, and the creditor desires to reach this property in the hands of the grantee and transferee. The court of equity alone can furnish an adequate proceeding for setting aside such fraudulent conveyances.² *Thirdly*, where the creditor does not know of the existence of any property whatever, but in order that he may ascertain whether the debtor has property which may be subjected to the claims of his creditors, he asks the aid of the court of equity for the purpose of making the discovery of such assets.³ In all of these cases the ground for assuming jurisdiction is the inadequacy of the legal remedies. Proceeding on that principle, in order that this extraordinary aid of the court of equity may be obtained, the plaintiff must have exhausted the common law remedies. In the first place, he must have reduced his claim to a judgment; and, as a general proposition, he must have had an execution issued and a return of *nulla bona* made.⁴ This rule, however, is not uniform, at any rate to the extent of requiring the return of *nulla bona* to the writ of execution. Thus, it has been held that where the creditor seeks to reach equitable interests of the debtor in real property, or to set aside fraudulent conveyances of the same, the courts are inclined to hold that, while an execution must have issued on the judgment, the return of *nulla bona* is not necessary.⁵ The reason for that distinction is, that the judgment creates a lien upon

¹ Hadden v. Spader, 20 Johns. 554; 5 Johns. Ch. 280; Bayard v. Hoffman, 4 Johns. Ch. 450; Tompkins v. Fonda, 4 Paige, 448; Lackland v. Garesche, 56 Mo. 267; Harris v. Alcock, 10 Gill & J. 226; Rose v. Bevan, 10 Md. 466; Halsted v. Davison, 2 Stockt. 290; Montgomery v. McGee, 7 Humph. 234; Wallace v. Smith, 2 Handy, 78; Galveston, &c. Ry. v. McDonald, 53 Tex. 510.

² McCaffrey v. Hickey, 66 Barb. 489; Tantum v. Green, 21 N. J. Eq. 364; Pulliam v. Taylor, 50 Miss. 551; Trego v. Skinner, 42 Md. 426; Beck v. Burdett, 1 Paige, 305; Gates v. Boomer, 17 Wis. 455; Hagan v. Walker, 14 How. (U. S.) 29; Hammond v. Hudson River, &c. Co., 20 Barb. 378.

³ Bay State Iron Co. v. Goodall, 30 N. H. 223; Miers v. Zanesville, &c. Co., 11 Ohio, 273; Cadwallader v. Granville, &c. Soc., 11 Id. 292; Hadden v. Spader, 20 Johns. 554; 5 Johns. Ch. 280; Hendricks v. Robinson, 2 Johns. Ch. 283; Gordon v. Lowell, 21 Me. 251; Thomas v. Adams, 30 Ill. 37; Clarke v. Webb, 2 Hen. & Mun. 8; Le

Roy v. Rogers, 3 Paige, 234; Trego v. Skinner, 42 Md. 426.

⁴ Parshall v. Tillon, 13 How. Pr. 7; Scott v. Wallace, 4 J. J. Marsh. 654; Wooley v. Stone, 7 Id. 302; Morgan v. Crabb, 3 Port. 470; Brown v. Bk. of Mississippi, 31 Miss. 454; Suydam v. North West. Ins. Co., 51 Pa. St. 394; McElwain v. Willis, 9 Wend. 548, 562, 565, 569; Beardsley Seythe Co. v. Foster, 36 N. Y. 561; Dunlevy v. Tallmadge, 32 Id. 457; Crippen v. Hudson, 13 Id. 161; Beck v. Burdett, 1 Paige, 305, 309; Willis v. Moore, Clarke Ch. 150; Spader v. Davis, 5 Johns. Ch. 280; 20 Johns. 554; Brinkerhoff v. Brown, 4 Johns. Ch. 671.

⁵ Hendricks v. Robinson, 2 Johns. Ch. 283, 296; Beck v. Burdett, 1 Paige, 305, 308; McElwain v. Willis, 9 Wend. 548, 568; Buswell v. Lincks, 8 Daly, 518; Geery v. Geery, 63 N. Y. 252; Jones v. Green, 1 Wall. 330; Neate v. Duke of Marlborough, 3 M. & Cr. 407; Shirley v. Watts, 3 Atk. 200; North American F. Ins. Co,

the real estate interests of the debtor; and that, in pursuing the equitable remedy, it is not simply an enforcement of a general claim of indebtedness against the debtor, but of a specific lien. It is accordingly held, that wherever the judgment itself constitutes a specific lien, in order that that lien may be enforced in equity, even the execution is unnecessary.¹ But where no lien is created by the judgment before a resort can be made to the equitable creditor's suit, the execution must have been issued and a return of *nulla bona* made as in the case of personal property.² There are exceptions to the general rule here laid down. Thus, it has been held that where an execution has been issued in the county, where the debtor resides, and has been returned unsatisfied, it is unnecessary to have an execution issued in the county in which the land is situated, in order that an equitable suit may be entertained for setting aside fraudulent conveyances of the same.³ It has also been held that, where a judgment was obtained against one of two persons who were sued as joint debtors and the execution of such judgment had been returned unsatisfied, the creditor could pursue his equitable remedy against the other joint debtor, without first proceeding to judgment and execution.⁴ Whether the debtor's insolvency and consequent inability to respond to the satisfaction of the execution would dispense with the proceedings at law, has been differently decided. Some of the cases hold that the insolvency does dispense with the necessity of proceeding to judgment at law;⁵ while, on the other hand, cases are cited which declare that the legal action is nevertheless necessary.⁶

The question has also been raised as to what is the effect of an attachment of the property, to answer the claim of creditors, upon the requirement of first resorting to the common law action and an unsatisfactory employment of the writ of execution, before the creditor's suit can be entertained by the court of equity. Inasmuch as the attachment of property to answer the claims of creditors has the effect of subjecting the property attached to a lien in favor of the attached creditor, which gives him priority of claim of satisfaction out of such property as against the general creditors, it has been held that the court of equity may interfere for the purpose of enforcing such a lien in a creditor's suit, without the requirement of obtaining a judgment at law and the

v. Graham, 5 Sandf. 197; *McCullough v. Colby*, 5 Bosw. 477; *Manchester v. McKee*, 4 Gilm. 511; *Thurmond v. Reese*, 3 Ga. 449; *Newman v. Willetts*, 52 Ill. 98; *Loving v. Pairo*, 10 Iowa, 282; *Miller v. Dayton*, 47 Id. 312.

¹ *McNairy v. Estland*, 10 Yerg. 310; *Montgomery v. McGee*, 7 Humph. 234; *Cornell v. Radway*, 22 Wis. 260; *Fleming v. Crafton*, 54 Miss. 79.

² *Hiler v. Hetterick*, 5 Daly, 33; see *Voorhees v. Howard*, 4 Abb. App. Dec. 503; *Hartshorn v. Eames*, 31 Me. 93; *Corey v. Greene*, 51 Id. 115; *Dockray v. Mason*, 48 Id. 178; *Griffin v. Nitcher*,

57 Id. 270, 272; *Webster v. Clark*, 25 Me. 313; *Dana v. Haskell*, 41 Id. 25.

³ *Shaw v. Dwight*, 27 N. Y. 244; *Payne v. Sheldon*, 63 Barb. 169.

⁴ *Hiler v. Hetterick*, 5 Daly, 33; see *Voorhees v. Howard*, 4 Abb. App. Dec. 203; *Webster v. Clark*, 25 Me. 313; *Dana v. Haskell*, 41 Id. 25; *Hartshorn v. Eames*, 31 Id. 93; *Corey v. Greene*, 51 Id. 115; *Dockray v. Mason*, 48 Id. 178; *Griffin v. Nitcher*, 57 Id. 270, 272.

⁵ *Tabb v. Williams*, 4 Jones Eq. 352; *Turner v. Adams*, 46 Mo. 95.

⁶ *Mixon v. Dunklin*, 48 Ala. 455; *Parish v. Lewis*, Freem. (Miss.) Ch. 299

issue of execution thereon.¹ And on the same general grounds it has been held by some of the cases that the court of equity may interfere without obtaining judgment, by a proceeding that may be called an equitable attachment, for the purpose of setting aside fraudulent conveyances, where the debtor has absconded or resides outside of the state.² And a similar conclusion is reached in respect to the right of a creditor, in a creditor's suit, to reach the money of an absconding debtor which is not subject to garnishment at law.³ But the doctrine, that an attachment, because it operates as a lien, dispenses with the judgment and execution at law as a prerequisite of a resort to the court of equity for aid, is denied by some of the courts.⁴

Whenever a creditor's suit is filed—in conformity with the equitable doctrine that equality is equity—it is required that all the parties interested in the subject-matter of the suit, should be made parties; and all the creditors of the defendant debtor may be joined at their request, in order to secure a *pro rata* distribution of the property.⁵

§ 530. **Exoneration and contribution distinguished.**—Although both exoneration and contribution are claims of one party to be reimbursed by another party, for money which the former has been compelled to pay out in satisfaction, in whole or in part, of an obligation of the latter, they arise in different cases, and are distinguishable. Exoneration is where a surety or some other party, who is secondarily liable for the debt, has been compelled to pay it through the failure or default of the primary debtor. The secondary obligor has the claim against the primary debtor of being completely exonerated; and in order that that claim may be enforced, he may resort to an action in equity for recovery from such primary debtor of the full amount, which he has been called upon to pay in consequence of the latter's default.⁶ It is only the amount, however, which the secondary obligor has been actually obliged to pay in performance of the obligation of

¹ Dodge v. Griswold, 8 N. H. 425; Stone v. Anderson, 26 Id. 506; Sheafe v. Sheafe, 40 Id. 516; see Castle v. Bader, 23 Cal. 76; Hunt v. Field, 1 Stockt. 36; Williams v. Michenor, 3 Id. 520; Ward v. McKenzie, 33 Tex. 297; Tappan v. Evans, 11 N. H. 311; Kelly v. Lane, 42 Barb. 594; Mechanics', &c. Bk. v. Dakin, 51 N. Y. 519; Heyneman v. Dannenberg, 6 Cal. 376; Scales v. Scott, 13 Id. 76; Robert v. Hodges, 16 N. J. Eq. 299; Curry v. Glass, 25 Id. 108; Falconer v. Freeman, 4 Sandf. Ch. 565; Greenleaf v. Mumford, 19 Abb. Pr. 469; Skinner v. Stewart, 15 Id. 391; Bates v. Plonsky, 62 How. Fr. 429.

² Peay v. Morrison's Ex'rs, 10 Gratt. 149; Pope v. Solomon, 36 Ga. 541; Scott v. McMillen, 1 Litt. 302; Kipper v. Glancey, 2 Blackf. 356.

³ Pendleton v. Perkins, 49 Mo. 565.

⁴ Weil v. Lankins, 3 Neb. 384; Bigelow v. Address, 31 Ill. 322; Martin v. Michael, 23 Mo. 50; McMinn v. Whelan, 27 Cal. 300; Thurber v. Blanck, 50 N. Y. 80; Lawrence v. Bk. of Republic, 35 Id. 320; Greenleaf v. Mumford, 50 Barb. 543; Griffin v. Nitcher, 57 Me. 270; Tennent v. Battey, 18 Kan. 324.

⁵ 1 Pom. Eq. Jur., § 410. "The practice of permitting judgment creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled." Nelson, J., in Myers v. Fenn, 5 Wall. 207; see, also, Conro v. Port Henry Iron Co., 13 Barb. 27; Dan. Chan. Pr. 236, 237; see, also, *ante*, § 21.

⁶ Townsend v. Whitney, 75 N. Y. 425; Harris v. Warner, 13 Wend. 400; Neimcewicz v. Gahn, 3 Paige, 614; 11 Wend. 312; Wesley Church v. Moore, 10 Barr. 273; Dering v. Earl of Winchelsea, 1 Cox, 318; 1 Eq. Lead. Cas. 120, 124, 134 (4th Am. ed.); Baxter v. Moore, 5 Leigh, 219; Butler v. Butler's Adm'r, 8 W. Va. 674; Hare v. Grant, 77 N. C. 203; Moore v. Young, 1 Dana, 516; Hamilton v. Johnston, 82 Ill. 39; Hearne v. Keath, 63 Mo. 84; Craythorne v. Swinburn, 14 Ves. 160; Hazelton v. Valentine, 113 Mass. 472, 479; Savage v. Winchester, 15 Gray, 453; Konitzky v. Meyer, 48 N. Y. 571.

the primary debtor, that may be recovered in a suit for exoneration. If, therefore, the surety or other secondary obligor should, in satisfaction of the primary debt, pay less than its full amount, the benefit of the compromise of the transaction must be given to the debtor; and only the actual amount paid by the surety can be recovered by him.¹ It is not necessary that the surety, or secondary obligor should wait, before paying the debt, until he has been sued and a judgment obtained against him. He can pay it immediately, and then recover of the primary debtor. Not only that, but even before he has been called upon to pay, he may institute an equitable action against the debtor, in the nature of a bill *quia timet*, to compel the primary debtor to pay such bill. In such a case, the creditor is made a co-defendant with the primary debtor.²

Contribution, on the other hand, is the claim of partial reimbursement between joint secondary obligors, where one of them has been called upon to pay the entire debt, for which all are jointly responsible, in consequence of the default of the primary debtor. In such a case, the secondary obligor, who has paid the whole debt, has his action against the other joint secondary obligors for a *pro rata* contribution towards the payment of the debt, each joint debtor being called on to pay to the secondary obligor, who has paid the debt, his proportionate share of such debt. As a general proposition, it seems to be necessary that the obligor who has paid the debt should first resort to the primary debtor; and when he has failed to obtain exoneration from the primary debtor, then the action for contribution will lie against the joint secondary obligors. But the right of contribution is not confined simply to cases of secondary joint obligors, but to all cases of joint obligations, whether primary or secondary, where one of the joint debtors has been compelled to pay.* The advantage of the equitable remedy over the common law action of contribution is

¹ Reed v. Norris, 2 My. & Cr. 361, 375; Bonney v. Seeley, 2 Wend. 481; Blow v. Maynard, 2 Leigh, 30.

² Padwick v. Stanley, 9 Hare, 627; Wooldridge v. Norris, L. R. 6 Eq. 410; Beaver v. Beaver, 23 Pa. St. 167; Ardesco Oil Co. v. N. A. Oil, & C. Co., 66 Id. 375, 381; Irick v. Black, 17 N. J. Eq. 189; Stephenson v. Taverners, 9 Gratt. 389; Rice v. Downing, 12 B. Mon. 44; Dempsey v. Bush, 18 Ohio St. 376; Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 405; Dering v. Earl of Winchelsea, 1 Cox, 318; Notes in 2 Eq. Lead. Cas. 278, 280, 283, 306, 1896 (4th Am. ed.); Nisbet v. Smith, 2 Bro. Ch. 579, 582; Comes Ranelagh v. Hayes, 1 Vern. 189; Antrobus v. Davidson, 3 Meriv. 569; Bishop v. Day, 13 Vt. 81; Hayes v. Ward, 4 Johns. Ch. 123, 131; King v. Baldwin, 2 Id. 554; 17 Johns. 384; Norton v. Reid, 11 S. C. 593; White v. Schurer, 4 Baxt. 23; Gilliam v. Esselman, 5 Sneed, 86.

* See, in general, Black v. Shreeve, 3 Halst. Ch. 440; Bowen v. Hoskins, 45 Miss. 183; Mills v.

Hyde, 19 Vt. 59; Strong v. Mitchell, 19 Id. 644; Wayland v. Tucker, 4 Gratt. 267; Campbell v. Mesier, 4 Johns. Ch. 334; 6 Id. 21; Dering v. Earl of Winchelsea, 1 Cox, 318; 1 Eq. Lead. Cas. 120, 124, 134; Jenkins v. Lockard's Adm'r, 66 Ala. 377; Magruder v. Admire, 4 Mo. App. 133; Stephens v. Meek, 6 Lea. 226; Oldham v. Broom, 28 Ohio St. 41; Camp v. Bostwick, 20 Id. 337; Robertson v. Deatherage, 82 Ill. 511; Conover v. Lill, 76 Id. 342; Wagenseller v. Prettyman, 7 Ill. App. 192; Curtis v. Parks, 55 Cal. 106; Taylor v. Reynolds, 53 Id. 686; Powell v. Powell, 48 Id. 234; Dussol v. Bruguere, 50 Id. 456; Whiting v. Burke, L. R. 6 Ch. 342; Hichborn v. Fletcher, 66 Me. 209; Morgan v. Smith, 70 N. Y. 537; Wells v. Miller, 66 Id. 255; Johnson v. Harvey, 84 Id. 363; Smith v. State, 46 Md. 617; Nally v. Long, 56 Id. 567; Bright v. Lennon, 83 N. C. 183; Scofield v. Gaskill, 60 Ga. 277; Owen v. McGehee, 61 Ala. 440; Broughton v. Wimberly, 65 Id. 549.

to be found especially in the ability of the court of equity to provide for an increase in the contribution of the other co-obligors, where one of them is insolvent and consequently cannot be compelled to make a contribution. That is, where one of three or more joint obligors, who can be called on to contribute towards the settlement of the debt, which has already been paid up by one of them, is insolvent, the other solvent obligors will be compelled by equity to divide among them the share of the insolvent obligor, so that the payment of such share shall not fall altogether on the one obligor, who has been compelled by the creditor to pay the debt.¹ And where a joint obligor has died before the suit for contribution has been instituted, his estate is liable in his stead.² The claim of contribution is very commonly enforced in connection with the settlement of mortgages of lands; and a more detailed discussion of the right of contribution, is, therefore, to be found in the chapter on mortgages of real estate.³

§ 531. **Subrogation.**—The doctrine of subrogation may be defined to be the right of all parties, who are interested in the payment and satisfaction of a debt or obligation, to share in the protection afforded by the possession by either of them of any securities or pledges, which the debtor has provided for securing the payment of the debt. That is, if a debt has been contracted in which there are secondary obligors, as well as a pledge or other security given, it matters not whether it be given to the secondary obligor, the surety or grantor, on the one hand, or to the creditor; in every case, the security is held to be the principal fund out of which the debt is to be paid; and being the property of the debtor, all parties have a right to secure payment by the enforcement of the lien on such pledge against the debtor. If the creditor has possession of this pledge or security, then the secondary obligor has a right to be subrogated to the creditor's claim against this pledge, on the principle that he has a right to be exonerated by the debtor, and by the debtor's property, from the obligation to pay the debt.⁴ On the other hand, if the pledge or security has been given to

¹ *Burrows v. McWhann*, 1 Desau. 409; *Breckinridge v. Taylor*, 5 Dana, 110; *Hitchman v. Stewart*, 3 Drew. 271; *Mayor, &c. v. Murray*, 5 De G. M. & G. 497; *Magruder v. Admire*, 4 Mo. App. 133.

² *Johnson v. Harvey*, 84 N. Y. 363; *Stephens v. Meek*, 6 Lea. 226; *Primrose v. Bromley*, 1 Atk. 89; *Dussol v. Bruguiere*, 50 Cal. 456.

³ See *ante*, §§ 451-457.

⁴ *Lidderdale's Ex'r's v. Ex'r of Robinson*, 12 Wheat. 594; *Norwood v. Norwood*, 2 Har. & J. 238; *Wright v. Grover*, 82 Pa. St. 80; *Marsh v. Pike*, 10 Paige, 595; *McDougal v. Dougherty*, 14 Ga. 674; *Neilson v. Fry*, 16 Ohio St. 552; *Dearborn v. Taylor*, 18 N. H. 153; *Pierson v. Catlin*, 18 Vt. 77; *Hayes v. Ward*, 4 Johns. Ch. 123; *Scribner v. Adams*, 73 Me. 541; *Kelly v. Her- rick*, 131 Mass. 373; *Thompson v. White*, 48 Conn. 509; *Townsend v. Whitney*, 75 N. Y. 425;

15 Hun, 93; *Van Santen v. Standard Oil Co.*, 81 N. Y. 171; *Cole v. Malcolm*, 66 Id. 363; *Lewis v. Palmer*, 28 Id. 271; *Steele's Appeal*, 72 Pa. St. 101; *Bleakley's Appeal*, 66 Id. 187, 191; *Price v. Trusdell*, 28 N. J. Eq. 200; *Allen v. Henley*, 2 Lea 141; *Harlan v. Sweeney*, 1 Id. 682; *Kirkman v. Bk. of America*, 2 Coldw. 397; *Smith v. Rumsey*, 33 Mich. 183; *Keith v. Hudson*, 74 Ind. 333; *Prout v. Lomer*, 79 Ill. 331; *Hollingsworth v. Pearson*, 53 Iowa, 53; *McArthur v. Martin*, 23 Minn. 74; *Eaton v. Hasty*, 6 Neb. 419; *Van Orden v. Durham*, 35 Cal. 136; *Receivers of N. Y., &c. Ry. v. Wortendyke*, 27 N. J. Eq. 658; *Irick v. Black*, 17 Id. 189; *Dent v. Wait's Adm'r*, 9 W. Va. 41; *Hevener v. Berry*, 17 Id. 474; *York v. Landis*, 65 N. C. 535; *Saffold v. Wade's Ex'r*, 51 Ala. 214; *Knighton v. Curry*, 62 Id. 404; *Osborn v. Noble*, 46 Miss. 449; *Davis v. Walker*, 51 Id. 659; *Talbot v. Wilkins*, 31 Ark. 411; *Fish-*

the surety or other secondary obligor, then that constitutes an additional fund to satisfy the primary obligation; and the creditor may likewise claim the benefit of the existence of such security, and the right of subrogation to such securities, by an appropriate equitable action.¹ The same claim of subrogation can be asserted by one joint secondary obligor against another; as, for example, by one surety against a co-surety; all the sureties or other secondary obligors are entitled to the protection afforded by the existence of the pledge or other security.²

§ 532. **Marshaling of securities.**—Where one creditor has two funds, out of which he may satisfy his claim against the debtor, and a second creditor has a claim of satisfaction of his debt against only one of these funds, and his lien or claim against such fund is second in order to the other creditor, the court of equity does not permit the party, having the claim of satisfaction against both funds, to defeat or prevent the satisfaction of the claim of the other creditor, by enforcing his lien against the property, to which both claims are attached. The second creditor can, by applying to the court of equity, secure a satisfaction of his debt, not by compelling the first creditor to enforce his lien on the other property, but by being subrogated to the additional security of the first creditor over the other property.³ But the rules, involved in the doctrine of marshaling of securities, as it is called, must be taken with the modification, that the paramount creditor shall not be delayed or inconvenienced in any way in the collection of his debt.⁴ Finally, it is necessary, in order that the doctrine may apply at all, that the parties themselves should be creditors of the same debtor.⁵ The rule of marshaling of assets has a general application to all sorts

back *v. Weaver*, 34 *Id.* 569; *Farmers', &c. Bk v. Sherley*, 12 *Bush*, 304; *Storms v. Storms*, 3 *Id.* 77.

¹ *Wallace's Appeal*, 5 *Barr.* 103; *Burwell's Adm'r v. Fauber*, 21 *Gratt.* 446; *Osborn v. Noble*, 46 *Miss.* 449; *Rardin v. Walpole*, 38 *Ind.* 146; *Moses v. Murgatroyd*, 1 *Johns. Ch.* 119; *Phillips v. Thompson*, 2 *Id.* 418, 421; *Rice's Appeal*, 79 *Pa. St.* 168.

² *Copis v. Middleton*, T. & R. 224, 231; *Fishback v. Weaver*, 34 *Ark.* 569; *Brown v. Ray*, 18 *N. H.* 102; *Adm'r of Aldrich v. Hapgood*, 39 *Vt.* 617; *Elwood v. Deifendorf*, 5 *Barb.* 398; *Parham v. Green*, 64 *N. C.* 436; *McCune v. Belt*, 45 *Mo.* 174.

³ *Herriman v. Skillman*, 33 *Barb.* 378; *Bk. of Kentucky v. Vance's Adm'r's*, 4 *Litt.* 168; *Ramsey's Appeal*, 2 *Watts*, 228; *Cheesebrough v. Millard*, 1 *Johns. Ch.* 409; *Hunt v. Townsend*, 4 *Sandf. Ch.* 510; *Glass v. Pullen*, 6 *Bush*, 346; *Russell v. Howard*, 2 *McLean*, 489; *Ross v. Duggan*, 5 *Col.* 85; *Terry v. Rosell*, 32 *Ark.* 478; *Hawley v. Mancius*, 7 *Johns. Ch.* 174, 184; *Evertson v. Booth*, 19 *Johns.* 486, 492; *Besley v. Lawrence*, 11 *Paige*, 581; *York, &c. Ferry Co. v. Jersey Co.*, *Hopk. Ch.* 460; *Zeigler v. Long*, 2 *Watts*, 205; *Pallen v. Agricultural Bk.*, *Freem.*

(*Miss.*) *Ch.* 419; *Tidd v. Lister*, 10 *Hare*, 140, 157; 3 *De G. M. & G.* 857; *Averall v. Wade*, *Lloyd & G.* 252; *Gibson v. Seagrim*, 20 *Beav.* 614; *Hales v. Cox*, 32 *Id.* 118; *Ex parte Alston*, L. R. 4 *Ch.* 168; *Heyman v. Dubois*, L. R. 13 *Eq.* 158; *Lanoy v. Duke of Athol*, 2 *Atk.* 444, 446; *Aldrich v. Cooper*, 8 *Ves.* 382, 395; 2 *Eq. Lead. Cas.* (4th *Am. ed.*) 2280, notes; *Ex parte Kendall*, 17 *Ves.* 514, 520; *Baldwin v. Belcher*, 3 *Dru. & War.* 173, 176; *Hughes v. Williams*, 3 *Macn. & G.* 683.

⁴ *Coker v. Shropshire*, 59 *Ala.* 642; *Sweet v. Redhead*, 76 *Ill.* 374; *Wolf v. Smith*, 36 *Iowa*, 454; *Jervils v. Smith*, 7 *Abb. Pr.*, N. S., 217; *Briggs v. Planters' Bk.*, *Freem. (Miss.) Ch.* 574; *Denham v. Williams*, 39 *Ga.* 312; *Calloway v. People's Bank*, 54 *Id.* 572; *Walker v. Covar*, 2 *S. C.* 16; *Evertson v. Booth*, 19 *Johns.* 486, 493; *Woolcocks v. Hart*, 1 *Paige*, 185. Or that the rights of third parties should be prejudiced thereby, *Cannon v. Kreipe*, 14 *Kans.* 324; *Leib v. Stribbling*, 51 *Md.* 285; *McArthur v. Martin*, 23 *Minn.* 74; *Marr v. Lewis*, 31 *Ark.* 203; *Barnes v. Racster*, 1 *Y. & C. Ch.* 401; *Averall v. Wade*, *Lloyd & G.* 252.

⁵ *Rogers v. Meyers*, 68 *Ill.* 92; *Ex parte Kendall*, 17 *Ves.* 514, 520; *Dorr v. Shaw*, 4 *Johns. Ch.* 17; *Stevens v. Church*, 41 *Conn.* 369.

of securities, but the most common application of the principle is to the case of successive mortgagees and judgment creditors. In the chapter on mortgages a further explanation of the subject is to be found.¹

§ 533 **Suits for accounting.**—The common law had an action which was known under the name of *account render*; but in view of the limitations of the common law jurisdiction, and the inability of the common law courts to obtain a discovery of essential facts from the defendant under oath, an additional difficulty and obstacle in the way of making the common law remedy inadequate and satisfactory, the common law action of account render fell into disuse, and instead thereof the equitable suit for an accounting took its place.² The suit for an accounting is very commonly employed as ancillary to some general equitable action; but the equitable jurisdiction is not confined to these cases. The court may institute the suit independently of any other ground for assuming jurisdiction. The general ground for assuming jurisdiction is the inadequacy of the legal remedy. The cases in which the equitable remedy is deemed to be necessary, because of the inadequacy of the common law remedies, are as follows: *First*, where the accounts are all on one side, but there are circumstances connected with the transaction which create great complications or difficulties in the way of a settlement at law, and the more elastic inquiry by a master or referee is necessary, to definitely settle upon the limitations of the claims of the parties.³ *Secondly*, where there are mutual accounts between plaintiff and defendant, and there have been mutual payments made by each of them, and the jurisdiction is exercised on account of the difficulty of securing a satisfactory accounting.⁴ *Thirdly*, where the monetary obligations arise between the parties out of a fiduciary relation. Under this heading, the subject of accounting as it relates to trustees and administrators would fall, but it has been already explained in other connections. But the same principle is applied to every case where the fiduciary relation prevails, but which is not considered as falling strictly under the

¹ See *ante*, § 458.

² 1 Spence Eq. 649; Mitf. Eq. Pl. 120, 123; Bacon Abr. tit. Accompt.

³ *Ward v. Peck*, 114 Mass. 121; *Farmers' &c. Bk. v. Polk*, 1 Del. Ch. 167; *Trapnall v. Hill*, 31 Ark. 345; *Nesbit v. St. Patrick's Church*, 1 Stockt. 76; *Seymour v. Long Dock Co.*, 20 N. J. Eq. 296; *contra*, *Norwich &c. R. R. v. Storey*, 17 Conn. 364; *Watt v. Conger*, 13 Sm. & Mar. 412; *Kirkman v. Vanlier*, 7 Ala. 217; *Printup v. Mitchell*, 17 Ga. 558; *Wilson v. Riddle*, 48 *Id.* 609; *Lafever v. Billmyer*, 5 W. Va. 33; *Blood v. Blood*, 110 Mass. 545; *Frue v. Loring*, 120 *Id.* 507; *Taff Vale Ry. v. Nixon*, 1 H. L. Cas. 110; *Mitchell v. Great Works &c. Co.*, 2 Story, 648; *Governor v. McEwen*, 5 Humph. 241.

⁴ *Phillips v. Phillips*, 9 Hare, 471; *Passyunk Building Assn.'s Appeal*, 83 Pa. St. 441; *Carter v. Bailey*, 64 Me. 458; *Dickinson v. Lewis*, 34

Ala. 638; *Avery v. Ware*, 58 *Id.* 475; *Garner v. Reis*, 25 Minn. 475; *Haywood v. Hutchins*, 65 N. C. 574; *Hay v. Marshall*, 3 Humph. 623; *Wilson v. Mallett*, 4 Sandf. 112; *Durant v. Einstein*, 5 Robt. 423; *Salter v. Ham*, 31 N. Y. 321; *Walker v. Cheever*, 35 N. H. 339; *Gloninger v. Hazard*, 42 Pa. St. 389; *North Eastern Ry. v. Martin*, 2 Phil. 758; *Kennington v. Houghton*, 2 Y. & C. Ch. 620, 627; *Porter v. Spencer*, 2 Johns. Ch. 169; *Smith v. Marks*, 2 Rand. 449; *Hickman v. Stout*, 2 Leigh, 6; *McLin v. McNamara*, 2 Dev. & Bat. Eq. 82; *Dinwiddie v. Bailey*, 6 Ves. 136; *Wells v. Cooper*, cited 6 *Id.* 139; *Allison v. Herring*, 9 Sim. 583; *Phillips v. Phillips*, 9 Hare, 471; *Padwick v. Hurst*, 18 Beav. 575; *Fluker v. Taylor*, 3 Drew. 183.

⁵ See *ante*, as to trustees, § 323; as to executors and administrators, § 329.

head of trusts; as in the case of principal and agent. But in order that suits for an accounting may be instituted between principal and agent, it must be shown that the character of the accounts make it necessary for the parties to resort to the extraordinary jurisdiction of the court of equity, on account of the complications involved in the account.¹ But the mere fact, that the parties sustain to each other the relation of principal and agent, does not in itself justify the principal in maintaining an equitable suit for an accounting against his agent.² The agent may likewise maintain a suit for an accounting against a principal, whenever such suit is necessary; as, for example, where the agent's salary depends upon the profits made by his employer.³ But the general rule is, that the agent does not need to resort to this remedy; and hence the remedy will generally be denied to him, in the absence of proof by him of special grounds for equitable consideration.⁴

The suit for accounting will also be entertained between joint owners of property in general, for the purpose of determining the amount of the profits of the joint transaction and the proportionate share of each in the same.⁵ But one co-tenant cannot in equity institute a suit for the recovery of his share of the profit, where the character of the transaction itself does not involve an account which requires the aid of equity.⁶

§ 534. **Accounting between partners.**—The most frequent application to the court of equity for an accounting is between partners, in the settlement of the partnership affairs. In consequence of the more ready facilities of the court of equity to deal with the matter of accounting, it is held to be an almost universal rule that, in the settlement of partnership affairs, the resort to a court of equity is indispensable. Modern statutes have given probate courts jurisdiction over the settlement of partnership affairs where one of the partners dies; but that extension of the probate jurisdiction does not deprive the court of equity of its power in any case to wind up the affairs of the firm.⁷ As a general rule, probate courts do not have jurisdiction over the settlement of partnership affairs in other cases than the death of one of the partners.⁸ The equitable jurisdiction is also in nowise affected by the

¹ *Dabbs v. Nugent*, 11 Jur., N. S., 643; *Coffman v. Sangston*, 21 Gratt. 263; *Kennington v. Houghton*, 2 Y. & C. Ch. 620, 627; *Taff Vale Ry. v. Nixon*, 1 H. L. Cas. 110; *Foley v. Hill*, 2 Id. 28, 46; *O'Connor v. Spaight*, 1 Sch. & Lef. 305, *per* Lord Redesdale; *South Eastern Ry. v. Brogden*, 3 Macn. & G. 8.

² *Coquillard v. Suydam*, 8 Blackf. 24; *Blakeley v. Biscoe*, 1 Hempst. 114; *Powers v. Gray*, 7 Ga. 206; *Long v. Lochran*, 9 Phila. 267; *County of Clinton v. Schuster*, 82 Ill. 137; *King v. Rossett*, 2 You. & J. 33; *Nevulshaw v. Brownrigg*, 1 Sim., N. S., 573; *R. De G. M. & G.* 441; *Hemings v. Pugh*, 4 Giff. 456; *Moxon v. Bright*, L.R. 4 Ch. 292.

³ *Harrington v. Churchward*, 6 Jur., N. S., 576; *Shepard v. Brown*, 4 Giff. 208; *Buel v. Selz*, 5 Ill. App. 116.

⁴ *Padwick v. Stanley*, 9 Hare, 637; *Smith v. Leveaux*, 2 De G. J. & S. 1.

⁵ *Darden v. Cowper*, 7 Jones L. 210; *Wright v. Wright*, 59 How. Pr. 176; *Hodges v. Pingree*, 10 Gray, 14; *Blood v. Blood*, 110 Mass. 545; *Gates v. Fraser*, 9 Ill. App. 624; *Strelly v. Winslow*, 1 Vern. 297; *McLellan v. Osborne*, 51 Me. 118; *Dyckman v. Valiente*, 42 N. Y. 549, 563; *Early v. Friend*, 16 Gratt. 21; *Leach v. Beattie*, 33 Vt. 195; *Wiswell v. Wilkins*, 4 Id. 137.

⁶ *Pico v. Columbet*, 12 Cal. 414.

⁷ *Griggs v. Clark*, 23 Cal. 427; *Scott v. Bufum*, 52 N. H. 345; *Perrin v. Lepper*, 49 Mich. 347.

⁸ *Anderson v. Beebe*, 22 Kans. 768; *Blake v. Ward*, 137 Mass. 94; *Booth v. Todd*, 8 Tex. 137; but see, to the contrary, *Ensworth v. Curd*, 68

fact that an action of account could lie at law between the partners.¹ The assumption of jurisdiction by a court of equity over an accounting is also not limited to the settlement of the interests of the parties in property situated within the state and county, in which the action is brought. If the parties are within the jurisdiction of the court, the decree in accounting can provide for the settlement of the conflicting claims of the parties in all classes of property, wherever situated.² And this is the case, even though some of the parties are non-resident.³ In the case of an accounting between partners, it is the general rule, that a bill for accounting will not be entertained, except where the accounting is prayed for as a means of procuring the final settlement of the partnership affairs, and the dissolution of the partnership.⁴ No specific prayer for dissolution of the partnership is necessary, where a pleading by a general bill for accounting is interpreted to include by presumption a prayer for dissolution;⁵ although a contrary rule obtained at an earlier day, particularly in the English courts.⁶ But while this is the general rule, that the dissolution of the partnership is presumed to be contemplated, when the bill for accounting is filed, yet a court of equity will entertain the suit for accounting without a dissolution of the partnership in special cases; as, for example, where one partner excludes another from a reasonable participation in the affairs of the firm, in order to force him to a dissolution of the partnership;⁷ or where one of the co-partners has, by a series of secret transactions, attempted to defraud the other partner of his just share of the profits of the business.⁸ So, also, where the agreement of partnership calls for a periodical settlement, or for settlements of distinct transactions, a court of equity will entertain an accounting for the purpose of ascertaining the periodical or special claims of the partner to shares in the profits of the business.⁹ And it has also been held that an accounting may be had, when the partnership business is a failure,

Mo. 282; see *Roulston v. Washington*, 79 Ala. 529; *Vincent v. Martin*, 79 Ala. 540; *Culley v. Edwards*, 44 Ark. 423; *Tiner v. Christian*, 27 Ark. 306; *Theller v. Sutt*, 57 Cal. 447.

¹ *Gillett v. Hall*, 13 Conn. 426; *Niles v. Williams*, 24 Conn. 279; *Bennett v. Woolfolk*, 15 Ga. 213; *Lilliendhal v. Stegnar*, 45 N. J. Eq. 648; *Reed v. Johnson*, 24 Me. 322; *Krutz v. Paola Town Co.*, 20 Kans. 397; *Glenn v. Hebb*, 12 Gill & J. (Md.) 271; see *Huyler v. Westervelt*, 7 Paige, (N. Y.) 155.

² *Bracken v. Kennedy*, 4 Ill. 558; *Bispham's Eq. Jur.*, § 505; *Christy's Appeal*, 92 Pa. St. 157; *Epping v. Aiken*, 71 Ga. 682.

³ *Near v. Lowe*, 49 Mich. 482; *Waugh v. Schlenk*, 33 Ill. App. 433.

⁴ *McMahon v. Thornton*, 4 Mont. 46; *Baird v. Baird*, 1 Dev. & B. Eq. (N. Car.) 524; *McRae v. McKenzie*, 2 Dev. & B. Eq. (N. Car.) 232; *Coville v. Gilman*, 13 W. Va. 314; *Clark v. Gridley*, 41 Cal. 119; *Nisbet v. Nash*, 52 Cal. 540; *Thompson v. Lowe*, 111 Ind. 272; *Davis v. Davis*, 60

Miss. 615; *Glynn v. Phetteplace*, 20 Mich. 383; *Phillips v. Blatchford*, 137 Mass. 510; and see *Roberts v. Eldred*, 73 Cal. 394.

⁵ *Coville v. Gilman*, 13 W. Va. 314; *Werner v. Leisen*, 31 Wis. 169; *Loscombe v. Russell*, 4 Sim. 8; *Ambler v. Whipple*, 20 Wall. (U. S.) 546.

⁶ *Foreman v. Homfray*, 2 Ves. & B. 329; *Knebell v. White*, 2 Y. & C. Ex. 15; *Loscombe v. Russell*, 4 Sim. 8.

⁷ *Fairthorn v. Weston*, 3 Hare, 387; *Harrison v. Armitage*, 4 Mad. 143; *Blisset v. Daniel*, 10 Hare, 493; *Richards v. Davies*, 2 R. & M. 347; and see *Inglis v. Floyd*, 33 Mo. App. 565.

⁸ *Smith v. Fitchett*, 56 Hun, 473; *Davis v. Davis*, 60 Miss. 615; *Traphagen v. Burt*, 67 N. Y. 30; *Hitchens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, 1 R. & M. 132; *Beck v. Kantorowicz*, 3 K. & J. 230; *Society, &c. v. Abbott*, 2 Beav. 559.

⁹ *Patterson v. Ware*, 10 Ala. 444; and see *Wadley v. Jones*, 55 Ga. 329; *Attorney-Gen. v. State Bank*, 1 Dev. & B. Eq. (N. Car.) 145.

and the partners are so numerous, that it is impossible or difficult for them all to be made parties to the action. In such a case, a special bill for accounting will be permitted to one or more of the partners, to be brought in their behalf against the managing partners. Any member of the firm, of course, has the right to maintain a bill for accounting,¹ whether such partner be active or dormant, known or silent, general or special. So, also, can the bill for accounting be filed by the executor or administrator of a deceased partner,² or by an assignee, mortgagee or purchaser from one partner of his share in the partnership affairs.³ Inasmuch as the administrator or executor of the deceased partner is given the power to maintain a suit for accounting, the general rule is that a similar suit cannot be maintained by the widow, legatee, distributee or creditors of the deceased partner.⁴ But if it can be established that the relation between the executor or administrator and the surviving partners is of such a nature, that the rights and interests of these parties, who are the beneficiaries of the deceased partner, will not be substantially protected and cared for by such executor or administrator, then the court of equity will, on this special ground, permit such parties to maintain a suit for accounting.⁵ This is especially the case, where fraud or collusion is proven to exist between the personal representatives of the deceased partner and the surviving partners.⁶ And where the executor or administrator is likewise the surviving partner, and more likely still, where he is the surviving managing partner, the reason for denying the widow and heirs and distributees of the deceased partner the right to maintain the suit for accounting against the partnership, would disappear altogether. In such cases, the accounting can always be had at the instance of the parties and beneficiaries who are interested in the estate of the deceased

¹ *Clarke v. Gridley*, 41 Cal. 119; *Quinlivan v. English*, 42 Mo. 362; *Harvey v. Barney*, 98 Mass. 118; *Simonton v. McLain*, 37 Ala. 663; *Sharp v. Hibbins*, 42 N. J. Eq. 543.

² *Freeman v. Freeman*, 136 Mass. 260; *Cheese-man v. Wiggins*, 1 Thomp. & C. (N. Y.) 595; *Pitt v. Moore*, 99 N. Car. 85; *Wickliffe v. Eve*, 17 How. (U. S.) 468; *Denver v. Roane*, 99 U. S. 355; *In re Clap*, 2 Low. (U. S.) 168; *Heyne v. Middlemore*, 1 Ch. Rep. 138; *Hockwell v. Eust-man*, Cro. Jac. 410; *McLaughlin v. Simpson*, 3 Stew. & P. (Ala.) 85; *Costley v. Towles*, 40 Ala. 600; *Tate v. Tate*, 35 Ark. 289; *Miller v. Jones*, 39 Ill. 54; *Atkinson v. Rogers*, 14 La. Ann. 643; *Grim's Appeal*, 105 Pa. St. 375; *Tillinghast v. Champlin*, 4 R. I. 173; *Watkins v. Fakes*, 5 Helsk. (Tenn.) 185; *Jennings v. Chandler*, 10 Wis. 21.

³ *Fourth Nat. Bk. v. Carrollton R. Co.*, 11 Wall. (U. S.) 624; *Fawcett v. Whitehouse*, 1 R. & M. 132; *Redmayne v. Forster*, L. R. 2 Eq. 467; *Fellows v. Greenleaf*, 43 N. H. 421; *Marx v. Goodnough*, 16 Oregon, 26; *Clagett v. Kil-bourne*, 1 Black. (U. S.) 346; *Mathewson v. Clarke*, 6 How. (U. S.) 122; *Stiness v. Pierce*, 13

R. I. 452; *Driggs v. Morely*, 2 Pinn. (Wis.) 403; 2 Chand. (Wis.) 59; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; 18 Am. Dec. 577; *Farley v. Moog*, 79 Ala. 148; *Nichol v. Stewart*, 36 Ark. 612; *Miller v. Brigham*, 50 Cal. 615; *Strong v. Clawson*, 10 Ill. 346; *Gyger's Appeal*, 62 Pa. St. 73; 1 Am. Rep. 382.

⁴ *Vienne v. McCarty*, 1 Dall. (Pa.) 154; *Har-ri-son v. Righter*, 11 N. J. Eq. 389; *Stainton v. Carron Co.*, 18 Beav. 146; *Davies v. Davies*, 2 Keen, 539; *Rosenzweig v. Thompson*, 66 Md. 593; *Tate v. Tate*, 35 Ark. 289; *Hutton v. Laws*, 55 Iowa, 710; *Hyer v. Burdett*, 1 Edw. Ch. (N. Y.) 325; *Ludlow v. Cooper*, 4 Ohio St. 1.

⁵ *Bausher v. Kirby*, 1 Russ. & M. 277; *Yatemen v. Yatemen*, 7 Ch. Div. 210; *Travis v. Milne*, 9 Hare, 141; *Stainton v. Carron Co.*, 18 Beav. 146; and see *Rosenzweig v. Thompson*, 66 Md. 593; *Forward v. Forward*, 6 Allen, (Mass.) 494; *Law v. Law*, 2 Coll. 41; *Gedge v. Traill*, 1 Russ. & M. 281; but see, to the contrary, *Ravenscraft v. Pratt*, 22 Kans. 20; *Dampf's Appeal*, 106 Pa. St. 72.

⁶ *Newland v. Champion*, 1 Ves. Sr. 105; *Seeley v. Boehm*, 2 Madd. 176.

partner.¹ It has also been held to be the right of an employee of a firm to maintain a bill for accounting against such firm, whenever the wages of the employee depend upon the profit of the concern and constitute a proportionate share or percentage of the same.²

§ 535. **Accounts stated.**—Where the parties, whether they be partners or other persons jointly interested, or having mutual accounts with each other, have already reached a settlement of the accounts and a settlement between them of the balance found to be due one to the other, that fact generally constitutes a good defense to a suit for accounting.³ But in order that a widow's settlement may operate as a good defense to such a suit, it must be in writing, although no signature or subscription by the parties seems to be required. For while such signature is the ordinary and customary mode of proving the acquiescence of the parties in such settlement, yet such acquiescence may be shown to exist by parol evidence.⁴ Mere statements, made by the party who has possession of the books of account, will not in themselves constitute what is known in the law as an account stated, until all the parties have acquiesced in the statement so made, and manifested by such acquiescence their determination to consider such statement as a final settlement of their joint affairs.⁵ Nor does it constitute an account stated where, in consequence of the custom of a firm that new books are to be opened every ten years, in closing the old books balances are struck, and only such balances transferred to the new books. The partners could, notwithstanding this custom, file a suit for accounting, which would involve an inquiry into the items of accounts which are to be found in the older set of books, unless the balances obtained at the time of closing the old books were accepted by such partners as a final settlement of their affairs.⁶ So, likewise, will

¹ *Pointon v. Pointon*, L. R. 12 Eq. 547; *Cropper v. Knappman*, 9 G. & C. Ex. 338; and see *Sanderson v. Sanderson*, 17 Fla. 820; *Forward v. Forward*, 6 Allen, (Mass.) 494; *Hyer v. Burdett*, 1 Edw. Ch. (N. Y.) 325; *Fiske v. Hills*, 11 Biss. (U. S.) 294; *Boyle v. Boyle*, 4 B. Mon. (Ky.) 570.

² *Turney v. Bayley*, 4 De G. J. & Sm. 332; *Kinlock v. Greg*, 4 Russ. 285; but see *Mulholland v. Rapp*, 50 Mo. 42; *Channon v. Stewart*, 103 Ill. 541; *Rishton v. Grissell*, L. R. 5 Eq. 326; *Harrington v. Churchward*, 29 L. J. Ch. 521; 6 Jur., n. s., 567; 8 Weekly Rep. 302; *Hallett v. Cumston*, 110 Mass. 32; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Osbrey v. Reimer*, 51 N. Y. 630; *Bentley v. Harris*, 10 R. I. 434; 14 Am. Rep. 695.

³ *Auld v. Butcher*, 2 Kans. 135; *Neil v. Greenleaf*, 26 Ohio St. 567; see, also, *Edgar v. Baca*, 1 N. Mex. 613; *Dignan v. Dignan*, (N. J. 1888) 14 Atl. Rep. 887; *Levi v. Karrick*, 13 Iowa, 344; *Denton v. Erwin*, 6 La. Ann. 317; *Groenendyke v. Coffeen*, 109 Ill. 325; *Dial v. Rogers*, 4 Desau. (S. Car.) 175; *Silver v. St. Louis, &c. R. Co.*, 5 Mo. App. 381; *Bassett v. Henry*, 34 Mo. App.

548; *Ledyard v. Bull*, 119 N. Y. 62; *Kidder v. McHenry*, 81 N. Car. 123; *Boyle v. Hardy*, 21 Mo. 62; *Davies v. Atkinson*, 124 Ill. 474; *Wagner v. Wagner*, 50 Cal. 76; *Cayton v. Walker*, 10 Cal. 450; *Gage v. Parmalee*, 87 Ill. 329; *Hanks v. Barber*, 53 Ill. 292; *Wood v. Fox*, 1 A. K. Marsh. (Ky.) 451; *Wells v. Erstine*, 24 La. Ann. 317.

⁴ *Correll v. Freeman*, 29 App. 39; *Ex parte Barber*, L. R. 5 Ch. App. 687; *Walker v. Consett*, *Forrest*, 157; and see *Raymond v. Vaughn*, 128 Ill. 250; *Groenendyke v. Coffeen*, 109 Ill. 325; *Hopley v. Wakefield*, 54 Iowa, 711; *Warden v. Marcus*, 45 Cal. 594; *Rhyne v. Love*, 98 N. Car. 486; *Zerano v. Wilson*, 8 Cush. (Mass.) 424; *Wood v. Gault*, 2 Md. Ch. 433; *Jessup v. Cook*, 6 N. J. L. 434; *Martin v. Smith*, (N. J. 1888) 13 Atl. Rep. 398; *Main v. Howland*, *Rich Eq. Cas.* (S. Car.) 352; *Hunt v. Belcher*, 2 De G. J. & Sm. 194; *Morris v. Harrison*, *Colles*, 157; *Willis v. Jernegan*, 2 Atk. 251; *Coventry v. Barclay*, 3 De G. J. & Sm. 320.

⁵ *Irwin v. Young*, 1 Sim. & S. 333; *Mourain v. Delamre*, 4 La. Ann. 78.

⁶ *Buckingham v. Ludlum*, 29 N. J. Eq. 345.

there have been no account stated, where the mere results are assumed by a general statement of balances, made without a formal examination by the parties into the affairs, and without the acceptance of these general statements as a final settlement of their accounts.¹ There may also be partial settlements of partnership affairs, either as to particular branches of business or the entire business for a particular time; and these partial settlements, so far as they extend, will constitute such an account stated as would operate as a good defense to a suit for accounting.² An account stated, or a final settlement made by a majority of the partners, will be binding upon the minority;³ and nothing but substantial charges of fraud, collusion or mistake, will permit such final settlement to be re-opened.⁴ Where the ground for opening the account is a mistake, the errors of law may be corrected, as well as errors of fact.⁵ But where a fraud or mistake has been committed or made in the preparation of the account, and the settlement of their affairs, the intentional, even though improper, omission of an item, or its improper insertion, will not be sufficient to correct such account. This wrongful result must be obtained by fraud or mistake.⁶ And in order that the charge of fraud or mistake may result in re-opening an account stated, the specific acts of fraud or mistake must be established, and the proof as to them must be clear and free from doubt.⁷ An action for re-opening the account must be brought within a reasonable time after the settlement has been made, and any unreasonable delay will result in a denial to the parties of the right to re-open the account.⁸ When an account stated is re-opened, it may require that all of the items of the transaction should be canvassed and presented;

¹ *Lynch v. Bitting*, 6 Jones Eq. (N. Car.) 238.

² *Holyoke v. Mayo*, 50 Me. 385; *Eakin v. Knox*, 6 Rich. (S. Car.) 14; *Thompson v. Walker*, 39 La. Ann. 892; *Thomas v. Gaboury*, 80 Ga. 443; *Horne v. Ingraham*, 125 Ill. 198; *Parkhurst v. Muir*, 7 N. J. Eq. 307; *Moore v. Wheeler*, 10 W. Va. 35; *Foster v. Rison*, 17 Gratt. (Va.) 321; *Newen v. Wetten*, 31 Beav. 315; *Milford v. Milford*, McCl. & Y. 150; *Clark v. Gridley*, 41 Cal. 119; *Stretele v. Talmadge*, 65 Cal. 510.

³ See *Klase v. Bright*, 71 Pa. St. 186; *Robinson v. Thompson*, 1 Vern. 465; *Kent v. Jackson*, 2 De G. M. & G. 46; *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

⁴ *Main v. Howland*, Rich. Eq. Cas. (S. Car.) 352; *Hoyt v. McLaughlin*, 52 Wis. 280; *Taylor v. Shaw*, 2 Sm. & Stu. 12; *Edno v. Caleham*, You. 306; *Nichols v. Mooring*, 16 Fla. 76; *Billingslea v. Ware*, 32 Ala. 415; *Wells v. Erstine*, 24 La. Ann. 317; *Riggs v. Hawley*, 116 Mass. 596; *Stetthelmer v. Killip*, 75 N. Y. 283; *Steadwell v. Morris*, 61 Ga. 97; *Quinlin v. Keiser*, 66 Mo. 603; *Donehue v. McCosh*, 70 Iowa, 733; *Pettett v. Crawford*, 51 Miss. 43; *Roach v. Ivey*, 7 S. Car. 434; *McLucas v. Durham*, 20 S. Car. 302; *Burdine v. Shelton*, 10 Yerg. (Tenn.) 41; *Gething v. Keighley*, 9 Ch. Div. 547; but see *Belt v. Mehen*, 2 Cal. 159; *Herty v. Clark*, 46

Ga. 649; *Johnston v. Preer*, 51 Ga. 313; *Wagoner v. Minter*, 7 J. J. Marsh. (Ky.) 173.

⁵ *Roberts v. Cuffin*, 2 Atk. 112; *Cobb v. Cole*, 44 Minn. 278; *Evans v. Clapp*, 123 Mass. 165; *Smith v. Ayrault*, 71 Mich. 475; *Bankhead v. Allaway*, 6 Coldw. (Tenn.) 56; *Clouch v. Moyer*, 23 Kans. 404; *Eakin v. Knox*, 6 Rich. (S. Car.) 14.

⁶ *Maund v. Allies*, 5 Jur. 860; *Laing v. Campbell*, 36 Beav. 3; *Nicholson v. Janeway*, 16 N. J. Eq. 285; *Stetthelmer v. Killip*, 75 N. Y. 282.

⁷ *Lambert v. Griffith*, 44 Mich. 65; *Johnson v. Curtis*, 2 Bro. C. C. 311; *Furham v. Brooks*, 9 Pick. (Mass.) 212; *Taylor v. Haylin*, 2 Bro. C. C. 310; *Dawson v. Dawson*, 1 Atk. 1; *Kinsman v. Barker*, 14 Ves. 579; *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Thornton v. McNeill*, 23 Miss. 369; *Wilde v. Jenkins*, 4 Paige, (N. Y.) 481; *Chubbuck v. Vernam*, 42 N. Y. 432; *Augsbury v. Flower*, 68 N. Y. 620; *Mahnke v. Neale*, 23 W. Va. 57; *Birkett v. Hird*, 55 Wis. 650; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Winter v. Wheeler*, 7 B. Mon. (Ky.) 25; *Loesser v. Loesser*, 81 Ky. 139; *Bry v. Cook*, 15 La. Ann. 493; *Harrison v. Dewey*, 46 Mich. 173.

⁸ *Toogood v. Swanston*, 6 Ves. 485; *Maund v. Allies*, 5 Jur. 860; *Millar v. Craig*, 6 Beav. 433; *Brownell v. Brownell*, 2 Bro. C. C. 61; *Leroy v. Lowber*, 1 Abb. Pr. (N. Y.) 67.

and when the justice of the case requires it, a full accounting between the parties will be made,¹ and not merely the errors in the account which are to be corrected.² Where the loss of the books of account make it impossible to secure a full accounting,³ the court will proceed to inquire into the special items of error and wrongful statement in the account, and leave the general account undisturbed.⁴

§ 536. **Taking the account.**—Where any disputed questions of fact are raised by the pleadings in other suits for accounting, the court may direct an issue out of chancery to try such questions by means of a sheriff's jury.⁵ But, generally, in suits for accounting between partners, the partnership and the dissolution of such partnership are admitted facts, and in consequence there is nothing to be done but to secure an accounting. The court in that case will decree an accounting to be had by some officer of the court: by the master, if the master in chancery is still retained as an officer of the court in the modern practice; or, in the absence of such an officer, the case would be referred for accounting to the referee or commissioner, who is specially appointed by the court for that purpose.⁶ The master, referee or commissioner, in assuming charge of the case referred to him, proceeds at once to an examination of all the affairs of the parties, in relation to which the accounting is asked for, in all the details.⁷ And it is the duty of the parties to the suit for accounting to bring before him and for his examination all the papers and books of account and agreements of partnership or joint action, as the case may be, or which are in any way whatever related to the subject-matter of the business, in respect to which the accounting is to be had.⁸ The books of account, which contain the statement of the business affairs of the parties, are presumed to contain a correct and true statement of

¹ *Botifeur v. Weyman*, 1 McCord Eq. (S. Car.) 156; *Gray v. Washington*, Cooke, (Tenn.) 321; *Vernon v. Vawdrey*, 2 Atk. 119; *Mathews v. Wallwyn*, 4 Ves. 118; *Middleditch v. Sharland*, 5 Ves. 87; *Stainton v. Carron Co.*, 24 Beav. 346; *Allfrey v. Allfrey*, 1 Mac. & G. 87; see, also, *Wharton v. May*, 5 Ves. 27; *Beaumont v. Boulton*, 5 Ves. 485; 7 Ves. 599; *Keough v. Foreman*, 33 La. Ann. 1434; *Roberts v. Totten*, 13 Ark. 609; *Black v. Merrill*, 65 Cal. 90; *Bailey v. Moore*, 25 Ill. 306; *Hunt v. Stuart*, 53 Md. 225; *Leonard v. Leonard*, 1 W. & S. (Pa.) 342; *Gething v. Keighley*, 9 Ch. Div. 547.

² *Burdine v. Shelton*, 10 Yerg. (Tenn.) 41; *Pitt v. Cholmondeley*, 2 Ves. Sr. 565; *Vernon v. Vawdrey*, 2 Atk. 119; *Van Horn v. Van Horn*, 52 N. J. L. 284; *Chubbuck v. Vernam*, 42 N. Y. 432.

³ *Millar v. Craig*, 6 Beav. 433; *Branch v. Cooper*, 82 Ga. 512; *Smith v. Fitchett*, 56 Hun. (N. Y.) 473; *Appeal of Varner*, (Pa. 1888) 16 Atl. Rep. 98.

⁴ *Toogood v. Swanston*, 6 Ves. 485; *Maund v. Allies*, 5 Jur. 860; see *Millar v. Craig*, 6 Beav.

433; *Brownell v. Brownell*, 2 Bro. C. C. 61; *Leroy v. Lowber*, 1 Abb. Pr. (N. Y.) 87.

⁵ *Carlin v. Donegan*, 15 Kans. 495; *French v. Wall*, 2 Tex. 288; *Setzer v. Beale*, 19 W. Va. 274; *Carlin v. Donegan*, 15 Kans. 495.

⁶ *Babcock v. Hermance*, 48 N. Y. 683; *Bloomfield v. Buchanan*, 14 Oregon, 181; *Fordyce v. Shriver*, 115 Ill. 530; and see *Crawshaw v. Collins*, 2 Russ. 347; *Morgan v. Adams*, 37 Vt. 233; *Newen v. Wetter*, 31 Beav. 315; and see *Bliffins v. Wilson*, 113 Mass. 248; *Smith v. Barringer*, 74 N. Car. 665.

⁷ *Brockman v. Aulger*, 12 Ill. 277; *Bernie v. Vandever*, 16 Ark. 616; and see *Killefer v. McLain*, 70 Mich. 508; *Eaton's Appeal*, 66 Pa. St. 483.

⁸ *Ashley v. Williams*, 17 Oregon, 441; *Maupin v. Daniel*, 3 Tenn. Ch. 223; *Van Horn v. Van Horn*, 52 N. J. L. 284; *Adams v. Funk*, 53 Ill. 219; *Wheatley v. Wheeler*, 34 Md. 62; *Brockman v. Aulger*, 12 Ill. 277; *Montanye v. Hatch*, 34 Ill. 394; *Succession of Andrew*, 16 La. Ann. 197; *Kelley v. Eckford*, 5 Paige, (N. Y.) 548; *Stebbins v. Harmon*, 17 Hun. (N. Y.) 445; *Galloway v. Tate*, 1 Hen. & M. (Va.) 9; *Clark v. Gridley*, 49 Cal. 105.

accounts between the parties.¹ This presumption in favor of the accuracy of the books of account is not overthrown by the fact, that they have been badly kept;² or that one partner has had exclusive possession of such books;³ or because some of the books have been lost, and it is impossible for the presumption of a balance to be applied to the remaining books.⁴ Where the statement of account assumes the form of an account stated, the presumption of correctness becomes still stronger.⁵ And until the accuracy of the statements in the books has been disproved, the books themselves are primary evidence of the facts stated in them, without special proof of these items by other evidence.⁶ But if the partner, having possession of the books, refuses to give to the other partners during the course of the business, any opportunity to inspect and examine the books of account, the presumption of the accuracy of the statements in such books is overthrown.⁷ And even when there has been sufficient opportunity given to all parties to inspect such books of account, even then they are only *prima facie* evidence of the business affairs of the parties, and are also subject to the charge and proof of inaccuracy.⁸ On the other hand, any charge of error, made by the partner whose duty it was to keep the books, will be closely scrutinized, and the presumption will be against the existence of such an error.⁹ And if such partner should destroy or otherwise dispose of the books, the presumption of the law will be against his claims.¹⁰ In all cases, whether the books have been regu-

¹ *Carpenter v. Camp*, 39 La. Ann. 1034; *Parker v. Jonte*, 15 La. Ann. 290; *Foster v. Fifield*, 29 Me. 136; *Wheatley v. Wheeler*, 34 Md. 62; *Topliff v. Jackson*, 12 Gray, (Mass.) 565; *Lambert v. Griffith*, 44 Mich. 65; *Tucker v. Peaslee*, 36 N. H. 167; *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Heart v. Corning*, 3 Paige, (N. Y.) 566; *Allen v. Coit*, 6 Hill, (N. Y.) 318; *Fairchild v. Fairchild*, 64 N. Y. 471; *Cheever v. Lamar*, 19 Hun, (N. Y.) 130; *Phillips v. Turner*, 2 Dev. & B. Eq. (N. Car.) 123; *Desha v. Smith*, 20 Ala. 747; *Kahn v. Boltz*, 39 Ala. 66; *Haller v. Williamowicz*, 23 Ark. 566; *Hale v. Brennan*, 23 Cal. 511; *Pond v. Clark*, 24 Conn. 370; *Stuart v. McKichan*, 74 Ill. 122; *Albee v. Wachter*, 74 Ill. 173; *O'Brien v. Hanley*, 86 Ill. 278; *Kitner v. Whitlock*, 88 Ill. 513; *Eden v. Lingenfelter*, 39 Ind. 19; *Hunter v. Aldrich*, 53 Iowa. 442; *Cunningham v. Smith*, 11 B. Mon. (Ky.) 325; *Boire v. McGinn*, 8 Oregon. 466; *Richardson v. Wyatt*, 2 Desau. (S. Car.) 471; *Myers v. Bennett*, 3 Lea. (Tenn.) 184; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea. (Tenn.) 258; *Saunders v. Duval*, 19 Tex. 467; *Fletcher v. Pollard*, 2 Hen. & M. (Va.) 544; *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363; *Shackleford v. Shackleford*, 32 Gratt. (Va.) 481; *Withers v. Withers*, 8 Pet. (U. S.) 355; *U. S. Bank v. Binney*, 5 Mason, (U. S.) 176.

² *Topliff v. Jackson*, 12 Gray, (Mass.) 565; *Foster v. Fifield*, 29 Me. 136.

³ *Moon v. Story*, 8 Dana, (Ky.) 226.

⁴ *Sangston v. Hack*, 52 Md. 173.

⁵ *Desha v. Smith*, 20 Ala. 747; *Pond v. Clark*,

24 Conn. 370; *Kitner v. Whitlock*, 88 Ill. 513; *Gage v. Parmalee*, 87 Ill. 329; *Richardson v. Wyatt*, 2 Desau. (S. Car.) 271.

⁶ *Powers v. Dickie*, 49 Ala. 81; *Brickhouse v. Hunter*, 44 Hen. & M. (Va.) 363; *Fletcher v. Pollard*, 2 Hen. & M. (Va.) 544.

⁷ *Layton v. Hall*, 25 Tex. 404; *Withers v. Withers*, 8 Pet. (U. S.) 355; *U. S. Bank v. Binney*, 5 Mason, (U. S.) 176; and see *Taylor v. Herring*, 10 Bosw. (N. Y.) 447; *Sutton v. Mandeville*, 1 Cranch, (C. C.) 2; *Haller v. Williamowicz*, 23 Ark. 566; *Wheatley v. Wheeler*, 34 Md. 62; *Phillips v. Turner*, 2 Dev. & B. Eq. (N. Car.) 123; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea. (Tenn.) 358; *Saunders v. Duval*, 19 Tex. 467.

⁸ *Hunter v. Aldrich*, 52 Iowa, 442; *Topliff v. Jackson*, 12 Gray, (Mass.) 565; *Lambert v. Griffith*, 44 Mich. 65; *Boire v. McGinn*, 8 Oregon. 466; *Heart v. Corning*, 3 Paige, (N. Y.) 566; *Scott v. Shipherd*, 3 Vt. 104.

⁹ *Pierce v. Scott*, 37 Ark. 308; *Bevans v. Sullivan*, 4 Gill, (Md.) 383; *Harvey v. Varney*, 104 Mass. 436; *Brown v. Haynes*, 6 Jones, (N. Car.) 49; *Moon v. Story*, 8 Dana, (Ky.) 226; *Dimond v. Henderson*, 47 Wis. 172; *Van Ness v. Van Ness*, 32 N. J. Eq. 669; *Gage v. Parmalee*, 87 Ill. 329; *McCabe v. Franks*, 44 Iowa, 208; *Leftwitch v. Leftwich*, 6 La. Ann. 346; *Hall v. Claggett*, 48 Md. 223.

¹⁰ *Gage v. Parmalee*, 87 Ill. 329; *Askew v. Odenheimer*, Baldw. (U. S.) 380; *Robertson v. Gibb*, 38 Mich. 165; see *Gray v. Haig*, 20 Beav. 219; *Walmsley v. Walmsley*, 3 Jo. & Lat. 556; *Pome-*

larly or irregularly kept, inaccuracy may be charged and proven by parol evidence.¹

After making a thorough examination of the accounts of the parties, the duty of the master or referee is to strike a balance and ascertain what is due by one party to another, or what are the shares of each party in the joint estates, as the case may be, and make a report to the court of his conclusions of fact. And when the report is presented, and is not contested by any of the parties, or if contested, when such contest has been settled, the report, as corrected under the judicial inquiry, or as it stands when presented to the court without contest, will then be confirmed by the court; and the court then issues a writ or decree directing the parties to perform the pecuniary obligations, which the report has shown to be due one to the other.

roy v. Benton, 77 Mo. 64; Johnson v. Garrett, 23 Minn. 465; Wallace v. Berger, 14 Iowa, 183; Churchman v. Smith, 6 Whart. (Pa.) 146; White v. Magann, 65 Wis. 86.

¹ Maddox v. Stephenson, 60 Ga. 125; Miller v. Howard, 26 N. J. Eq. 166; Boire v. McGinn, 8 Oregon, 466; Cunningham v. Smith, 11 B. Mon.

325; Flannigan v. Maddin, 81 N. Y. 623; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; and see McCabe v. Franks, 44 Iowa, 208; Jessup v. Cook, 6 N. J. L. 434; Barry v. Barry, 3 Cranch, (C. C.) 120; Randle v. Richardson, 53 Miss. 176; Seltzer v. Brundage, (Pa. 1889) 17 Atl. Rep. 9.

CHAPTER XXXIII.

BILLS QUIA TIMET, INCLUDING BILLS TO PERPETUATE TESTIMONY AND TO REMOVE CLOUDS FROM TITLE.

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§ 539. **General statement.**—The peculiar characteristic of all common law remedies is the postponement of all opportunity to resort to such remedies, until the injury complained of has been suffered; and the party suffering then appeals to the court, not for an avoidance or prevention of the future injury, but damages for the injury already suffered. On the other hand, a court of equity acts upon the familiar maxim, “An ounce of prevention is worth a pound of cure,” and prefers a resort to remedies preventive in their nature, instead of compensatory for past injuries. The equitable remedy of injunction, which has been already fully explained in a previous chapter, constitutes one branch of such preventive remedies. But there are other cases, in which the remedy of injunction, as commonly applied, would prove inefficacious or insufficient to reach the needed protection to rights, which are threatened. The injunction can only be employed for preventing the commission of injuries which appear to be imminent and certain. Where there is a serious and well grounded fear of the commission of an injury or the suffering of damages, but this injury or damage is not imminent or certain, the injunction cannot be resorted to; and, in consequence of the irreparable damages that would flow from the happening of the threatened injury, there is a call for the interference by the court in some way, so as to prevent the injury which is threatened. In order to supply that want, courts of equity have in times past consented to hear and receive, what are known as bills *quia timet*; a bill which prays the intervention of the court and the application to the case of some appropriate relief, not because some party plaintiff has suffered an injury, or is in imminent danger of suffering an injury from the wrongful acts of another; but simply because he fears, or has reasonable cause to fear, that if he is compelled to wait until the danger becomes imminent, or the injury actually committed, the damage thus suffered by him would prove irreparable. The court will for such reasons entertain the case and grant the relief, which is most appropriate to the needs of the particular party.

§ 540. **Covenants to indemnify.—Bonds of indemnity.—Rights of sureties in respect thereto.**—Among the cases, in which the court of equity will entertain a bill *quia timet*, are the cases of covenants or bonds of indemnity, where there is danger of an irreparable injury, if the court does not interfere to compel a specific performance of such covenant or bond, in consequence of the possible change in the financial condition of the parties and the consequent inability at a subsequent time of securing a specific performance of the covenant.¹ But there must be something more than mere apprehension of damage, in order that a court may interfere with any ordinary covenant of indemnity; as for example, in the case of covenants in deeds of conveyance against incumbrances. The general rule is, that a court of equity will not grant the relief under the *quia timet* jurisdiction against the possible damage on the breach of the covenant against incumbrances, but the parties will ordinarily be left to their ordinary actions at law.² In order that the equitable relief may be applied to such cases, the circumstances must be unusual and contain some element involving a peculiar and extraordinary danger.³ Of the same character are the cases of sureties against debtors and other obligors. The bill *quia timet* is very often employed for the protection of the sureties against the primary debtor and creditor, looking towards an immediate settlement of the debt, for which the surety is secondarily responsible. Thus the surety, who apprehends loss or injury from a delay in the settlement of the debt, files a bill *quia timet* against the creditor, and compels the creditor to enforce his claim against the primary debtor immediately, provided such a decree will not operate injuriously to the interests of the creditor. If there is any doubt as to such danger resulting from the enforced sale of the assets of the debtor, a decree will be issued against such creditor, only upon the execution to him by the surety of a bond of indemnity against such possible loss.⁴ But, perhaps, the more common case is where a surety files a bill *quia timet* to compel the primary debtor to pay the debt immediately and without delay.⁵ Ordinarily, these cases of bills

¹ *Flight v. Cook*, 2 Ves. 620; *Burroughs v. McNeill*, 2 Dev. & Bat. Eq. (N. C.) 297; *Ranelagh v. Hayes*, 1 Vern. 189; *Hemming v. Mad-dick*, L. R. 7 Ch. 395; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 406.

² *Busby v. Tredwell*, 24 Ark. 457; *Barkhamsted v. Case*, 5 Conn. 528; *Percival v. Hurd*, 5 J. J. Marsh. (Ky.) 670; *Hall v. Priest*, 6 Bush. (Ky.) 14; *Young v. Butler*, 1 Head. (Tenn.) 646; *Middlekuff v. Barrick*, 4 Gill. (Md.) 290; *Timms v. Shannon*, 19 Ind. 296; *Harris v. Ranson*, 24 Miss. 234; *Glenn v. Whipple*, 1 Beasley's Ch. (N. J.) 50; *Akerly v. Vilas*, 21 Ohio, 88; *Weaver v. Wilson*, 48 Ill. 128; *Rawle on Covenants of Title*, (4th ed.) 681; *Whitworth v. Stuckey*, 1 Rich. Eq. (S. C.) 408; *Beal v. Seiveley*, 8 Leigh. (Va.) 658; *Clanton v. Burgess*, 2 Dev. Eq. 15; *Merritt v. Hunt*, 4 Ired Eq. (N. C.) 406; *Wilkins*

v. Hogue, 2 Jones Eq. (N. C.) 479; *Henry v. Elliott*, 6 Jones Eq. (N. C.) 175; *Miller v. Long*, 3 Marsh. (Ky.) 334; *Rawlings v. Timberlake*, 6 Marsh. (Ky.) 233.

³ *Selby v. Marshall*, 1 Blackf. (Ind.) 385; *Jones v. Waggoner*, 7 J. J. Marsh. (Ky.) 144; *Refeld v. Woodfolk*, 23 How. (U. S.) 318; *Tallman v. Green*, 3 Sandf. (N. Y.) 437; see *Rector of Trinity Church v. Higgins*, 4 Rob. (N. Y.) 372; *Tinte v. Miller*, 10 Ohio, 382; *Watkins v. Owen*, 2 J. J. Marsh. (Ky.) 142; *Barnett v. Montgomery*, 6 Monr. (Ky.) 327.

⁴ *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; see *Stephenson v. Taverners*, 9 Gratt. (Va.) 398; *King v. Baldwin*, 2 Johns. Ch. 561; *Wright v. Simpson*, 6 Ves. 734; *Rees v. Berrington*, 2 Ves. Jr. 540.

⁵ *Cox v. Tyson*, 1 Turn. & Russ. 395; *Nisbet v. Smith*, 2 Bro. Ch. 579.

quia timet, brought by the surety, are instituted after the debt falls due; but it is not without precedent that, under extraordinary circumstances, the court will entertain the bill *quia timet* brought by the surety, even before the notes representing the debt have fallen due, in order to give to the surety whatever benefit he may obtain, through the bill *quia timet*, in securing the subject-matter of the transaction.¹

§ 541. **Trust estates and estates for life.**—The same remedy is sometimes resorted to for the protection of the interests of the beneficiary, where his property, in the hands of a trustee or agent for a particular purpose, is in danger of being misappropriated to the prejudice of the beneficiary, and the intervention of a court of equity is sought for, to prevent such threatened misappropriation or misapplication. This principle is applied to all parties, who have possession of property in a fiduciary character, whether they be technical trustees, or agents or executors, and the like.² But the danger must be imminent and the damage resulting from the threatened injury irreparable, in order that the intervention of a court of equity by a bill *quia timet* may be had.³

So, also, where personal property has been limited for life with the remainder over, and there is danger of irreparable injury to such property by the life tenant, the court of equity will entertain a bill *quia timet*, for the purpose of preventing such threatened injury by the application of the necessary equitable remedies.⁴ But the court will not interfere in the exercise of this extraordinary jurisdiction, merely for the purpose of declaring the future rights of the parties in and to the personal property, except in the one case of suits brought for the purpose of construing a will, or to determine the proper disposition of property by the executor under the will.⁵ Of the same character, also, is the application to the court by a bill *quia timet* for the protection of property claimed by two or more parties during the pendency of a suit, in which the question of title is to be determined.⁶

¹ Walker v. Miller, 11 Ala. 1067.

² Taylor v. Allen, 2 Atk. 313; Utterson v. Mair, 4 Bro. Ch. 277; Middleton v. Dodswell, 13 Vesey, 266; Elmendorf v. Lansing, 4 Johns. Ch. (N. Y.) 562; see Rous v. Noble, 2 Vern. 249; Batten v. Earnley, 2 P. Wms. 163.

³ Mandeville v. Mandeville, 8 Paige Ch. (N. Y.) 475; Shields v. Shields, 60 Barb. (N. Y.) 56; Watson v. Bothwell, 11 Ala. 650; Blalock v. Hardy, 37 Miss. 615; Camp v. Elston, 48 Ala. 81; Elmendorf v. Lansing, 4 Johns. Ch. (N. Y.) 562; see Rous v. Noble, 2 Vern. 249; Batten v. Earnley, 2 P. Wms. 163; Taylor v. Allen, 2 Atk. 313; Utterson v. Mair, 4 Bro. Ch. 277; Middleton v. Dodswell, 13 Vesey, 266.

⁴ Sanderson v. Jones, 6 Fla. 430; Gibson v. Jayne, 37 Miss. 164; Collins v. Barksdale, 23 Ga. 602; Champlain v. Champlain, 4 Edw. Ch. (N. Y.) 228; Pattison v. Gilford, L. R. 18 Eq. 259; Clark v. Clark, 8 Paige, 152; 2 Story Eq. Jur.,

§ 843; Emmons v. Cairns, 2 Sandf. Ch. 369; Covenhaven v. Shuler, 2 Paige, 123; James v. Scott, 9 Ala. 579; Flight v. Cook, 2 Ves. Sr. 619; Cranston v. Plumb, 54 Barb. (N. Y.) 59; Preston v. Smith, 23 Fed. Rep. 737; Vanduyne v. Vreeland, 1 Beasl. (N. J.) 142; McDougal v. Armstrong, 6 Humph. (Tenn.) 428; Bowling v. Bowling, 6 B. Monr. (Ky.) 31; McNeill v. Bradley, 6 Jones Eq. (N. C.) 41.

⁵ Black v. Fleece, 2 Lea. (Tenn.) 566; Cross v. De Valle, 1 Wall. 14; Lorillard v. Coster, 5 Paige, 172; Hawley v. James, 5 Paige, 442; Girard v. Philadelphia, 7 Wall. 1; see Grove v. Bastard, 2 Phillips, 621; Langdale v. Briggs, 39 Eng. Law & Eq. 214; 8 De G. M. & G. 391; Perry on Trusts, § 17; Baylies v. Payson, 5 Allen, (Mass.) 473; Price v. Minot, 107 Mass. 62. As to bills for construing a will, see § 545.

⁶ Building Assn. v. Ashmead, 7 Phila. (Pa.) 272; Peak v. Hayden, 3 Bush, (Ky.) 125.

§ 542. **Suits to perpetuate testimony.**—A suit to perpetuate testimony could be maintained in equity, whenever the plaintiff at the time of bringing the suit had some vested or contingent right, which could not then be investigated, established or defended by an action at law; and such right is one which did not involve the immediate possession of the property alone, but some future interest which is to take effect upon the happening of some future event. But while the plaintiff, in a suit to perpetuate testimony, need not, and in fact does not, have an immediate cause of action, or the immediate right to the possession or enjoyment of his interest in the property, yet there must be some fixed interest in such property claimed by the plaintiff; it must be an interest which is recognized and maintained by the law, although it might be contingent or conditional.¹ Thus, for example, the plaintiff cannot bring suit to perpetuate testimony in respect to the possibility of an interest which he may have in the property of his ancestors, in his character as an heir at law.² In England this rule has been changed by statute, so that the plaintiff in a suit to perpetuate testimony is not required to have any positive or actual legal interest in the property; but a mere possibility as an heir at law would be sufficient to support the suit, where such suit to perpetuate testimony could be shown to be needful in the future.³

The plaintiff's interest may be in any kind of property, either real or personal, corporeal or incorporeal.⁴ But it must be a right or interest which could not possibly be the subject of an immediate action at law or in equity. Where the party can bring the suit immediately to an issue, there is no reason why the testimony should be perpetuated, and hence a suit for that purpose would not be entertained.⁵ As soon as the testimony is obtained, then the purpose of the suit has been fully performed, and it comes to a close; nothing more is needed or required to be done, except the publication of the evidence, as it is called in chancery practice, which constitutes in fact a filing or recording of such evidence. It is only done, however, in aid of a special cause of action, or upon the death of the witness whose testimony has thus been obtained.⁶ This equitable remedy for the perpetuation of testimony is now very generally superseded in all the American states, where the civil code of procedure has been adopted, by statutory remedies of a simpler and more convenient character.

§ 543. **Bills to remove cloud from title.**—The principle, involved in the equitable bill *quia timet*, has also been applied to cases where

¹ *Earl of Belfast v. Chichester*, 2 J. & W. 451, 452; *Townshend Peerage Cases*, 10 Cl. & Fin. 289; *Dursley v. Fitzhardinge*, 6 Ves. 251; *Allan v. Allan*, 15 Id. 134, 135, 136.

² *In re Tayleur*, L. R. 6 Ch. 416; *Sackville v. Ayleworth*, 1 Vern. 105, 106.

³ *Campbell v. Earl of Dalhousie*, L. R. 1 H. L. Sc. App. 462.

⁴ *Earl of Suffolk v. Green*, 1 Atk. 450.

⁵ *Angell v. Angell*, 1 S. & S. 83; *Ellice v. Roupell*, 32 Beav. 299; *Earl Spencer v. Peek*, L. R. 3 Eq. 415.

⁶ *Morris v. Morris*, 2 Ph. 205; *Atty.-Gen. v. Ray*, 2 Hare, 518; *Beavan v. Carpenter*, 11 Sim. 22; *Wright v. Tatham*, 2 Id. 459; *Angell v. Angell*, 1 S. & S. 83; *Morrison v. Arnold*, 19 Ves. 670; *Barnsdale v. Lowe*, 2 Russ. & My. 142.

the question of an incumbrance, or apparent defect in the title to property, throws upon the property a cloud or objection, which detracts from the salableness of the land. In such cases the bill will be entertained by a court of equity to remove the so-called cloud from the title, and restore to it its marketable character.¹ And the relief is granted, on the ground that the debt, or other instrument which constitutes the cloud, may, if not removed, be asserted to the injury or vexation or embarrassment of the plaintiff, in the enjoyment or disposition of his property.² In order that the jurisdiction to remove the cloud from the title may be exercised by a court of equity, either the interest or title must be equitable; or if the title be legal, then the remedies at law must be inadequate to the protection of the interest.³ The general principle, in respect to the limitation of the equitable jurisdiction, applies here, viz.: that a court of equity will never interfere for the purpose of trying disputed questions of title. And as long as there is no legal adjudication of the right to the legal title, it will generally refuse to entertain a bill to remove a cloud upon the title. In the application of this principle to the particular case, the authorities have been at variance as to the extent, to which it would be necessary for the plaintiff to have possession of the premises, in respect to whose title the relief is sought, in order to support his claim to the equitable relief. Some authorities state without qualification, that a plaintiff, seeking to have a cloud removed from his title, should under all circumstances have the possession of the property.⁴ While, on the other hand, other cases state that possession is never necessary in the plaintiff.⁵ But, probably, the true rule is to be found midway between these two extremes, and certainly the great majority of the cases are found keeping to the middle ground. The general rule is, that where a plaintiff asks for the equitable relief from a cloud upon a legal title, when he is out of possession, he is left to his remedy by ejectment.⁶ And, on the other hand, if he

¹ *Hayward v. Dimsdale*, 17 Ves. 111; *Mayor of Colchester v. Lowten*, 1 V. & B. 226, 244; *Pettit v. Shepherd*, 5 Paige, 493, 501; *Apthorp v. Comstock*, 2 *Id.* 482; *Peirsoll v. Elliott*, 6 Pet. 95, 98.

² *Hager v. Shindler*, 29 Cal. 47, 55; *Eckman v. Eckman*, 55 Pa. St. 269, 273; 1 *Fonbl. Eq. Bk.* 1, Ch. 1, § 8, and n. (y.); see, also, *Shell v. Martin*, 19 Ark. 139, 141.

³ *Grigg v. Swindal*, 67 Ala. 187; *Miller v. Neiman*, 27 Ark. 233; *Crane v. Randolph*, 30 *Id.* 579; *Munson v. Munson*, 28 Conn. 582; *Commonwealth v. Smith*, 10 Allen, 448; *Kennedy v. Northup*, 15 Ill. 148; *Moran v. Palmer*, 13 Mich. 367; *King v. Carpenter*, 37 *Id.* 363; *Branch v. Mitchell*, 24 Ark. 431; *Hall v. Whiston*, 5 Allen, 126; *Hinckley v. Greany*, 118 Mass. 595; *Daniel v. Stewart*, 55 Ala. 278; *Redmond v. Packenham*, 66 Ill. 434; *Martin v. Graves*, 5 Allen, 601; *Sullivan v. Finnegan*, 101 Mass. 447; *Plant v. Barclay*, 56 Ala. 561; *Jones v. De Graffenreid*, 60 *Id.* 145; *De Witt v. Hays*, 2 Cal. 463; *Hager v. Shindler*, 29 *Id.* 47; *Gage v. Rohrbach*, 56 Ill. 262, 266; *Gage v. Billings*, 56 *Id.* 268; *Budd v.*

Long, 13 Fla. 288; *Lockwood v. City of St. Louis*, 24 Mo. 20.

⁴ *Miller v. Neiman*, 27 Ark. 233; *Kearne v. Kyne*, 66 Mo. 216; *Haythorn v. Margerem*, 3 Halst. Ch. 324; *Busbee v. Lewis*, 85 N. C. 332; *Herrington v. Williams*, 31 Tex. 448; *Clark v. Covenant, &c. Ins. Co.*, 52 Mo. 272; *Orton v. Smith*, 18 How. (U. S.) 263; *Daniel v. Stewart*, 55 Ala. 278; *Arnett v. Bailey*, 60 *Id.* 435; *Tyson v. Brown*, 64 *Id.* 244; *Baines v. Barnes*, 64 *Id.* 375; *Smith's Ex'r v. Cockrell*, 66 *Id.* 64.

⁵ *Almony v. Hicks*, 3 Head, 39; *Hager v. Shindler*, 29 Cal. 47; *Thompson v. Lynch*, 29 *Id.* 189; *Buch v. Gallagher*, 5 Blatch. 481; *Jones v. Smith*, 22 Mich. 360.

⁶ *Crane v. Randolph*, 30 Ark. 579; *Munson v. Munson*, 28 Conn. 582; *King v. Carpenter*, 37 Mich. 363; *Lawrence v. Zimpleman*, 37 Ark. 643; *Odel v. Odel*, 73 Mo. 289; *Burton v. Gleason*, 56 Ill. 25; *Polk v. Pendleton*, 31 Md. 118; *Branch v. Mitchell*, 24 Ark. 431, 439; *Moran v. Palmer*, 13 Mich. 367, 370.

is in possession, and for that reason cannot obtain any remedy or protection by his action at law, then the bill to remove the cloud upon the title will be entertained. So, also, where the plaintiff out of possession has an equitable title, or he holds his equitable title under such peculiar circumstances that the law cannot furnish him full and complete relief; and if irreparable damage is to be feared from the delay necessitated by a resort to the action of ejectment, before the bill to remove the cloud from the title is entertained, then the courts have in many cases dispensed with the action of ejectment, and permitted an immediate resort to equity to have the cloud removed.¹ The ordinary cases, in which the resort to this equitable relief is necessary to prevent the danger of vexation and loss to the owner of land, is where extrinsic evidence is necessary to prove the invalidity of the instrument of conveyance, or agreement which constitutes the cloud.² Still, if the defect appears upon the face of the instrument, and a resort to extraneous evidence is not necessary to prove its invalidity, then such a deed or other legal instrument cannot be treated as really being a cloud upon the title, certainly in the technical sense; because by no possible means can such a deed be employed to annoy or interfere with the plaintiff's enjoyment of his property. Hence, for that reason, it has been held, that the equitable interference to remove the cloud from the title would not be permitted in such a case.³ The reason for the refusal of the equitable aid to such cases is the technical one, that there is, in fact, no cloud to be removed, where the deed or other instrument, which constitutes the ground for asserting an adverse claim to the land is on its face absolutely void, and therefore cannot be used successfully in interference with the title of the true owner. Hence, the courts refuse the equitable relief for the removal or cancellation of this deed or other instrument, because the instrument has no legal effect and cannot have any, because no extraneous evidence is needed for the purpose of proving its invalidity. Where extraneous evidence is needed, the possi-

¹ *Low v. Staples*, 2 Nev. 209, 212; *Pier v. Fond du Lac*, 38 Wis. 470; *Lawrence v. Zimpleman*, 37 Ark. 643, 645; *Booth v. Wiley*, 102 Ill. 84, 114; *Redmond v. Packenham*, 66 Ill. 434; *Plant v. Barclay*, 56 Ala. 561; *Thompson v. Lynch*, 29 Cal. 189; *Hager v. Shindler*, 29 *Id.* 47; *Kennedy v. Northrup*, 15 Ill. 148, 152; *Branch v. Mitchell*, 24 Ark. 431, 439; *King v. Carpenter*, 37 Mich. 363; *Ormsby v. Barr*, 22 *Id.* 80, 84.

² *Smith v. Fellows*, 9 J. & S 36; *Barton v. Drake*, 21 Minn. 299; *Lockett v. Hurt*, 57 Ala. 198; *Lick v. Ray*, 43 Cal. 83; *Alden v. Trubee*, 44 Conn. 455; *Brooks v. Kearns*, 86 Ill. 547; *Clark v. Covenant, &c. Ins. Co.*, 52 Mo. 272; *Johnson v. Cooper*, 2 Yer. 524; *Almony v. Hicks*, 3 Head, 39; *Bunce v. Gallagher*, 5 Blatch. 481; *Crooke v. Andrews*, 40 N. Y. 547; *Newell v. Wheeler*, 48 *Id.* 486; *Ward v. Dewey*, 16 *Id.* 519; *Radcliffe v. Rowley*, 2 Barb. Ch. 23; *Longley v. City of Hudson*, 4 T. & C. 353; *Congregation Shaarai*

Tephila v. Mayor, &c., 53 How. Pr. 213; *Daniel v. Stewart*, 55 Ala. 278.

³ *Shepardson v. Supervisors*, 28 Wis. 593; *Briggs v. Johnson*, 71 Me. 235; *Busbee v. Macy*, 85 N. C. 329; *Minturn v. Smith*, 3 Sawy. 142; *Curtis v. City of East Saginaw*, 35 Mich. 508; *Merchants' Bk. v. Evans*, 51 Mo. 335, 345; *Farnham v. Campbell*, 34 N. Y. 480; *Dederer v. Voorhies*, 81 *Id.* 153; *Stuart v. Palmer*, 74 *Id.* 183; *Townsend v. Mayor, &c.*, 77 *Id.* 542; *Wells v. City of Buffalo*, 80 *Id.* 253; *Peirson v. Elliott*, 6 Pet. 95; *Posey v. Conaway*, 10 Ala. 811; *Cohen v. Sharp*, 44 Cal. 29; *Head v. James*, 13 Wis. 641; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Overing v. Foote*, 43 *Id.* 290; *Marsh v. City of Brooklyn*, 59 *Id.* 280; *Levy v. Hart*, 54 Barb. 248; *Tilden v. Mayor, &c.*, 56 Barb. 340; *Mulligan v. Baring*, 3 Daly, 75; *Howell v. City of Buffalo*, 2 Abb. App. Dec. 412; *Simpson v. Lord Howden*, 3 My. & Cr. 97, 102, 103, 108; *Cox v. Clift*, 2 N. Y. 118; *Van Doren v. Mayor, &c.*, 9 Paige, 388.

bility of the loss of such evidence, or the inability at any subsequent time to produce such evidence, through the death of the witness, or the loss of papers and other sources of proof, that are constantly occurring, the equitable relief will be granted. This principle, in determining the limitation of the jurisdiction of the court of equity to remove clouds from titles to those cases only, where extraneous evidence is needed to prove its invalidity, has been applied to all classes of cases; not only where the so-called cloud consists of a deed of conveyance,¹ or mortgage;² but also to executory contracts for the sale of lands,³ notices of *lis pendens*,⁴ and to judgments and executions;⁵ assessments for taxes, and even in findings of commission of lunacy.⁶

¹ *Plant v. Barclay*, 56 Ala. 561; *Jones v. De Graffenreid*, 60 *Id.* 145; *Arnett v. Bailey*, *Id.* 435; *Tyson v. Brown*, 64 *Id.* 244; *Baines v. Barnes*, *Id.* 375; *Smith's Ex'r v. Cockrell*, 66 *Id.* 64; *Grigg v. Swindal*, 67 *Id.* 187; *Lyon v. Hunt*, 11 Ala. 295; *Hunt v. Acre*, 28 *Id.* 580; *Barclay v. Henderson*, 44 *Id.* 269; *Daniel v. Stewart*, 55 *Id.* 278; *Lockett v. Hurt*, 57 *Id.* 198; *Posey v. Conway*, 10 *Id.* 811; *Florence v. Paschal*, 50 *Id.* 28; *Jones v. Neale*, 2 P. & H. 339; *Carroll v. Brown*, 28 *Gratt.* 791; *Willis v. Sweet*, 49 *Wis.* 505; *Bunce v. Gallagher*, 5 *Blatch.* 481; *Peirsoll v. Elliott*, 6 *Pet.* 95; *Butler v. Rutledge*, 2 *Coldw.* 4; *Whillock v. Gisham*, 3 *Sneed*, 237; *Williams v. Williams*, 7 *Baxt.* 116; *Huffman v. Huffman*, 1 *Lea.* 491; *Levy v. Hart*, 54 *Barb.* 248; *Busbee v. Macy*, 85 *N. C.* 329; *Busbee v. Lewis*, 85 *Id.* 332; *Jones' Heirs v. Perry*, 10 *Yer.* 59; *Johnson v. Cooper*, 3 *Id.* 524; *Almony v. Hicks*, 3 *Head*, 39; *Carter v. Taylor*, *Id.* 30; *Downing v. Wherrin*, 19 *N. H.* 9, 91; *Hall v. Fisher*, 9 *Barb.* 17; *Buffalo, &c. R. R. v. Lampson*, 47 *Id.* 533; *Remington Paper Co. v. O'Dougherty*, 81 *N. Y.* 484; *Cox v. Clift*, 2 *Id.* 118; *Bookes v. Lansing*, 74 *Id.* 437; *Hotchkiss v. Elting*, 36 *Barb.* 38; *Sullivan v. Finnegan*, 101 *Mass.* 447; *Russell v. Deshon*, 124 *Id.* 342; *Davis v. City of Boston*, 129 *Id.* 377; *Merch. Bk. v. Evans*, 51 *Mo.* 335; *Clark v. Covenant, &c. Ins. Co.*, 52 *Id.* 272; *Harrington v. Utterback*, 57 *Id.* 519; *Keane v. Kyne*, 66 *Id.* 216; *Haythorn v. Margerem*, 3 *Halst. Ch.* 324; *Brooks v. Kearns*, 86 *Id.* 547; *Burton v. Gleason*, 56 *Id.* 25; *Peck v. Sexton*, 41 *Iowa*, 566; *Gerry v. Stimson*, 60 *Me.* 186; *Polk v. Rose*, 25 *Md.* 135; *Polk v. Reynolds*, 31 *Id.* 106; *Polk v. Pendleton*, 31 *Id.* 118; *Briggs v. Johnson*, 71 *Me.* 235; *Martin v. Graves*, 5 *Allen*, 601; *Burns v. Lynde*, 6 *Id.* 305; *Munson v. Munson*, 28 *Conn.* 582; *Stout v. Cook*, 37 *Ill.* 283; *Reed v. Tyler*, 56 *Id.* 288; *Gage v. Billings*, *Id.* 268; *Reed v. Reber*, 62 *Id.* 240; *Lee v. Ruggles*, 62 *Id.* 427; *Kennedy v. Northup*, 15 *Id.* 149; *Redmond v. Packenham*, 66 *Id.* 434; *Shell v. Martin*, 19 *Ark.* 139; *Walker v. Peay*, 22 *Id.* 103; *Miller v. Neiman*, 27 *Id.* 233; *Crane v. Randolph*, 30 *Id.* 579; *Riley v. Pehl*, 25 *Cal.* 70; *Hager v. Shindler*, 29 *Id.* 47; *Thompson v. Lynch*, 29 *Id.* 189; *Lick v. Ray*, 43 *Id.* 83; *Cohen v. Sharp*, 44 *Id.* 29; *Alden v. Trubee*, 44 *Conn.* 455.

² *Comm. v. Smith*, 10 *Allen*, 448; *Vogler v.*

Montgomery, 54 *Mo.* 577; *Ward v. Dewey*, 16 *N. Y.* 519; *Smith v. Fellows*, 9 *J. & S.* 36; *Elderidge v. Smith*, 34 *Vt.* 484; *Ramsdell v. Fuller*, 28 *Cal.* 37; *City of Hartford v. Chipman*, 21 *Conn.* 488; *Sherman v. Fitch*, 98 *Mass.* 59; *Clouston v. Shearer*, 99 *Id.* 209; and leases, *Mayor, &c. v. North Shore, &c. Co.*, 9 *Hun.* 620; *Spofford v. Bangor, &c. R. R.*, 66 *Me.* 51.

³ *Larmon v. Jordan*, 56 *Ill.* 204; *Sea v. Morehouse*, 79 *Id.* 216; *Boyd v. Schlesinger*, 59 *N. Y.* 301; *Washburn v. Burnham*, 63 *Id.* 132.

⁴ *Nickerson v. Loud*, 115 *Mass.* 94; *Sanxay v. Hunger*, 42 *Ind.* 44.

⁵ *Merriman v. Polk*, 5 *Heisk.* 717; *Rooney v. Soule*, 45 *Vt.* 303; *Goodell v. Blumer*, 41 *Wis.* 436; *Gamble v. Loop*, 14 *Id.* 465; *Moore v. Cord*, *Id.* 213; *Standish v. Dow*, 21 *Iowa*, 363; *Tucker v. Kenniston*, 47 *N. H.* 267; *Radcliff v. Rowley*, 2 *Barb. Ch.* 23; *Lounsbury v. Purdy*, 18 *N. Y.* 515; *Tisdale v. Jones*, 38 *Barb.* 533; *Brown v. Goodwin*, 75 *N. Y.* 409; *Fonda v. Sage*, 48 *Id.* 173; *Farnham v. Campbell*, 34 *N. Y.* 480; *Schroeder v. Gurney*, 73 *N. Y.* 430; *Mulligan v. Baring*, 3 *Daly*, 75; *Tear v. Mathews*, *Wright*, (Ohio), 371; *Bk. U. S. v. Schultz*, 2 *Ohio*, 471; *Norton v. Deaver*, 5 *Id.* 173; *Groves v. Webber*, 72 *Ill.* 606; *Key City, &c. Co. v. Munsell*, 19 *Iowa*, 305; *Hall v. Whiston*, 5 *Allen*, 126; *Hinchley v. Greany*, 118 *Mass.* 595; *O'Hare v. Downing*, 130 *Id.* 16; *Barton v. Drake*, 21 *Minn.* 299; *Hanson v. Johnson*, 20 *Id.* 194; *Drake v. Jones*, 27 *Mo.* 428; *Uhl v. May*, 5 *Neb.* 157; *Hall v. Theisen*, 9 *Pac. C. L. J.* 479; *Budd v. Long*, 13 *Fla.* 288; *Davidson v. Seegar*, 15 *Id.* 671; *Campbell v. McCahan*, 41 *Ill.* 45; *Tucker v. Conwell*, 67 *Id.* 552; *Henderson v. Palmer*, 71 *Id.* 579; *Burt v. Cassety*, 12 *Ala.* 734; *Ala., &c. Co. v. Pettway*, 24 *Id.* 544; *Rea v. Longstreet*, 54 *Id.* 291; *Pixley v. Huggins*, 15 *Cal.* 127; *England v. Lewis*, 25 *Id.* 337; *Shattuck v. Carson*, 2 *Id.* 588.

⁶ As to assessments of taxes, see *Hebrew, &c. Association v. Mayor, &c.*, 4 *Hun.* 446; *Dederer v. Voorhies*, 81 *N. Y.* 153; *Van Doren v. Mayor, &c.*, 9 *Paige*, 388; *Heywood v. City of Buffalo*, 14 *N. Y.* 534; *Howell v. City of Buffalo*, 2 *Abb. App. Dec.* 412; *DeWitt v. Hays*, 2 *Cal.* 463; *Minturn v. Smith*, 3 *Sawy.* 142; *Waterbury Sav. Bk. v. Lawler*, 46 *Conn.* 243; *Gage v. Rohrbach*, 56 *Ill.* 262; *Gage v. Chapman*, *Id.* 311; *Milwaukee Iron Co. v. Town of Hub-*

However sound, as a technical proposition of law, the rule may be, which declares that there is no cloud upon the title of property where the instrument, which furnishes the opportunity of asserting a defect in the title of the owner, is invalid on its face, and does not, therefore, require extraneous evidence to establish its invalidity; as a business proposition, and viewed from the stand-point of the purchaser of real estate, there can be no question that there is such a defect and a cloud upon the title, whenever anything remains uncanceled in the shape of a deed or other legal instrument, which gives the slightest pretext to an adverse claim to such title. The refusal of the court, to apply to such case its equitable relief for removal of the cloud from title, certainly does operate to the infliction of a pecuniary damage upon the owner of the land, either because the continued existence of this cloud upon the title makes the property actually unsalable, or reduces its market value. It is certainly a very peculiar attitude for a court of equity to assume, in denying the relief, in the way of a cancellation of a void deed, because it is void.¹

§ 544. **Statutory suits to quiet title.**—As has been already explained in a preceding chapter, the equitable jurisdiction to quiet title, independently of statute, could only be invoked by the plaintiff in possession and holding the legal title, after he has been subjected to successive actions of ejectment by some other person out of possession, or when the cause of dispute was an equitable title which could not be tried by the common law action. But statutes have been passed in many of the states, changing its jurisdiction in two particulars. The statutes vary in the different states, and may be divided into two classes. The first class includes those states, which require the plaintiff to be in possession of the land when the suit to quiet title is brought, viz.: in Arizona, Colorado, Kansas, Kentucky, Illinois, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Utah, Wisconsin, Georgia, Louisiana, Massa-

bard, 29 Wis. 51; *Hamilton v. City of Fond du Lac*, 25 *Id.* 490; *Head v. James*, 13 *Id.* 641; *Barnett v. Cline*, 60 Conn. 205; *Holland v. Mayor, &c.*, 11 Md. 186; *Scofield v. City of Lansing*, 17 Mich. 437; *Henry v. Gregory*, 29 *Id.* 68; *Curtis v. City of East Saginaw*, 35 *Id.* 508; *Lockwood v. City of St. Louis*, 24 Mo. 20; *Fowler v. City of St. Joseph*, 37 *Id.* 228; *Townsend v. Mayor, &c.*, 77 *Id.* 542; *Wells v. City of Buffalo*, 80 *Id.* 253; *Burnet v. Corp. of Cincinnati*, 3 Ohio, 73; *Culbertson v. City of Cincinnati*, 16 *Id.* 574; *Shepardson v. Supervisors*, 28 Wis. 593; *McPike v. Pen*, 51 Mo. 63; *Johnson v. Hahn*, 4 Neb. 139; *Morris Canal, &c. Co. v. Jersey City*, 1 Beasl. 227; *Longley v. City of Hudson*, 4 T. & C. 353; *Newell v. Wheeler*, 48 N. Y. 486; Cong. Shaarai Tephila v. Mayor, &c.; 53 How. Pr. 213; *Overing v. Foote*, 43 N. Y. 290; *Tilden v. Mayor, &c.*, 56 Barb. 340; *Sanders v. Village of Yonkers*, 63 N. Y. 489; *Marsh v. City of Brooklyn*, 59 *Id.* 280;

Guest v. City of Brooklyn, 69 *Id.* 506; *Stuart v. Palmer*, 74 *Id.* 183. *Commission of lunacy, Yauger v. Skinner*, 1 McCart. 389.

¹ "It leads to the strange scene, almost daily, in the courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested; and of judges declining to interfere because the deed or other instrument is void; while from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value; and the judge himself, who repeats the rule, would neither buy the property while thus affected, nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency." 3 Pom. Eq. Jur., § 1399, p. 438.

chusetts, Missouri, Nebraska, Mississippi, Iowa, Indiana and California. The second class includes all those states in which the statute allows the action to be brought by the plaintiff, whether he is in possession or not, viz.: California, Dakota, Idaho, Indiana, Iowa, Mississippi and Nebraska.¹ In the majority of the states, the suit to quiet title can

¹ Von Phul v. Penn, 31 Mo. 333; Rutherford v. Ullman, 42 Id. 216; Deware v. Wyatt, 50 Id. 236; Jordan v. Stevens, 55 Id. 361; Webb v. Donaldson, 60 Id. 394; Babe v. Phelps, 65 Id. 27; Grant v. King, 31 Id. 312; Campbell v. Allen, 61 Id. 581; Bredell v. Alexander, 8 Mo. App. 110; Hill v. Andrews, 12 Cush. 185; Dewey v. Bulkley, 1 Gray, 416; Macomber v. Jaffray, 4 Id. 82; Munroe v. Ward, 4 Allen, 150; Tomkins v. Wyman, 116 Mass. 558; India Wharf v. Central Wharf, 117 Id. 504; Tisdale v. Brabrook, 102 Id. 374; Boston Mfg. Co. v. Burgin, 114 Id. 340; Bowditch v. Gardner, 113 Id. 315; Dooley v. Gibson, 32 La. Ann. 192; Lange v. Baranco, Id. 697; White v. Sheriff, Id. 130; Dahlgreen v. Duncan, 26 Id. 363; Deuchatell v. Robinson, 24 Id. 176; Dickson v. Marks, 10 Id. 518; Searles v. Costillo, 12 Id. 203; Millard v. Richard, 13 Id. 572; South Car. R. R. v. Steiner, 44 Ga. 546; Jones v. Geo. R. R., 62 Id. 718; Dart v. Orme, 41 Id. 376; Wynne v. Lumpkin, 35 Id. 208; Pier v. Fond du Lac, 38 Wis. 470; Maxon v. Ayers, 23 Id. 612; Shaffer v. Whelpley, 37 Id. 334; Page v. Kennan, 38 Id. 320; Wals v. Grosvenor, 31 Id. 681; Jones v. Collins, 16 Id. 594; Gamble v. Loop, 14 Id. 465; Dean v. Madison, 9 Id. 402; Goldberg v. Taylor, 2 Utah, 486; Tichenor v. Knapp, 6 Oreg. 205; Thompson v. Woolf, 8 Id. 454; King v. French, 2 Sawy. 441; Stark v. Starrs, 6 Wall. 402; Harvey v. Jones, 1 Disney, 65; Douglass v. Scott, 5 Ohio, 194; Clark v. Hubbard, 8 Id. 382; Thomas v. White, 2 Ohio St. 540; Ellithorpe v. Buck, 17 Id. 72; Collins v. Collins, 19 Id. 468; Rhea v. Dick, 34 Id. 420; Bailey v. Hughes, 35 Id. 567; Onderdonk v. Mott, 34 Barb. 106; Haynes v. Onderdonk, 5 T. & C. 176; Burnham v. Onderdonk, 41 N. Y. 425; Fisher v. Hepburn, 48 Id. 41; Austin v. Goodrich, 49 Id. 266; Barnard v. Simms, 42 Barb. 304; Donahue v. O'Connor, 13 J. & S. 278; Schroeder v. Gurney, 10 Hun, 413; Ford v. Belmont, 69 N. Y. 567; Powell v. Mayo, 24 N. J. Eq. 178; Holmes v. Chester, 26 Id. 79; Bogert v. City of Elizabeth, 27 Id. 568; Jersey City v. Lembeck, 31 Id. 255; Ludington v. City of Elizabeth, 32 Id. 159; 34 Id. 357; Lembeck v. Jersey City, 30 Id. 554; Raymond v. Post, 25 Id. 447; Low v. Staples, 2 Nev. 209; Scorpion S. M. Co. v. Marsano, 10 Id. 370; Lake Bigler Road Co. v. Bedford, 3 Id. 399; Central Pac. R. R. v. Dyer, 1 Sawy. 641; State v. Sioux City, & C. R. R., 7 Neb. 357; Harral v. Gray, 10 Id. 186; Huntington v. Allen, 44 Miss. 654; Glazier v. Bailey, 47 Id. 395; Carlisle v. Tindall, 49 Id. 229; Handy v. Noonan, 51 Id. 166; Griffin v. Harrison, 52 Id. 824; Shivers v. Simmons, 54 Id. 520; Wolford v. Bailey, 57 Id. 239; Boyd v. Thornton, 13 S. & M. 338; Toulmin v. Heidelberg, 32 Miss. 268; Kerr v. Freeman, 33

Id. 292; Ezelle v. Parker, 41 Id. 520; Steele v. Fish, 2 Minn. 153; Meighen v. Strong, 6 Id. 177; Bidwell v. Webb, 10 Id. 59; Wilder v. City of St. Paul, 12 Id. 192; Murphy v. Hinds, 15 Id. 182; Byrne v. Hinds, 16 Id. 521; Conklin v. Hinds, Id. 457; Leggett v. Cole, 1 McCreary, 515; Haddon v. Hemingway, 39 Mich. 615; Hammontree v. Lott, 40 Id. 190; Barron v. Robbins, 22 Id. 35; King v. Carpenter, 37 Id. 363; Moran v. Palmer, 13 Id. 367; Ormsby v. Barr, 22 Id. 80; Jenkins v. Bacon, 30 Id. 154; Meth. Church of Newark v. Clark, 41 Id. 730; Stockton v. Williams, 1 Dougl. 546; Hall v. Kellogg, 16 Mich. 135; Rowland v. Doty, Harr. Ch. 3; Blanchard v. Tyler, 12 Mich. 339; Stetson v. Cook, 39 Id. 750; Dudley v. Trustees of Frankfort, 12 B. Mon. 610; Armitage v. Wickliffe, Id. 488, 494; Taylor v. Embry, 16 Id. 340; Cates v. Loftus' Heirs, 4 Mon. 439; Beard v. Smith, 6 Id. 430, 505; Underwood v. Crutcher, 7 J. J. Marsh. 529; Hiatt's Heirs v. Calloway's Heirs, 7 B. Mon. 178; Harris v. Smith, 2 Dana, 10; Landrum v. Farmer, 7 Bush, 46; Frayley v. Peters, 12 Id. 469; Eaton v. Giles, 5 Kans. 24; Brenner v. Bigelow, 8 Id. 496; O'Brien v. Creitz, 10 Id. 202; Wood v. Missouri, &c. Ry., 11 Id. 323; Giles v. Ortman, Id. 59; Douglass v. Nuzum, 16 Id. 515; Entrekren v. Howard, Id. 551; Cartwright v. McFadden, 24 Id. 662; Douglass v. Bishop, Id. 749; Giltenan v. Lemert, 13 Id. 476; Pierce v. Thompson, 26 Id. 714; Fejervary v. Langer, 9 Iowa, 159; Laverty v. Sexton, 41 Id. 435; Miller v. Davison, 31 Id. 435; Lewis v. Soule, 52 Id. 11; Paton v. Lancaster, 38 Id. 494; Balmear v. Otis, 4 Dill. 558; Cooper v. Jackson, 7 Ind. 244; Green v. Glynn, Id. 336; Rose v. Nees, 61 Id. 484; Emery v. Cochran, 82 Ill. 65; Hardin v. Jones, 86 Id. 313; Gage v. Abbott, 99 Id. 366; Whitney v. Stevens, 97 Id. 482; Oakley v. Hurlbut, 100 Id. 204; Barnard v. Hoyt, 63 Id. 341; Wing v. Sherrer, 77 Id. 200; Reed v. Calderwood, 32 Cal. 109; Pralus v. Pacific, &c. Min. Co., 35 Id. 30; Pralus v. Jefferson, &c. M. Co., 34 Id. 558; Brooks v. Calderwood, 34 Id. 563; 45 Id. 519; Ross v. Heintzen, 36 Id. 313; Nevada Co., &c. Canal Co. v. Kidd, 37 Id. 282; Sepulveda v. Sepulveda, 39 Id. 13; Coleman v. San Rafael, &c. Co., 49 Id. 517; Practice Act, Merced Min. Co. v. Fremont, 7 Cal. 317; Smith v. Brannan, 13 Id. 107; Curtis v. Sutter, 15 Id. 259; Van-Winkle v. Hinckle, 21 Id. 342; Rico v. Spence, Id. 504; Head v. Fordyce, 17 Id. 149; Lyle v. Rollins, 25 Id. 437; Horn v. Jones, 28 Id. 194; Ferris v. Irving, 28 Id. 645; Leet v. Rider, 48 Cal. 623; Pierce v. Felter, 53 Id. 18; Stoddard v. Burge, Id. 394; Brandt v. Wheaton, 52 Id. 430; San Francisco v. Ellis, 54 Id. 72; Brewer v. Houston, 58 Id. 345; Burton v. Le Roy, 5 Sawy. 510.

be brought by the plaintiff, whether he has a legal or equitable title;¹ but in a few of the states it is still necessary for the plaintiff to have a legal title.² But in all the states where these statutory suits to quiet title has been instituted—whether the plaintiff is required to be in possession, or his possession is declared to be unnecessary—the essential distinction made by the statutes, between these statutory suits and the former equitable suit, is that under the statute, the plaintiff need not wait for the attempted interference with his possession, but anticipating the danger of vexatious litigation, he may, under the principle *quia timet*, bring his action for trying the title to the property, and definitely settling the question of title between himself and the party threatening the litigation.³

The statutory suits to quiet title may be instituted by the possessor of title to a mining claim;⁴ but a mere trespasser upon government land cannot maintain an action.⁵ In those states in which the statutory suit to quiet title can only be instituted by a plaintiff in possession, where he is out of possession, he is required to resort to his action of ejectment.⁶ Yet it must not be understood that this statutory regulation of the equitable suit to quiet title was intended to interfere with the right of such a party to file a bill *quia timet* to remove the cloud from the title, in those cases in which a court of equity would entertain such a bill.⁷ In several of the states the statutes in express terms apply the statutory suit to all cases, in which equitable bills to remove clouds from titles would have been entertained.⁸ And a similiar conclusion has been reached by the courts in construction of the statutes of other states.⁹

§ 545. **Suits to interpret and construe wills.**—Another phase of the equitable jurisdiction on the principle *quia timet*, is to be found in suits to construe and interpret the provisions of a will. The authorities are not uniform or in harmony in determining the limitations of

¹ *Leet v. Rider*, 48 Cal. 623; *Pierce v. Felter*, 53 Cal. 18; *Brandt v. Wheaton*, 52 Cal. 430; *Brewer v. Houston*, 58 Cal. 345; *Stoddard v. Burge*, 53 Cal. 394; *San Francisco v. Ellis*, 54 Cal. 72; *Burton v. Le Roy*, 5 Sawy. 510; *Cooper v. Jackson*, 71 Ind. 244; *Green v. Glynn*, 71 Ind. 336; *Rose v. Nees*, 61 Ind. 484; *Fejervary v. Langer*, 9 Iowa, 159; *Miller v. Davison*, 31 Iowa, 435; *Paton v. Lancaster*, 38 Iowa, 494; *Balmear v. Otis*, 4 Dill. 558; *Lewis v. Soule*, 52 Iowa, 11; *Lavery v. Sexton*, 41 Iowa, 435; *Boyd v. Thornton*, 13 Sm. & M. 338; *Kerr v. Freeman*, 33 Miss. 292; *Huntington v. Allen*, 44 Miss. 654; *Glazier v. Bailey*, 47 Miss. 395; *Handy v. Noonan*, 51 Miss. 166; *Shivers v. Simmons*, 54 Miss. 520; *Wofford v. Bailey*, 57 Miss. 239; *Griffin v. Harrison*, 52 Miss. 824; *Carlisle v. Tindall*, 49 Miss. 229; *State v. Sioux City, &c. R. R. Co.*, 7 Neb. 357; *Harrall v. Gray*, 10 Neb. 186.

² See Chase's Ohio Stat., pp. 687, 1278, 1697.

³ *Merced Min. Co. v. Fremont*, 7 Id. 317, 319; *Giltinan v. Lemert*, 13 Kans. 476; *Meighen v.*

Strong, 6 Minn. 177, 179; *Pierce v. Felter*, 53 Cal. 18; *Stoddard v. Burge*, 53 Id. 394; *Curtis v. Sutter*, 15 Cal. 259, 263; *Head v. Fordyce*, 17 Id. 149; *Central Pac. R. R. v. Dyer*, 1 Sawy. 641, 648; *Stark v. Starrs*, 6 Wall. 402, 410; *Smith v. Brannan*, 13 Cal. 107, 114.

⁴ *Pralus v. Pacific, &c. Min. Co.*, 35 Cal. 30; *Merced Min. Co. v. Fremont*, 7 Id. 317.

⁵ *Wood v. Missouri, &c. Ry.*, 11 Kans. 323.

⁶ *Curtis v. Sutter*, 15 Cal. 259, 264; *Van Winkle v. Hinckle*, 21 Id. 342; *King v. Carpenter*, 37 Mich. 363; *Moran v. Palmer*, 13 Id.; *Meth. Ch. of Newark v. Clark*, 41 Id. 730.

⁷ *King v. Carpenter*, 37 Mich. 363; *Ormsby v. Barr*, 22 Id. 80; *Low v. Staples*, 2 Nev. 209; *Pier v. Fond du Lac*, 38 Wis. 470; *Jones v. Smith*, 22 Mich. 380; *Harral v. Gray*, 10 Neb. 186, 188.

⁸ Mississippi, Illinois, New Jersey and Georgia.

⁹ *Head v. Fordyce*, 17 Cal. 149; *Maxon v. Ayers*, 28 Wis. 612; *Dean v. Madison*, 9 Id. 402; *Lewis v. Soule*, 52 Iowa, 11, 13.

these suits. Some of the cases hold to the broad proposition that the suit will be entertained by a court of equity, whenever the will contains complicated provisions of doubtful and double meaning, and there is a *bona fide* contest over them between parties who are interested in them as beneficiaries under the will; it matters not whether the interests created by these provisions be legal or equitable, or whether it is possible or not to recognize a trust or fiduciary relation as having been created by the disputed provision.¹ On the other hand, the majority of the courts hold that the court of equity can entertain a suit, for the interpretation and construction of the provisions of a will, only as a part of its general jurisdiction over trusts; and, therefore, only when the provisions under inquiry create some fiduciary relation, and that the mere difficulty in interpretation and construction of the provisions would not justify a court of equity to entertain a suit for that purpose, where the provisions did not create a trust of some sort, but a strictly legal right or estate, as in the case of devises of lands. "The jurisdiction is incidental to that of trusts."² But inasmuch as all the personal property of the testator is taken into possession by the executor or administrator in trust, for the creditors first, and finally for the legatees and distributees under the will, the court of equity will always entertain a suit for the construction and interpretation of bequests of personal property, whether a formal trust is created by the provisions of the will or not.³ But in every such case, the suit must be instituted by an executor, legatee, trustee, or *cestui que trust*, and cannot be begun by one who is not interested in the result in any one of these characters.⁴ Finally, there must be an actual controversy over the meaning of the provisions of the will, and the necessity for a settlement of the dispute must be urgent. The court of equity will not entertain a suit to construe the provision, whose effect and operation

¹ *Rosenberg v. Frank*, 58 Cal. 387; *Trotter v. Blocker*, 6 Port. (Ala.) 269; *First Bap. Church v. Robberson*, 71 Mo. 326; *Purvis v. Sherrod*, 12 Tex. 140; *Howze v. Howze*, 14 Tex. 232; *Little v. Birdwell*, 21 Tex. 597; *Gibbes v. Elliott*, 5 Rich. Eq. 327; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Baldwin v. Bean*, 59 Me. 481; *Sellers v. Sellers*, 35 Ala. 235.

² *Chipman v. Montgomery*, 63 N. Y. 221, 230, *per Allen, J.*; *Bailey v. Briggs*, 56 N. Y. 407; *Clark v. Clark*, 17 Ga. 485; *Strubher v. Belsey*, 79 Ill. 307; *Whitman v. Fisher*, 74 Ill. 147; *Bowers v. Smith*, 10 Paige, 193; *Onderdonk v. Mott*, 34 Barb. 106; *Woodruff v. Cook*, 47 Barb. 304; *Dill v. Wissner*, 88 N. Y. 153, 160; *Delaney v. McCormack*, 88 N. Y. 174; *Walrath v. Handy*, 24 How. Pr. 353; *Duncan v. Duncan*, 4 Abb. N. C. 275; *Wager v. Wager*, 21 Hun, 93; *Bullock v. Bullock*, 2 Dev. Eq. 307; *Simmons v. Hendricks*, 8 Ired. Eq. 84, 86; *Deveraux v. Deveraux*, 81 N. C. 12; *Rothgeb v. Mauck*, 35 Ohio St. 503; *Bussey v. McKie*, 2 McCord, Ch. 23; *Schaeffner's Appeal*, 41 Wis. 280; *Wolf v. Schaeffner*, 51 Wis.

53; *Magers v. Edward's Adm'r*, 13 W. Va. 822; *Rexroad v. Wells*, 13 W. Va. 812; *Gibbes v. Elliott*, 5 Rich. Eq. 327; *Goddard v. Brown*, 12 R. I. 31; *Houston v. Howie*, 34 N. C. 349; *Taylor v. Bond*, Busb. Eq. 5; *Marrow v. Marrow*, *Id.* 148; *Ferrand v. Howard*, 3 Ired. Eq. 381; *Powell v. Demming*, 22 How. 235; *Marlett v. Marlett*, 14 Hun, 313; *Stinde v. Ridgeway*, 55 How. Pr. 301; *Post v. Hover*, 33 N. Y. 593, 602; s. c., 30 Barb. 312, 324; *Bailey v. Southwick*, 6 Lans. 356; *Emmons v. Cairns*, 2 Sandf. Ch. 369; compare *Mallory's Adm'r v. Craig*, 2 McCart. 73; *Youmans v. Youmans*, 26 N. J. Eq. 149; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Sellers v. Sellers*, 35 Ala. 235; *Cowles v. Pollard*, 51 Ala. 445; *Clay v. Gurley*, 62 Ala. 14.

³ *Bowers v. Smith*, 10 Paige, 193; *Onderdonk v. Mott*, 34 Barb. 106; *Bliven v. Seymour*, 88 N. Y. 469; *Dill v. Wissner*, 88 N. Y. 153, 160; but see *contra*, *Walrath v. Handy*, 24 How. Pr. 353; *Wager v. Wager*, 21 Hun, 93.

⁴ See cases cited in the preceding notes.

is not immediate, but future, contingent and uncertain,¹ or which relates to some past transaction, which has been already fully executed.² And it seems that the suit cannot be resorted to by an administrator for the purpose of obtaining judicial instruction as to the proper performance of his duties.³

§ 546. **Relief granted in bills quia timet.**—The character of the relief which will be granted by the court of equity on application by bill *quia timet* must, of course, vary according to the circumstances of the case and the needs of the parties. But the more common forms of relief are, *first*, the appointment of receiver,⁴ payment of money into court,⁵ the giving of security,⁶ injunction,⁷ and by cancellation of the instruments, which are the source of the threatened injuries.⁸

¹ *Minot v. Taylor*, 129 Mass. 160; *Goddard v. Brown*, 12 R. I. 31; *Tayloe v. Bond*, Busb. Eq. 5; *Marrow v. Marrow*, *Id.* 148.

² *Sohier v. Burr*, 127 Mass. 221; *Powell v. Demming*, 22 Hun. 235; *Tayloe v. Bond*, Busb. Eq. 5; *Marrow v. Marrow*, *Id.* 148.

³ *Clay v. Gurley*, 62 Ala. 14; *Ferrand v. Howard*, 3 Ired. Eq. 381; but see *Stevens v. Warren*, 101 Mass. 564.

⁴ *Blondheim v. Moore*, 11 Md. 364; *Verplank v. Caines*, 1 Johns. Ch. 57; *Skip v. Harwood*, 3 Atkinson, 564; *Voshell v. Hyson*, 26 Md. 83; *Tomlinson v. Ward*, 2 Conn. 391; *Orphan Asylum v. McCarter*, Hopkins, 429; *Maynard v. Bailey*, 2 Nev. 313; *Crawford v. Ross*, 39 Ga. 44; *Chappell v. Akin*, 39 Ga. 177.

⁵ *Rothwell v. Rothwell*, 2 Sim. & Stu. 217;

Clarkson v. De Peyster, Hopk. Ch., (N. Y.) 274; *Mandeville v. Mandeville*, 8 Paige, (N. Y.) 475.

⁶ *Covenhoven v. Shuler*, 2 Paige, (N. Y.) 122; *Henderson v. Vaulx*, 10 Yerg. (Tenn.), Kinnard v. Kinnard, 5 Watts, (Pa.) 109; *Lippincott v. Warder*, 14 Serg. & R. (Pa.) 118; *Smith v. Ostrand*, 5 N. Y. S. C. 664.

⁷ See chapter on Injunction.

⁸ *Sanders v. Village of Yonkers*, 63 N. Y. 489; *Merriman v. Polk*, 5 Heisk. 717; *Pettit v. Shepherd*, 5 Paige, 493; *Oakley v. Trustees, &c.*, 6 *Id.* 262; *Shattuck v. Carson*, 2 Cal. 588; *Norton v. Beaver*, 5 Ohio, 178; *Bk. U. S. v. Schultz*, 2 *Id.* 471; *Groves v. Webber*, 72 Ill. 606; *O'Hare v. Downing*, 130 Mass. 16; *Mann v. City of Utica*, 44 How. Pr. 334.

CHAPTER XXXIV.

BILLS OF DISCOVERY AND EQUITABLE SUITS FOR TAKING TESTIMONY.

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§ 549. **General explanation of jurisdiction.**—As has been explained in a preceding chapter, on the subject of equitable jurisdiction in general, one phase of that jurisdiction consists of remedies which are intended to be *auxiliary* to other remedies both legal and equitable, in that the auxiliary remedy procures the means of proving and establishing the ultimate cause of action. These auxiliary remedies are designed to furnish to the plaintiff in the ultimate cause of action the evidence wherewith to prove his claim, and in the present chapter these remedies will be explained. They are four in character at law, viz.: bills of discovery; suits to a perpetuate testimony; suits to take testimony of witnesses *de bene esse*; and suits to take testimony of witnesses in foreign countries. Suits to perpetuate testimony have been already explained in the preceding chapter;¹ the others will now be explained.

§ 550. **Bills of discovery.**—This equitable remedy is not to be confounded with the ordinary process of an equitable court, to compel parties to a suit to disclose facts and evidence which are material to the establishment of the claim of the other parties. Courts of equity have had that power in any ordinary equitable action. The bill of discovery, as presently discussed, constitutes an independent and auxiliary action, whereby the evidence is procured by compulsory disclosure of the other party, prior to the trial of the main cause of action; and this suit for discovery comes to an end, as soon as the defendant files his sworn answer to the bill, satisfactorily complying with the order of the court to make such answer.² The suit for discovery may be

¹ See § 542.

² Jeremy's Eq. Jurisd. 257, 258; 1 Spence Eq. Jurisd. 677, 678; Adams Eq. 20, (marg. pag.) 89 (6th Am. ed.); Shotwell v. Smith, 20 N. J. Eq.

(5 C. E. Green,) 79; Heath v. Erie R. R., 9 Blatch. 316; Kearney v. Jeffries, 48 Miss. 343; Lady Shaftsbury v. Arrowsmith, 4 Ves. 71.

instituted, not only in aid of equitable actions, but likewise in aid of actions at law, for the purpose of obtaining evidence which is material to such cause of action.¹ And so, likewise, may the suit for discovery be instituted by the defendant in the suit in equity by filing a cross-bill against the plaintiff, calling for a disclosure of facts which would be necessary to enable him properly to form his answer to the original bill, or to divulge facts material as evidence in support of his defense.² The bill of discovery may be filed, whenever such discovery of material evidence is in any way essential to the successful prosecution of the suit by the plaintiff, or defense of the cause of action by the defendant. It is not necessary that the evidence, thus expected to be obtained by discovery, should be the only means by which the complainant therein may be able to substantiate or protect his rights. Even where he has other evidence which tended to support his claim, he may nevertheless employ this auxiliary remedy for procuring additional evidence, whenever such additional evidence would be material to the cause of action of the plaintiff or the defense of the defendant, as the case may be.³ The suit for discovery was instituted by a court of equity at a very early day for the purpose of providing in equity a means of doing justice between the parties, and truly protecting the rights of each other in a way, which the limited powers of the common law courts could not insure. It is very likely that the fundamental conception of this auxiliary jurisdiction was derived from the Roman law, which had provided *actiones interrogatorie*, by which defendants were obliged to make answer under oath to questions propounded in *actiones ad exhibendum*, in which the decree ordered the defendant to produce some specific thing.⁴

§ 551. **The effect of modern statutes in suits for discovery.**—As was explained in the preceding paragraph, the suit for discovery was instituted by equity and made applicable by it, to actions at law as well as in equity, for the purpose of disclosing facts material to the support of the claims of the opposite party, on account of the inefficacy of the existing rules of law in respect to the compulsory examination of parties to the suit in aid of the cause of the other party. Since the general adoption of this auxiliary remedy, the systems of procedure have been materially modified everywhere in the English-speaking world; and in England, and in some of the American states, the entire systems of procedure, legal and equitable, which previously existed,

¹ *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 71; *Kearney v. Jeffries*, 48 Miss. 343; *Heath v. Erie R. R.*, 9 Blatch. 316; *Shotwell v. Smith*, 20 N. J. Eq. (5 C. E. Green,) 79.

² *United States v. Wagner*, L. R. 2 Ch. 582; L. R. 3 Eq. 724; *Colombian Gov't v. Rothschild*, 1 Sim. 94; *Millsaps v. Pfeiffer*, 44 Miss. 805; see *King of Spain v. Hallett*, 1 Cl. & Fin. 333; *Prieoleau v. United States*, L. R. 2 Eq. 659.

³ *Continental Life Ins. Co. v. Webb*, 54 Ala.

688; *Merchants' Nat. Bk. v. State Nat. Bk.*, 3 Cliff. 201; *Happock v. United, &c. R. R.*, 27 N. J. Eq. 286; *French v. Rainey*, 2 Tenn. Ch. 640; *Peck v. Ashley*, 12 Met. 478; *Thomas v. Tyler*, 3 Y. & C. Exch. 255; *French v. First Nat. Bk.*, 7 Ben. 488; *Kearney v. Jeffries*, 48 Miss. 343; *Heath v. Erie R. R.*, 9 Blatch. 316; *Buckner v. Ferguson*, 44 Miss. 677; *Shotwell v. Smith*, 20 N. J. Eq. (5 C. E. Green,) 79.

⁴ *Pomeroy Eq. Jur.*, Vol. I, § 492.

have been completely abrogated and the modern procedure adopted in its place, which is shorn of all of the crudities which marked the old common law system, and which constituted the chief distinction between legal and equity procedure. This modern procedure has adopted the essence of the equitable remedies, and has applied them to all causes of action, whether legal or equitable, under the modified form, so that at the present time there are no separate legal and equitable actions; but all actions are of the one character, and the same remedy can be employed for the purpose of discovering evidence in the suit itself, in which the evidence is to be employed. Such is especially the case under the English Supreme Court of Judicature Act, and the Codes of Civil Procedure of New York and other American states. In consequence of this great reform in procedure in these states, as well as in others where similar reforms have been partially adopted, the value of the old equitable suit for discovery has been greatly diminished, and, according to the opinion of some of the courts, completely abrogated, since it abolished all of the grounds upon which the suit for discovery was based.¹ On the other hand, notwithstanding these great changes in procedure, which have been created by these statutes, and which seem to make this auxiliary remedy for disclosure of material evidence unnecessary, it has been held that this auxiliary equitable jurisdiction still exists, and may be resorted to whenever the parties seem to find it necessary, as long as it has not been expressly abolished by the statute, although its practical value has been greatly diminished, if not entirely taken away.² It will be seen, from this general statement, of the effect of the modern codes of procedure of the different states, that the suit for discovery as an auxiliary remedy is confined at present to only a portion of the American states and territories; and even in these states and territories, the remedy has lost its practical value through the statutory provisions for obtaining the same end in the same suit. For this reason, it will not be necessary to give any minute or comprehensive discussion of the equitable suit for discovery, and the present chapter will be confined to a presentation of those principles relating to the suit for discovery, which are common to the original equitable remedy, and the modern statutory proceedings, which are the substitute for the equitable suit for discovery.

§ 552. **What judicial proceedings will be aided by discovery.**—A suit for discovery could be maintained in aid of another cause of action, which is pending in a court of equity, upon filing a cross-bill by the defendant of the main cause of action,³ as well as in aid of pro-

¹ *Riopelle v. Doellner*, 26 Mich. 102; *Heath v. Erie R. R.*, 9 Blatch. 316.

² *Hoppock v. United, &c. R. R.*, 27 N. J. Eq. (12 C. E. Green.) 286; *French v. First Nat. Bk.*, 7 Ben. 488; *Buckner v. Ferguson*, 4 Miss. 677; *Kearney v. Jeffries*, 48 Miss. 343; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Cannon v. McNab*, 48 Ala. 99; *Millsaps v. Pfeiffer*, 44 Miss.

805; *Shotwell v. Smith*, 20 N. J. Eq. (5 C. E. Green.) 79.

³ *Montague v. Dudman*, 2 Ves. Sen. 398, *per* Lord Hardwicke; *Colombian Gov't v. Rothschild*, 1 Sim. 94; *Heath v. Erie R. R.*, 9 Blatch. 316; *Millsaps v. Pfeiffer*, 44 Miss. 805; *King of Spain v. Hullett*, 1 Cl. & Fin. 333; *Prieolean v. U. S.*, L. R. 2 Eq. 659; *U. S. v. Wagner*, L. R. 2 Ch. 583; L. R. 3 Eq. 724.

ceedings in any common law court, where no provision was made by the common law rules of procedure for compelling the disclosure of evidence by parties to the suit.¹ It is claimed that this jurisdiction in aid of courts of law is confined to the superior courts, or courts of general jurisdiction, and does not extend to the inferior courts and courts of limited jurisdiction.² So, also, it has been held that a discovery will not be granted in aid of parties to a controversy submitted to arbitration, where such submission was a voluntary act of the parties.³ But where the arbitration or the reference of the case to the masters in equity, or to referees, has been ordered by the court in the pending action, the suit for discovery will lie in aid of such compulsory reference.⁴ The suit for discovery will also lie in aid of a controversy which is pending in the court of some foreign country.⁵ But in order that the suit for discovery might lie, the regular cause of action in which the discovery is asked must be altogether a civil action; the suit for discovery will not be entertained in aid of a criminal prosecution or of cases which are penal in their nature, or of controversies which involve the charge of conduct of an immoral character, even though the action is brought for recovery of a penalty or of pecuniary compensation, and is not strictly a criminal prosecution.⁶ It is also a rule in equity, that it would not entertain a suit for discovery in aid of an action, pending or to be brought in a court, which by its established rules of procedure was able to give to its suitors the same relief which was asked for in the suit for discovery.⁷ And it was on account of this indisposition of a court of equity to grant this extraordinary relief in aid of parties, where the ordinary cause of action was pending in a court having the power to give the same relief, that in some of the modern cases the courts have been induced to hold that the statutory enlargement of the powers of the common law courts, in respect to disclosure of evidence by parties to a suit, operates as an implied abrogation of this equitable jurisdiction for discovery.⁸ But

¹ *Kearney v. Jeffries*, 48 Miss. 343; *Buckner v. Ferguson*, 44 *Id.* 677; *Shotwell v. Smith*, 20 N. J. Eq. (5 C. E. Green,) 79; *Jeremy Eq. Jurisd.* 268; *March v. Davison*, 9 Paige, 580; *Lane v. Stebbins*, *Id.* 622; *Atlantic Ins. Co. v. Lunar*, 1 Sandf. Ch. 91.

² *Pomeroy Eq. Jur.*, Vol. I, § 196; *Jeremy Eq. Jurisd.* 268.

³ *Jeremy Eq. Jurisd.* 268; *Street v. Rigby*, 6 Ves. 821.

⁴ *British Empire Ship Co. v. Somes*, 3 K. & J. 433.

⁵ *Mitchell v. Smith*, 1 Paige, 287; *Daubigny v. Davallon*, 2 Anst. 467.

⁶ *Short v. Mercier*, 3 Macn. & G. 205; *U. S. v. McRae*, L. R. 3 Ch. 79; *L. R. 4 Eq.* 327; *U. S. v. Saline Bk.*, 1 Peters, 100, 104; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Stewart v. Drasha*, 4 McLean, 563; *Black v. Black*, 26 N. J. Eq. (11 C. E. Green,) 431; *Currier v. Concord R. R.*, 48 N. H. 321; *Glynn v. Houston*, 1 Keen, 329; *Bailey*

v. Dean, 5 Barb. 297; *Thorpe v. Macauley*, 5 Madd. 229, 230; *Shackell v. Macauley*, 2 S. & S. 79; 2 Russ. 550 (n); 1 Bligh, n. s., 96, 133, 134; *Wilmot v. Maccabe*, 4 Sim. 263; *Southall v. —*, 1 Younge, 308; *Hare on Discovery*, 116, 117; *Union Bk. v. Baker*, 3 Barb. Ch. 358; *Skinner v. Judson*, 8 Conn. 528; *Northrup v. Hatch*, 6 *Id.* 361; *Poindexter v. Davis*, 6 Gratt. 481.

⁷ *Earl of Glyngall v. Frazer*, 2 Hare, 99, 106, V. C. Wigram; *Seymour v. Seymour* 4 Johns. Ch. 411; *Leggett v. Postley*, 2 Paige, 599, 601; *Jeremy Eq. Jurisd.* 269; *Dunn v. Coates*, 1 Atk. 288; *Anon.*, 2 Ves. 451; *Gelston v. Hoyt*, 1 Johns. Ch. 547; *Peck v. Ashley*, 12 Met. 481; *Stacy v. Pearson*, 3 Rich. Eq. 152; *Chambers v. Warren*, 13 Ill. 521; *Williams v. Wann*, 8 Blackf. 478; *March v. Division*, 9 Paige, 580; *French v. First Nat. Bk.*, 7 Ben. 488; *Shotwell v. Smith*, 20 N. J. Eq. (5 C. E. Green,) 79.

⁸ *Riopelle v. Drellner*, 26 Mich. 102; *Heath v. Erie R. R.*, 9 Blatch. 316.

the other cases have maintained, that this old equitable rule is to be construed in the light of what were the limitations upon the common law courts, at the time when the suit for discovery was devised; and hence modern accessions to the powers of the law courts do not operate as an implied repeal of the original equitable jurisdiction.¹ It has also been held that the statutes, which allow the defendant in a suit in equity to examine the plaintiff upon interrogatories, do not affect the right of such defendant to obtain the same end by filing a cross-bill for discovery.² Ordinarily, the suit for discovery is instituted in aid of an action already brought and pending; but this is not necessary, and the court will order a discovery, if the bill for discovery shows on its face that the plaintiff has a right to maintain or defend an action in some other court, and that he is about to sue or is liable to be sued, and that a discovery is needed to determine the rights of the party complainant, or to properly frame the allegations of the pleading.³ But inasmuch as the suit for discovery is only entertained in aid of a pending or a future action, it will never be granted after a verdict has been rendered in the action at law; the suit must be filed before the cause of action, in aid of which the suit for discovery is instituted, has been brought to a close.⁴

§ 553. **Who can file the bill for discovery?**—Either the plaintiff or defendant, in a pending or anticipated cause of action at law, may file a bill for a discovery. The party asking for discovery must institute the action and appear as plaintiff therein, so that if a defendant in an equity suit desires to discover evidence from the plaintiff in the suit, he must file a cross-bill and thus become a plaintiff for the purpose of discovery.⁵ The cross-bill must show that the party bringing it has an interest in the subject-matter to which the discovery relates; such an interest as that he can maintain or defend in an action in another court, and for that reason he is entitled to the discovery. A stranger to the subject-matter, to which the discovery relates, cannot entertain the bill for discovery.⁶ The plaintiff in the suit for discovery must

¹ *Lovell v. Galloway*, 17 Beav. 1; *British Empire Ship Co. v. Somes*, 3 K. & J. 433; *Cannon v. McNab*, 48 Ala. 99; *Shotwell v. Smith*, 26 N. J. Eq. (5 C. E. Green,) 79.

² *Millsaps v. Pfeiffer*, 44 Miss. 805; but see *contra*, *Heath v. Erie R. R.*, 9 Blatch. 316.

³ *Turner v. Dickerson*, 1 Stockt. Ch. 140; *Moodalay v. Morton*, 1 Bro. Ch. 469; 2 Dick. 652; *Angell v. Angell*, 1 S. & S. 83; *City of London v. Levy*, 8 Ves. 404; *Kearney v. Jeffries*, 48 Miss. 343; *Buckner v. Ferguson*, 44 Id. 677; *Hoppock v. United, &c. R. R.*, 27 N. J. Eq. (12 C. E. Green,) 288; *Baxter v. Farmer*, 7 Ired. Eq. 239.

⁴ *Cowman v. Kingsland*, 4 Edw. Ch. 627; *Foltz v. Pourie*, 2 Desau. 40; *Faulkner's Adm'r v. Harwood*, 6 Rand. 125; *Green v. Masie*, 21 Gratt. 356; *McCollum v. Prewitt*, 37 Ala. 573; *Duncan v. Lyon*, 3 Johns. Ch. 355, 402.

⁵ *Millsaps v. Pfeiffer*, 44 Miss. 805; *Bogert v.*

Bogert, 2 Edw. Ch. 399; *Princess of Wales v. Lord Liverpool*, 1 Sw. 114; *United States v. Wagner*, L. R. 2 Ch. 582; *Talmage v. Pell*, 9 Paige, 410; *White v. Buloid*, 2 Id. 164.

⁶ *Buden v. Dore*, 2 Ves. 445; *Shaftsbury v. Arrowsmith*, 4 Ves. 71; *Cooper Eq. Pl.*, Ch. 1, § 4, pp. 58, 59; Ch. 3, § 3, pp. 197, 198; *Jeremy Eq. Jurisd.* 258; *Baxter v. Farmer*, 7 Ired. Eq. 239; *Turner v. Dickerson*, 1 Stockt. Ch. 140; *Carter v. Jordan*, 15 Ga. 76; *Jones v. Bradshaw*, 16 Gratt. 355; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Brown v. Dudbridge*, 2 Bro. Ch. 321, 322; *Brownsword v. Edwards*, 2 Ves. Sen. 243, 247; *Sackvill v. Ayleworth*, 1 Vern. 105; *Dursley v. Fitzhardinge*, 6 Ves. 260; *Allan v. Allan*, 15 Id. 131; *Attorney-General v. Duplessis*, Parker, 144, 155-164; 5 Bro. P. C. 91; *Glegg v. Legh*, 4 Madd. 193, 208; *Wigram on Disc.* 21, 22; *Jeremy Eq. Jurisd.* 262, 263; *Brown v. Wales*, L. R. 15 Eq. 142; *Girdlestone v. North*

not only show that he has a title to or interest in the subject-matter, but he must likewise make it appear that the discovery would not be useless; he must show that he has a *prima facie* good cause of action. It is, however, not necessary that he should establish his right beyond dispute; it is sufficient if the bill for discovery establishes a *prima facie* cause of action.¹ But in order that this discovery may be refused, there must be no reasonable doubt as to the want of action or right on the part of the plaintiff; if there is any reasonable doubt as to the result of the controversy between the parties, the court of equity will grant a discovery and leave the matter to be finally settled by the court in which the main action is pending.² And a suit for discovery may be entertained, even where the same court refused to grant relief on the facts of the case.³

§ 554. **From whom can discovery be required?**—In order that a discovery may be required of one, the defendant must be a person who is not laboring under legal disabilities; such as an infant or a lunatic without a committee or guardian. So, on the other hand, it is impossible for one to be made a defendant in a suit for discovery who is not interested in the subject-matter of the controversy, in aid of which the bill of discovery has been filed.⁴ Thus, for example, in a suit by creditors against a bankrupt and his assignees, the bankrupt cannot be compelled to make discovery.⁵ And arbitrators cannot, in general, be joined in a bill for discovery, and be compelled to disclose the grounds of their award.⁶ But if the arbitrators are charged with actual misconduct or fraud, they are obliged to answer in respect to such charges.⁷ The bill for discovery will not be entertained against mere witnesses; they cannot be joined with the party to the action as defendants and obliged to answer. So, likewise, the agent of any party to the action is not a proper party defendant.⁸ But where the agent is a *particeps criminis* with his principal in the practice of some fraud, then he may be made a co-defendant and compelled to disclose facts, because he is liable with his principal for the fraud.⁹ Another exception to the rule, that

British, &c. Co., L. R. 11 Eq. 197; Comm'rs, &c. v. Glasse, L. R. 15 Eq. 302; Kettlewell v. Barstow, L. R. 7 Ch. 686; Slack v. Black, 109 Mass. 496; Haskell v. Haskell, 3 Cush. 540.

¹ Thomas v. Tyler, 3 Y. & C. 255; Metler v. Metler, 4 Green Ch. 457; Slack v. Black, 109 Mass. 496; Angell v. Draper, 1 Vern. 399; Macaulay v. Shackell, 1 Bligh, n. s., 120.

² Bailey v. Dean, 5 Barb. 297; Peck v. Ashley, 12 Metc. 478; Thomas v. Tyler, 3 Y. & C. 255, 261, 262; Hare on Disc. 43-46; March v. Davison, 9 Paige, 580; Lane v. Stebbins, 9 Id. 622; Deas v. Harvie, 2 Barb. Ch. 448.

³ Chichester v. Marquis of Donegal, L. R. 4 Ch. 416; Kettlewell v. Barstow, L. R. 7 Ch. 686; Thompson v. Dunn, L. R. 5 Ch. 573; Smith v. Duke of Beaufort, 1 Phil. 209; McCollum v. Prewitt, 37 Ala. 573; Treadwell v. Brown, 44 N. H. 551; Primmer v. Patten, 32 Ill. 528.

⁴ Plummer v. May, 1 Ves. Sen. 426; Dineley v. Dineley, 2 Atk. 394; Finch v. Finch, 2 Ves. Sen. 491; Fenton v. Hughes, 7 Ves. 287; Jeremy Eq. Jurisd. 259; Brownsword v. Edwards, 2 Ves. Sen. 243; Newman v. Edwards, 2 Ves. Sen. 243; Neuman v. Godfrey, 2 Bro. Ch. 332.

⁵ De Golls v. Ward, 3 P. Wms. 311 (n); Griffin v. Archer, 2 Anst. 478; 2 Ves. 643; Whitworth v. Davis, 1 V. & B. 545.

⁶ Tittenson v. Peat, 3 Atk. 529; Steward v. East India Company, 2 Vern. 380; Anon., 3 Atk. 644.

⁷ Chicot v. Lequesne, 2 Ves. Sen. 315, 418; Lindsley v. James, 3 Coldw. 477.

⁸ Ballin v. Ferst, 55 Ga. 546.

⁹ Gartland v. Nunn, 6 Eng. (Ark.) 721; Ballin v. Ferst, 55 Ga. 546; Bowles v. Stewart, 1 Sch. & Lef. 227; Bennet v. Vade, 2 Atk. 324.

agents cannot be made parties to a suit for discovery brought against the principal, is in cases of suits against corporations. The agents of corporations may be made parties and compelled to make discovery of the facts affecting the rights and liabilities of the corporation, arising from the fact that the corporation itself cannot make answer on oath.¹ And so, likewise, will a bill of discovery be entertained by or against nations and states which are not monarchical, viz.: republics like the United States of America.² It is also a rule of the court of equity, that a bill for discovery will not be entertained against a defendant who sets forth the fact that he is a *bona fide* purchaser of a subject-matter of the controversy; the ground being that such *bona fide* purchaser, in his character as such, can claim a paramount title to the property which the plaintiff is attempting to recover. But, of course, in order that the defendant might escape the necessity of answering the bill for discovery, he must establish his character as a purchaser for value and without notice of the claim of the plaintiff.³ The same protection against the liability to a bill of discovery is afforded to the purchaser from a *bona fide* purchaser; although the former cannot, in his own person, claim the character of a *bona fide* purchaser, he is permitted to stand upon the superior equity of his grantor.⁴

(§ 555. What matters the bill of discovery may include.—The fundamental rule, in regard to the questions which the plaintiff can require to be answered, and which the defendant in the suit for discovery may be required to answer, is, that the plaintiff in the suit for discovery is entitled to a disclosure of all the facts relating to the subject-matter of the controversy, which may be material to the issue in establishment of his own title or cause of action; but it does not extend to a discovery of the facts which constitute the defendant's own defense to the cause of action. The plaintiff is entitled to know what is the defense of the defendant, or in the case of a question of title he has a right to know the defendant's title; but he cannot require such defendant to disclose the evidence upon which he intended to rely in support of that title.) But this statement, that the plaintiff is not

¹ French v. First Nat. Bk., 7 Ben. 488; Fenton v. Hughes, 7 Ves. 288-291; Jeremy Eq. Jurisd. 260; Wych v. Meal, 3 P. Wms. 311, 312, *per* Lord Chan. Talbot; Ayres v. Wright, 8 Ired. Eq. 229; Yates v. Monroe, 13 Ill. 212; Many v. Beekman Iron Co., 9 Paige, 188.

² King of Sicilies v. Willcox, 1 Sim., n. s., 301; Columbian Govt. v. Rothschild, 1 Sim. 94; Republic of Costa Rica v. Erlanger, L. R. 1 Ch. Div. 171; L. R. 19 Eq. 33; Republic of Peru v. Weguelin, L. R. 20 Eq. 140; King of Spain v. Hullett, 1 Cl. & Fin. 333; U. S. v. Wagner, L. R. 2 Ch. 582; L. R. 3 Eq. 724; Prioleau v. United States and Andrew Johnson, L. R. 2 Eq. 659.

³ Payne v. Compton, 2 Y. & C. 457; Fitzsimmons v. Ogden, 7 Cranch, 2; Vattier v. Hinde,

7 Pet. 252, 271; McNeil v. Magee, 5 Mason, 269, 270; Wood v. Mann, 1 Sumner, 506; Flagg v. Mann, 2 Id. 487; Willoughby v. Willoughby, 1 T. R. 763, 767, *per* Lord Hardwicke; Jeremy Eq. Jurisd. 263, 264; Stanhope v. Earl Verney, 2 Eden, 81; Maundrell v. Maundrell, 10 Ves. 246, 259, 260, 270.

⁴ Hart v. Farmers and Mech. Bank, 33 Vt. 252; Abell v. Howe, 43 Vt. 403; but see Danbury v. Robinson, 1 McCarter, 213; Whitworth v. Gaugain, 3 Hare, 416; Basset v. Nosworthy, and Le Neve v. Le Neve, 2 Lead. Cas. in Eq. 1, 109; Varick v. Briggs, 6 Paige, 323, 329; Jackson v. McChesney, 7 Cow. 260.

⁵ King v. Ray, 11 Paige, 235; Brooks v. Byam, 1 Story, 296-301; Langdon v. Goddard, 3 Story,

entitled to a disclosure of the evidence of the defendant, is intended to refer to cases where such evidence would not in any way aid the plaintiff in support of his own cause of action or defense. If the disclosure of the evidence, upon which the defendant in the suit for discovery relies, is essential to the establishment of the plaintiff's cause of action or defense, then such evidence must be disclosed, although it may be material to the defendant.¹ It is, of course, a positive requirement of all cases of suits for discovery, that the matters required to be disclosed should be material to the plaintiff's cause of action or defense; he is not permitted to ask for a disclosure of matters not material to his claim or rights, merely for the purpose of gratifying malice or an idle curiosity.² So, also, must the purpose for which the discovery is asked be one which a court of equity could effectuate; the object of the discovery must, also, not be opposed to good morals or to principles of public policy.³ Under this general doctrine, it has been held that the defendant, in a suit for discovery, cannot be required to disclose facts which would tend to criminate himself, or to expose him to criminal prosecution or punishment, or to the infliction of penalties or forfeitures. Not only may he refuse to answer in respect to the directly criminating facts, but also refuse such answer to any facts which would constitute a link in the chain of evidence, tending to fasten upon him criminal or moral responsibility.⁴ But whenever such evidence is material to the plaintiff's cause of action, he could not refuse to make a disclosure in such suit of his own fraud, because the fraud was so gross as to expose him to a criminal prosecution.⁵ So, also, is it impossible for a defendant to refuse to make a discovery of facts which would tend to expose him to a liability to some pecuniary penalty, where the facts thus required tend to support or establish the rights of the plaintiff under the contract made by the defendant.⁶ So, also, is it no ground for exemption from the liability

13; *Haskell v. Haskell*, 3 Cush. 542; *Heath v. Erie R. R.*, 9 Blatch. 316; *Sackville v. Ayleworth*, 1 Vern. 105; *Dursley v. Fitzhardinge*, 6 Ves. 260; *Allan v. Allan*, 15 Ves. 131; *Janson v. Solarte*, 2 Y. & C. 127; *Bellwood v. Wetherell*, 1 Y. & C. 211-218; *Cullison v. Bosson*, 1 Md. Ch. 95; *Phillips v. Prevost*, 4 Johns. Ch. 205; *Cuyler v. Bogert*, 3 Paige, 186; *Bank of Utica v. Mercereau*, 7 Paige, 517; *Hoppock v. United, &c. R. R.*, 27 N. J. Eq. (12 C. E. Green.), 286; *French v. Rainey*, 2 Tenn. Ch. 641; *Richardson v. Mattison*, 5 Biss. 31; *Kearney v. Jeffries*, 48 Miss. 343.

¹ In *Atty.-Gen. v. Corp'n of London*, 2 Maen. & G. 247, 256, 257, s. c., 13 Beav. 313; *Stainton v. Chadwick*, 3 Maen. & G. 575; *Young v. Colt*, 2 Blatch. 373.

² *Gelston v. Hoyt*, 1 Johns. Ch. 548, 549; *Lindsley v. James*, 3 Coldw. 477; *Wier v. Tucker*, L. R. 14 Eq. 25; *Minet v. Morgan*, L. R. 8 Ch. 361; *Finch v. Finch*, 2 Ves. Sen. 492; *Richards v. Jackson*, 18 Ves. 472.

³ *Rajah v. East India Co.*, 35 Eng. Law & Eq.

283; *Jeremy Eq. Jurisd.* 268; *King v. Burr*, 3 Meriv. 693; *Cousins v. Smith*, 13 Ves. 542.

⁴ *Black v. Black*, 26 N. J. Eq. (11 C. E. Green.), 431; *East India Co. v. Campbell*, 1 Ves. Sen. 246; *Currier v. Concord, &c. R. R.*, 48 N. H. 321; *U. S. v. Saline Bk.*, 1 Peters, 100; *Horsburg v. Baker*, *Id.* 232-236; *Greenleaf v. Queen*, 1 Peters, 138; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Stewart v. Drasha*, 4 McLean, 563; *Union Bk. v. Barker*, 3 Barb. Ch. 358; *Northrup v. Hatch*, 6 Conn. 361; *Skinner v. Judson*, 8 *Id.* 528; *Poin-dexter v. Davis*, 6 Gratt. 481; *Higdon v. Heard*, 14 Ga. 255; *Marshall v. Riley*, 7 *Id.* 367.

⁵ *Skinner v. Judson*, 8 Conn. 528; *Howell v. Ashmore*, 1 Stockt. Ch. 82; *O'Connor v. Tack*, 2 Brews. (Pa.) 407; *Green v. Weaver*, 1 Sim. 404, 427, 432; *Mitchell v. Koecker*, 11 Beav. 380; *Robinson v. Kitchin*, 35 Eng. L. & Eq. 558; *Currier v. Concord, &c. R. R.*, 48 N. H. 321; *Attwood v. Coe*, 4 Sandf. Ch. 412.

⁶ *Green v. Weaver*, 1 Sim. 404; *Lee v. Read*, 5 Beav. 381; *Hurst v. Hurst*, L. R. 9 Ch. 762; *Chauncey v. Tabourden*, 2 Atk. 392.

to make discovery, where the liability to a penalty is barred by the lapse of time, or where the right to such penalty held by the plaintiff has been waived by him.¹

§ 556. **Privileged communications.**—The defendant in a suit for discovery can never be required to make a disclosure of facts, which have come to his knowledge by means of, what is pronounced by law to be, privileged communications. He cannot be required to disclose such privileged communications; but he is also prevented by the court from making even a voluntary communication of that sort. For this reason, a married woman cannot be compelled to disclose facts which tend to establish any liability whatever upon her husband; and the same doctrine would now apply to the disclosure by the husband of any facts within his knowledge which would tend to fasten a liability upon his wife. On the same principle, is it held by the law generally, that an attorney at law, to whom communications have been made in the repose of professional confidence, cannot be the defendant to a bill of discovery.² But there are some exceptions to this rule, in the case of client and attorney, in which the protection of a privileged communication would not be established; thus, for example, where a client and attorney jointly commit a fraud, the attorney can be compelled to disclose facts relating to such fraud.³ It is also a doubtful question as to the time when the communication must be made to the attorney, in order that it may come within the exception to the liability for discovery. According to the earlier cases in England, and in some of the American states, in order that the communication to the attorney may constitute a privileged communication which need not be disclosed in a bill of discovery, the statement must have been made during the actual pendency of a litigation, or in contemplation of an anticipated litigation.⁴ But, according to the later English cases, and the American cases in general, the communication to an attorney is privileged, whether made in anticipation of litigation or before any dispute has arisen, provided a communication is made to such attorney in his professional capacity.⁵ The same principle of privileged communication, in regard to the liability for discovery, has been applied to all governmental officers; so that such officers are not com-

¹ *Northrup v. Hatch*, 6 Conn. 361; *Dwinal v. Smith*, 25 Me. 379; *Mitf. on Eq. Pl.* 195-197; *Trinity House Corp'n v. Burge*, 2 Sim. 411; *Skinner v. Judson*, 8 Conn. 528.

² *Anderson v. Bank of Br. Columbia*, L. R. 2 Ch. Div. 644; *Bulstrode v. Letchmore*, 3 Freem. 5; 1 Chan. Cas. 277; *Parkhurst v. Lowten*, 2 Sw. 194, 216; *Currier v. Concord*, &c. R. R., 48 N. H. 321; *Russell v. Jackson*, 9 Hare, 387; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Crosby v. Berger*, 11 Paige, 377; *March v. Ludlum*, 3 Sandf. Ch. 35; *Stuyvesant v. Peckham*, 3 Edw. Ch. 579; *Parker v. Carter*, 4 Munf. 273.

³ *Cossey v. London, &c. Ry.*, L. R. 5 C. P. 146; *Anderson v. Bank of Br. Columbia*, L. R. 2 Ch. Div. 644. *Reynell v. Sprye*, 10 Beav. 51; 11 *Id.* 618; *Gartside v. Outram*, 26 L. J. (Ch.) 113.

⁴ *Radcliffe v. Fursman*, 2 Bro. C. P. 514; *Bolton v. Corp'n of Liverpool*, 3 Sim. 467; 1 My. & K. 88; *Whiting v. Barney*, 30 N. Y. 330.

⁵ *Minet v. Morgan*, L. R. 8 Ch. 361; *Pearse v. Pearse*, 1 De G. & Sm. 12; *Lawrence v. Campbell*, 4 Drew. 485; *Bolton v. Corp'n of Liverpool*, 3 Sim. 467; 1 My. & K. 88; *McLellan v. Longfellow*, 32 Me. 494; *McMannus v. State*, 2 Head, (Tenn.) 213.

pelled to disclose matters of state, where the public interests would be harmed by such a disclosure.¹

§ 557. **Manner of making discovery.**—Where the bill of discovery relates to a subject-matter which is properly brought within the operation of a bill, and is filed against a defendant who is not exempt by any principle of law from the liability to make such discovery, he is then called upon and is required to make a full and complete discovery of all of the facts which are material to the cause of action or defense of the plaintiff in the suit for discovery; that is, he cannot make a partial answer to such inquiries, but he must answer them fully and completely. Of course, the court will protect such defendant against immaterial inquiries, and against any oppressive enforcement of the rule.² The information, therefore, that he gives, must be complete, for, unless such information is complete, a discovery will not be of any special value to the plaintiff.³ And the defendant, in making answer, is required to make it to the best of his knowledge, information and belief.⁴ The answers must also be distinct and positive in their statement and must leave nothing to be inferred; he must give specific answers to specific questions.⁵ But there is, of course, a limit to the specification of his answer, so as to avoid unnecessary minuteness or verbosity.⁶

§ 558. **Production and inspection of documents.**—As a part of the reply by the defendant to the bill for discovery, where such bill calls for the production for inspection of documents in the possession of the defendant, a complete answer to such a bill would require the production of such documents; and it is no excuse for non-production that they are in the possession of a third person, or even that a third person has a lien upon and interest in such documents, as long as the defendant has control of such documents.⁷ But if the documents which are called for in the bill for discovery belong wholly or in part to third persons, who are not parties to the suit, the defendant cannot be required to produce them.⁸ If the defendant, in making answer to

¹ *Greenough v. Gaskell*, 1 My. & K. 98, 115; *Wardé v. Warde*, 1 Sim., n. s., 18; 3 Macn. & G. 365; *Bluck v. Galsworthy*, 2 Griff. 453; *Jenkyns v. Bushby*, L. R. 2 Eq. 547; *Bolton v. Corp'n of Liverpool*, 3 Sim. 467; 1 My. & K. 88; *McLellan v. Longfellow*, 32 Me. 494; *McMannus v. State*, 2 Head, (Tenn.) 213.

² *Cuyler v. Bogert*, 3 Paige, 186; *Bank of Utica v. Mersereau*, 7 Id. 517; *King v. Ray*, 11 Id. 235; *Chaplin v. Chaplin*, 2 Edw. Ch. 362; *Waring v. Suydam*, 4 Id. 426; *Brooks v. Byam*, 1 Story, 296; *Langdon v. Goddard*, 3 Id. 13; *Kittredge v. Claremont Bank*, 3 Id. 590; *Wootten v. Burch*, 2 Md. Ch. 190; *Saunders v. Jones*, L. R. 7 Ch. Div. 435, 443; *Wier v. Tucker*, L. R. 14 Eq. 25; *Meth. Epis. Ch. v. Jaques*, 1 Johns. Ch. 65; *Phillips v. Prevost*, 4 Johns. Ch. 205; *Hagthorpe v. Hook*, 1 Gill & J. 272; *Salmon v. Claggett*, 3 Bland Ch. 142; *Robertson v. Bingley*, 1 McCord Ch. 333; *French v. Rainey*, 2 Tenn. Ch. 641;

Shotwell v. Struble, 21 N. J. Eq. (6 C. E. Green,) 31; *Walter v. McNabb*, 1 Heisk. 703.

³ *White v. Williams*, 8 Ves. 195; *Atty.-Gen. v. East Retford*, 2 My. & K. 35; *Drake v. Symes*, Johns. 647.

⁴ *Fry v. Shehee*, 55 Ga. 208.

⁵ *Tipping v. Clarke*, 2 Hare, 383, 389; *Anon.*, 2 Y. & C. 310; *Duke of Brunswick v. Duke of Cambridge*, 12 Beav. 281; *Faulder v. Stuart*, 11 Ves. 296; *Wharton v. Wharton*, 1 S. & S. 235.

⁶ See *Parker v. Fairlie*, 1 S. & S. 295; *Lowe v. Williams*, 2 Id. 574; *Norway v. Rowe*, 1 Meriv. 346; *Byde v. Masterman*, Cr. & Ph. 265.

⁷ *Taylor v. Rundell*, Cr. & Ph. 104; 1 Phil. 222; *Clinch v. Financial Corp'n*, L. R. 2 Eq. 271; *Glengall v. Frazer*, 2 Hare, 99; *Stuart v. Bute*, 11 Sim. 442; *Lady Beresford v. Driver*, 14 Beav. 387; *Robbins v. Davis*, 1 Blatch. C. C. 238.

⁸ *Hadley v. McDougall*, L. R. 7 Ch. 312; *Warwick v. Queen's College*, L. R. 4 Eq. 254.

the bill of discovery, states unequivocally that the documents required are not in his possession and not under his control, he cannot be required to produce them; and his statements are not ordinarily subject to any contest, either by cross-examination by such defendant or by contradictory evidence offered on the part of the plaintiff, where the answer is sworn to.¹ But where the defendant's own sworn answer or evidence, filed by him in the suit, gives rise to reasonable and well-founded suspicions that the statement in respect to the absence of the document is false, then he may compel the defendant to make a more specific statement under oath as to the possession of the documents called for.²

It is also required that the documents, which are required to be produced, should be material to or should relate to the plaintiff's case; and where the defendant in the suit for discovery positively denies that they are material, he is relieved from the duty of producing them.³ A defendant is not generally required to produce his own title deeds, where such title deeds are only evidence of his own title.⁴ But if such title deeds contain statements or clauses, which tend to support the claims of the plaintiff in the suit for discovery, then he must produce them in aid of plaintiff's cause.⁵

§ 559. **To what extent the answer in the suit for discovery may be used as evidence.**—Where evidence is discovered by means of a suit for discovery, the answer thus procured has the effect of a judgment, and it must be produced in court without any limitation or curtailment, if the party obtaining the discovery makes use of any part of the answer in support of his claim or cause of action.⁶ The answer in an ordinary equitable suit may and sometimes does contain admissions or answers to interrogatories contained in the plaintiff's bill; these answers have the same force and effect as a similar answer when made to a bill for discovery.⁷

§ 560. **Equitable provisions for examination of witnesses.**—As has been explained in the preceding paragraphs, which relate to the

¹ *Reynell v. Sprye*, 1 De G. M. & G. 656; and see *Robbins v. Davis*, 1 Blatch. C. C. 238; *Wright v. Pitt*, L. R. 3 Ch. 809, 810, *per* Page Wood, L. J.

² *Wright v. Pitt*, L. R. 3 Ch. 809, 810, *per* Page Wood, L. J.; *Saull v. Browne*, L. R. 17 Eq. 402; *Noel v. Noel*, 1 De G. J. & S. 468.

³ *Minet v. Morgan*, L. R. 8 Ch. 361, *per* Lord Selborne; *Kettlewell v. Barstow*, L. R. 7 Ch. 686; *Patch v. Ward*, L. R. 1 Eq. 436, 439; *Atty.-Gen. v. Corp'n of London*, 2 Macn. & G. 247.

⁴ *Patch v. Ward*, L. R. 1 Eq. 436; *Thompson v. Engle*, 3 Green's Ch. 271; *Cullison v. Bossom*, 1 Md. Ch. 95; *Chichester v. Marquis of Donegal*, L. R. 5 Ch. 497; *Minet v. Morgan*, L. R. 11 Eq. 284.

⁵ *Follett v. Jefferyes*, 1 Sim., n. s., 1; *Freeman v. Butler*, 33 Beav. 289; *Crisp v. Platel*, 8 Beav. 62; *Cullison v. Bossom*, 1 Md. Ch. 195; *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33, 44,

45, *per* Malins, V. C.; *Beckford v. Wildman*, 16 Ves. 438.

⁶ *Shotwell v. Smith*, 20 N. J. Eq. (5 C. E. Green,) 79; *Holmes v. Holmes*, 36 Vt. 525; *Lyons v. Miller*, 6 Gratt. 439; *Fant v. Miller*, 17 Gratt. 187; *Hart v. Freeman*, 42 Ala. 567.

⁷ *Sweet v. Parker*, 3 C. E. Green, (22 N. J. Eq.) 453; *Tomlinson v. Lindley*, 2 Carter, (Ind.) 569; *Hughes v. Blake*, 6 Wheat. 453; *Union Bk. v. Geary*, 5 Peters, 99; *Chance v. Teeple*, 3 Green's Ch. 173; *Myers v. Kinzie*, 26 Ill. 36; *White v. Hampton*, 10 Iowa, 238; *Hart v. Freeman*, 42 Ala. 567; *Eaton's Appeal*, 16 P. F. Smith, (Pa. St.) 483; *Swift v. Dean*, 6 Johns. 523; *Clason v. Morris*, 10 Id. 524; *Stafford v. Bryan*, 1 Paige Ch. 239; *Page v. Page*, 8 N. H. 187; *Daniel v. Mitchell*, 1 Story, 173; *McMahon v. Burchell*, 2 Phil. 127; *Glenn v. Randall*, 2 Md. Ch. 220; *Fant v. Miller*, 17 Gratt. 187.

matter of bills of discovery, that remedy applies only where the party to a suit desires that the opposing party shall make discovery of facts or information, or of documents under his control, where such discovery is needed in the prosecution of one's suit. It is not possible for a bill of discovery to be employed in procurement of the examination of witnesses, who are not parties to the suit. At common law, the only provision for the examination of witnesses was in the suit in which the evidence was needed; and if, before the suit could be brought to trial, the witness dies or absconds, or for some other reason cannot be placed upon the witness-stand, the evidence could not be obtained in any other way, and if the suit depended upon such evidence, it would, in that case, fail completely. In order that such failures of justice may be avoided, equity interposed its extraordinary power and jurisdiction for the purpose of providing a remedy for such dangers by furnishing the means of obtaining testimony of parties who, for some reason or other, either could not be brought before the court, or who are likely to go beyond the jurisdiction of the court before the suit comes to trial. In all such cases, the suit for the examination of the witnesses is an independent action, and auxiliary to the many causes of action in aid of which the suit for the examination of witnesses is brought. These auxiliary remedies are three in number: *First*, the suit to perpetuate testimony; *second*, suits to take testimony of witnesses *de bene esse*; *third*, suits to take the testimony of witnesses in a foreign country. The suit to perpetuate testimony has been already explained in the preceding chapter.¹ The remaining classes of suits for the procurement of needed testimony will be explained in the succeeding paragraph.

§ 561. **Suits to take testimony of witnesses *de bene esse*.**—The suit to perpetuate testimony, it will be remembered, was instituted whenever the plaintiff had an interest in the property, which could not be enforced or established ordinarily at the present time, and in order to preserve the testimony for use in the future cause of action in respect to such interest. In the case of a suit to take testimony *de bene esse*, the party plaintiff is not required to show that he cannot now bring the main action in the enforcement of his right; on the contrary, the suit to take testimony *de bene esse* is an equitable remedy for procuring testimony to be used in some pending cause of action, whenever there is any danger of losing such evidence through the death, insanity, illness, or departure of such witness from the country.² These depositions when taken are admissible as evidence in the pending cause of action at the trial, whenever it is shown that the witness

¹ See § 542.

² *Rowe v. ———*, 13 Ves. 261; *Cholmondeley v. Orford*, 4 Bro. Ch. 157; *Shirley v. Earl Ferrers*, 3 P. Wms. 77; *Pearson v. Ward*, 1 Cox, 177; *Prichard v. Gee*, 5 Madd. 364; *Jeremy Eq. Jurisd.*, pp. 271-273; *Angell v. Angell*, 1 S. & S.

83, 92, 93; *Fitzhugh v. Lee*, Amb. 65; *Phillips v. Carew*, 1 P. Wms. 117; *Frere v. Green*, 19 Ves. 320; *Cann v. Cann*, 1 P. Wms. 567; *Hope v. Hope*, 3 Beav. 317; *McIntosh v. Great West. Ry.*, 1 Hare, 328.

is dead or beyond the jurisdiction of the court, or for some other cause physically or mentally incapable of testifying in person. If it is possible to produce the witness on the witness stand, the deposition is not permitted to be used.¹

§ 562. **Suits to examine witnesses in foreign countries.**—This is an equitable suit, whereby persons living beyond the jurisdiction of a court can be provided with the means of giving their evidence before a committee, appointed by the court of equity for the purpose of taking such deposition. It really constitutes but one kind of suit to take testimony *de bene esse*; the only peculiarity or point of difference being, that in the present case the evidence is taken beyond the ordinary jurisdiction of the court, and by commissioners appointed by such court to act as its agents in taking the testimony. And the ground for exercising this jurisdiction is the inability of a court to compel an attendance of such person upon the trial.² Statutory modes of taking and procuring such testimony have now superseded the more cumbersome equitable suit in the discovery or perpetuation of evidence, so that the equitable remedies here described have become practically obsolete.

¹ Harris v. Cotterell, 3 Meriv. 680; Gason v. Wordsworth, 2 Ves. Sen. 336; Dew v. Clark, 1 S. & S. 108; Webster v. Pawson, Dick. 540.

² Mendizabel v. Machado, 2 Id. 483; Thorpe

v. Macauley, 5 Madd. 218, 231; Devis v. Turn-
dull, 6 Id. 232; Grinnell v. Cobbold, 4 Sim. 546;
Moodalay v. Morton, 1 Bro. Ch. 469; Angell v.
Angell, 1 S. & S. 83, 93.

CHAPTER XXXV.

INTERPLEADER.

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§ 566. **General principles.**—This is, in some cases, a purely equitable remedy; for, while at common law the remedy was employed in two special cases, viz.: when two persons claimed the title to the same article which had been lost and found, and when two or more persons had made a joint bailment, and subsequently dispute between themselves over their respective rights to the subject of the bailment; yet the general employment of the remedy was confined to equitable actions. The purpose of the remedy is to enable the one who has possession of some property, to which two persons are making antagonistic claims, and who is in danger of being subjected to two or more law suits, to avoid this danger and annoyance by filing a bill in equity, calling upon the adverse claimants to interplead in respect to the subject-matter of their contention, and to settle the same between themselves; while the court takes charge of the subject-matter, and relieves the interpleader from all further obligations in respect to the contention.¹ It is sometimes stated that the remedy of interpleader is provided for the purpose of enabling one to avoid the risk of two recoveries of judgment against himself. This is, however, not the case; all that is required as a foundation to the action is, that the interpleader is subject to the risk of being annoyed by two or more suits in respect to the matter; it is not necessary for him to be subject to the possibility of a double liability. In fact, in most cases, if not in all, the liability is single; but the double element in the case is the

¹ *Hays v. Johnson*, 4 Ala. 267; *Mich., &c. Co. v. White*, 44 Mich. 25; *Cogswell v. Armstrong*, 77 Ill. 139; *Hathaway v. Foy*, 40 Mo. 540; *Orr Water Ditch Co. v. Larcombe*, 14 Nev. 53; *Pfister v. Wade*, 56 Cal. 43; *Bell v. Hunt*, 3 Barb. Ch. 391; *Richards v. Slater*, 6 Johns. Ch. 445; *Atkinson v. Manks*, 1 Cow. 691; *Cady v. Potter*, 55 Barb. 463; *Mount Holly, &c. Tp. Co. v. Ferree*, 17 N. J. Eq. 117; *Strange v. Bell*, 11 Ga. 103; *Burton v. Black*, 32 *Id.* 53; *Lincoln v. Rutland*,

&c. R. R., 24 Vt. 639; *Dorn v. Fox*, 61 N. Y. 264; *Shaw v. Coster*, 8 Paige, 339; *Mohawk, &c. R. v. Clute*, 4 *Id.* 384; *Redell v. Hoffman*, 2 *Id.* 199; *Badeau v. Rogers*, 2 *Id.* 209; *Mitford's Eq. Pl.*, pp. 58, 59; *Crawshaw v. Thornton*, 2 *My. & Cr. 1*; *Sieveking v. Behrens*, 2 *Id.* 581; *Glyn v. Duesbury*, 11 Sim. 139, 147; *Langston v. Boylston*, 2 Ves. 101, 103, 109; *Jones v. Thomas*, 2 Sm. & Gif. 186; *Prudential Ass. Co. v. Thomas*, L. R. 3 Ch. 74; *Farley v. Blood*, 30 N. H. 354.

doubt as to the person to whom he is liable.¹ But in order that a bill of interpleader may be filed, the risk of being subjected to two or more law suits must be real, and the fear well founded; and this fear must continue to be well founded until the decree is made.² It is not, however, necessary that a suit should be actually brought against the interpleader at the time when he files his bill; but it is simply required that the danger of being subjected to a multiplicity of suits should be real.³ The equitable jurisdiction in all such cases does not in anywise depend upon the legal or equitable character of the conflicting claims, *i. e.*, the court of equity will have jurisdiction for the settlement of such a dispute, whether the conflicting claims are both legal or both equitable,⁴ or where one is legal and the other is equitable.⁵ But whatever may be the character of these claims, they must certainly be adverse to each other. If there is no conflict between the claims of the parties, but one may be reconciled with the other, there is no reason for an interference by a court of equity.⁶

§ 567. **Essential requisites to an action for interpleader.**—Independently of statutory modification, in order that a bill of interpleader may be filed and the party to it be called upon to interplead in respect to their conflicting claims, four essential requisites must co-exist: *First*, their contention must be about the same thing, debt, or duty; *secondly*, their adverse claims must have a common origin; *thirdly*, the party filing the bill must be disinterested; *fourthly*, he must not be under any independent liability to either of the claimants, in respect to the subject-matter of their contention.

§ 568. **The same thing, debt or duty.**—The first requirement to an action for interpleader, is that the same thing, debt, or duty, must be claimed by both parties against the person who calls for relief by way of interpleader.⁷ It has been held that “where the claims made

¹ Trigg v. Hitz, 17 Abb. Pr. 436; Farley v. Blood, 30 N. H. 354; Mich., &c. Co. v. White, 44 Mich. 25; Newhall v. Kastens, 70 Ill. 156; Nelson v. Barter, 2 Hem. & M. 334; 33 L. J. Ch. 705; 10 Jur., N. S., 832; Crawford v. Fisher, 1 Hare, 436, 441; East and West India Dock Co. v. Littledale, 7 Id. 57, 60; Langston v. Boylston, 2 Ves. 101; Sablicich v. Russell, L. R. 2 Eq. 441; Greene v. Mumford, 4 R. I. 313; School District v. Weston, 31 Mich. 85; Pfister v. Wade, 56 Cal. 43.

² Blair v. Porter, 2 Beasl. 267; Kerr v. Union Bk., 18 Md. 296.

³ Langston v. Boylston, 5 Ves. 101, 103, 109; Providence Bk. v. Wilkinson, 4 R. I. 507; Briant v. Reed, 1 McCart. 271; Yarborough v. Thompson, 3 Sm. & Mar. 291; Angell v. Hadden, 15 Ves. 244; Morgan v. Marsack, 2 Meriv. 107; Farley v. Blood, 30 N. H. 354; Richards v. Slater, 6 Johns. Ch. 445; Yates v. Tisdale, 3 Edw. Ch. 71; Schuyler v. Pelissier, 3 Id. 191; Strange v. Bell, 11 Ga. 103; Gibson v. Goldthwaite, 7 Ala. 281; Newhall v. Kasten, 70 Ill. 156; Richards v. Salter, 6 Johns. Ch. (N. Y.) 447.

⁴ Lowndes v. Cornford, 18 Ves. 299.

⁵ Duke of Bolton v. Williams, 4 Bro. Ch. 297, 309; Farley v. Blood, 36 N. H. 354; Richards v. Salter, 6 Johns. Ch. 445; Yates v. Tisdale, 3 Edw. Ch. 71; Schuyler v. Pelissier, 3 Id. 191; Lozier's Ex'rs v. Van Saun's Adm'rs, 2 Green Ch. 325; Oil Run Petro. Co. v. Gale, 6 W. Va. 525; Strange v. Bell, 11 Ga. 103; Burton v. Black, 32 Id. 53; Lowndes v. Cornford, 18 Ves. 299; Morgan v. Marsack, 2 Meriv. 107; Wright v. Ward, 4 Russ. 215; Paris v. Gilham, Coop. 56; Martinus v. Helmuth, 2 V. & B. 412; Smith v. Hammond, 6 Sim. 10; Crawford v. Fisher, 10 Id. 479; Hamilton v. Marks, 5 De G. & Sm. 638; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74; Gibson v. Goldthwaite, 7 Ala. 281; Whitney v. Cowan, 55 Miss. 626, 647; Newhall v. Kastens, 70 Ill. 156; Common Law Procedure Act 23 and 24 Vict., Ch. 128, § 12; Rusden v. Pope, L. R. 3 Exch. 269; Engelback v. Nixon, L. R. 10 C. P. 645; Attenborough v. London & St. Katherine's Dock Co., L. R. 3 C. P. Div. 450; see Langton v. Horton, 3 Beav. 464.

⁶ Wright v. Freeman, 48 L. J. C. P. 276.

⁷ Desborough v. Harris, 5 De G. M. & G. 439.

by the defendants are for different amounts, they can never be identical," and hence a dispute between two parties over a subject-matter, out of which they claim a recovery for different amounts, there can be no interference of a court of equity by way of interpleader.¹ But this is not a reliable statement of the law in explanation of the requirement, that the contentions of the parties must be about the same thing, debt, or duty. Parties may set a different value upon the same thing, or make a different estimate of the damages which they have suffered in consequence of an interference with one's property, as where one brings an action of trover for the conversion of one's property, he may claim a different amount of damages than what would be asked for by a contestant of the title to the same thing, if he were to bring a parallel action of trover. That fact or circumstance would not interfere with the claim that the contention of the two parties was about the same thing, debt or duty; and that has been the adjudication of the later English and American cases.² This rule is not only maintained, where the cause for variance was the difference in the estimation of damages for conversion, but the same difficulty might be experienced in contentions about the right of a *chose in action*.³ So, also, has it been held to be a case for an interpleader, where two counties claim the right to tax the same property for different amounts.⁴ The same conclusion is reached in every case, where the contention is over a specific thing, whose identity is clear, whatever difference there may be in the estimation made by the parties of the value of the same.⁵ On the other hand, where one defendant claims rent as the owner of certain property, and the other claims damages for their use and occupation, it has been held that the dispute was not over the same thing, debt, or duty, and hence the bill of interpleader would not lie. So, also, has it been held that where, in the case of an auction sale of a

455; *Saratoga Co. Sup. v. Seabury*, 11 Abb. N. C. (N. Y.) 461; see, also, *Mitchell v. Hayne*, 1 Sim. & St. 63; *Hastings v. Cooper*, 3 Del. Ch. 165; *Perkins v. Trippe*, 40 Ga. 225; *Bd. of Educ. v. Scoville*, 13 Kans. 17; *School Dist. v. Weston*, 31 Mich. 86; *Rohrer v. Turrill*, 4 Minn. 407; *Hyman v. Cameron*, 46 Miss. 725; *O. W. Ditch Co. v. Larcombe*, 14 Nev. 53; *Leddell v. Starr*, 20 N. J. Eq. 274; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691; *Bedell v. Hoffman*, 2 Pal. (N. Y.) 199; *Cady v. Porter*, 55 Barb. (N. Y.) 463; *B. & O. Co. v. Arthur*, 10 Abb. N. C. (N. Y.) 147; *Turner v. Kendall*, 3 M. & W. 171; s. c., 2 D. & L. 197; *Hayes v. Johnson*, 4 Ala. 287; *Adams v. Dixon*, 19 Ga. 513; *Burton v. Black*, 32 Ga. 52; *Rohrer v. Turrill*, 4 Minn. 407; *Yarborough v. Thompson*, 11 Miss. 291; *Cannon v. Kinney*, 1 Sm. & M. Ch. (Miss.) 525; *Mount Holly, &c. Tp. Co. v. Ferree*, 17 N. J. Eq. 117; *Bedeau v. Rogers*, 2 Pal. (N. Y.) 209; *Aymer v. Gault*, 2 Pal. (N. Y.) 284; *Yates v. Tisdale*, 3 Edw. (N. Y.) 71; *Prov. Bk. v. Wilkinson*, 4 R. I. 507.

¹ *Glyn v. Duesbury*, 11 Sim. 139, 148; *Pfister v. Wade*, 56 Cal. 43.

² *Yates v. Tisdale*, 3 Edw. Ch. 71; *Fargo v. Arthur*, 43 How. Pr. 193; *Newhall v. Kastens*, 70 Ill. 156; *Bd. of Education v. Scoville*, 13 Kans. 17; *School District v. Weston*, 31 Mich. 85; *Reading v. School Board*, L. R. 16 Q. B. D. 686; but see *Mitchell v. Hayne*, 2 Sim. & St. 63; *Patornia v. Campbell*, 12 M. & W. 277; *Slaney v. Sidney*, 14 M. & W. 800; *Nelson v. Goree*, 34 Ala. 565; *Chamberlain v. O'Connor*, 8 How. (N. Y.) 45; *Bird v. Neff*, (Pa.) 1 Tr. & Ha. Prac., § 497.

³ See *City Bank v. Bangs*, 2 Paige, 570; *Briant v. Reed*, 1 McCarter, 271; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Leddell's Ex'r v. Starr*, 20 Id. 274; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Oil Run Petro. Co. v. Gale*, 6 W. Va. 525; *Pfister v. Wade*, 56 Cal. 43.

⁴ See *Thomson v. Ebbets*, Hopk. Ch. 273; *Mohawk, &c. R. R. v. Clute*, 4 Paige, 384, 391; *Redfield v. Supervisors*, Clarke Ch. (N. Y.) 42; *Dorn v. Fox*, 61 N. Y. 264; but see *per contra*, *Greene v. Mumford*, 4 R. I. 313.

⁵ *Cady v. Potter*, 55 Barb. 463; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 2 Green Ch. 325.

horse, the auctioneer was subjected to conflicting claims of two parties growing out of the transaction, one for a breach of warranty, and the other for the purchase-money, the dispute was not about the same thing, debt, or duty.¹

§ 569. **The adverse claims must be derived from the same source.**—The meaning of this requirement is, that the conflicting claims must have some privity of dependence one with or from the other, *i. e.*, either the claims of the one party must be derived from the other, or both claims must be derived from a common source. If there is no privity between the claimants, and the one claim is held to be paramount to, but independent of, the title of the other, there is no ground for filing a bill of interpleader.²

§ 570. **Plaintiff must be a disinterested party.**—In order that one may, by filing a bill of interpleader, obtain relief from the annoyance and costs of two or more suits by parties having adverse claims to property in his possession, he must occupy the disinterested position of a stakeholder, and he must have no interest in the issue of the suit, except to be indemnified against any loss in the way of costs; so that when he files his bill of interpleader, and the court orders the defendants to interplead, he must be able then to withdraw altogether from the controversy.³ And while the plaintiff cannot set up any claim, or charge, or lien upon the subject-matter of the suit, where such issue constituted a part of the litigation, and to be settled for or against the claim of the plaintiff in the judgment of the action,⁴ yet where the claim is admitted by both defendants, and the charges of the party interpleading must be made good and be performed, no matter which of the defendants succeeds in the suit, his assertion of the claim would not interfere with his right to file the bill of interpleader. A common case of this kind would be the claim of a bailee for his services, in the performance of a bailment, where the title to the property is contended for by two or more persons, both of whom, however, are under an obligation to discharge the claim.⁵ So, also, may a bill of interpleader be filed, notwithstanding that the plaintiff has a disputed claim

¹ *Wright v. Freeman*, 48 L. J. C. P. 276.

² *Attenborough v. London, &c. Dock Co.*, L. R. 3 C. P. Div. 450; *Pearson v. Cardon*, 2 Russ. & My. 606, 609-612; *Crawshaw v. Thornton*, 2 My. & Cr. 1, 19-24; *Nickolson v. Knowles*, 5 Madd. 47; *Cooper v. De Tastet*, Taml. 177; *Pfister v. Wade*, 56 Cal. 43.

³ *Lozier's Ex'rs v. Van Saun's Adm'r*, 2 Green Ch. 325; *Kerr v. Union Bk.*, 18 Md. 396; *Burton v. Black*, 32 Ga. 53; *Adams v. Dixon*, 19 *Id.* 513; *Anderson v. Wilkinson*, 10 Sm. & Mar. 601; *Cullen v. Dawson*, 24 Minn. 66; *Mitchell v. Hayne*, 2 S. & S. 63; *Langston v. Boylston*, 2 Ves. 101; *Moore v. Usher*, 7 Sim. 383; *Bignold v. Audland*, 11 *Id.* 23; *Hoggart v. Cutts*, Cr. & Ph. 197; *Lincoln v. Rutland, &c. R. R.*, 24 Vt. 639; *Atkinson v. Manks*, 1 Cow. 691; *Shaw v.*

Coster, 8 Paige, 339; *Killian v. Ebbinghaus*, 110 U. S. 568; *Long v. Barker*, 85 Ill. 431; *Snodgrass v. Butler*, 54 Miss. 45; *Anderson v. Wilkinson*, 10 Sm. & M. (Miss.) 601; *Dohnest's App.*, 64 Pa. 311.

⁴ *Wakeman v. Dickey*, 19 Abb. Pr. 24; *Mitchell v. Hayne*, 2 S. & S. 63; *Moore v. Usher*, 7 Sim. 384; *Bignold v. Audland*, 11 Sim. 23; *Jacobson v. Blackhurst*, 2 J. & H. 436; *Best v. Hayes*, 32 L. J. Ex. 129; s. c., 3 F. & F. 113.

⁵ *Cotter v. Bank of England*, 2 Dow. Pr. C. 728; and see *Attenborough v. London, &c. Co.*, L. R. 3 C. P. Div. 450; *Gibson v. Goldthwaite*, 7 Ala. 281; *Webster v. McDaniel*, 2 Del. Ch. 297; *Cotter v. Bk. of Eng.*, 3 Moore & S. 180; *Attenborough v. St. Kath. Docks*, L. R. 3 C. P. D. 450.

or charge on the fund, providing he waives the claim.¹ It is also a part of the general proposition just set forth, that the plaintiff must be a disinterested party, that the plaintiff should make no express denial of his liability in whole or in part to one of the defendants; his denial of his liability to either of them would destroy that element of neutrality, which is essential to the claim that he is a disinterested party as to the subject-matter of the suit.² So, also, would the right to file a bill of interpleader be denied, where the amount of the fund or debt, which is due by the plaintiff to one of the parties, is uncertain, and could only be made certain by the settlement of their conflicting claims, the amount varying with the decision of the court in favor of one or the other of the parties defendant. In such a case the plaintiff, who files the bill of interpleader, has an interest in the results of the litigation, which precludes him from obtaining the relief of interpleading.³ But the plaintiff must have an interest in the very thing or fund itself, in order to be precluded from filing a bill of interpleader; an interest in the legal question, which is at issue in the contention of the parties, will not prevent the plaintiff's claim to relief, where his interest is involved in the application of the same legal question to a different statement of facts. So, also, would he not be claimed to be an interested party, where he had a claim or debt against one of the defendants, the satisfaction of which he could secure, if the decree of the court should be in favor of that one of the contestants.⁴ It is, also, a rule of the court of equity that a person in possession of a thing or fund, in respect to which two other parties contend, is the only person who can file a bill of interpleader; one of the contestants cannot institute the action by making the other contestant and the stakeholder defendants.⁵ But this position is not sustained by all of the courts; in some of them the action of interpleader is permitted in every case, where there are triangular claims, and the suit is permitted to be instituted by one of the contestants, as well as by the stakeholder.⁶

The last requirement in this connection is, that the plaintiff in the action of interpleader must be in possession of the fund, or have it under his control, so that he may deliver or pay it in obedience to the decree of the court. If he has already delivered the thing or paid the debt to one of the contestants, he cannot file a suit for interpleader.⁷

¹ *Jacobson v. Blackhurst*, 2 J. & H. 486.

² *Moore v. Usher*, 7 Sim. 383; *Greene v. Mumford*, 4 R. I. 313; *Patterson v. Perry*, 14 How. Pr. 505; *Cogswell v. Armstrong*, 77 Ill. 139.

³ *City Bank v. Bangs*, 2 Paige, 570; *Consociated Pres. Soc. v. Staples*, 23 Conn. 544; *Chamberlain v. O'Connor*, 1 E. D. Smith, 665; *Bender v. Sherwood*, 15 How. Pr. 258; *Patterson v. Perry*, 14 Id. 505; *B. & O. R. Co. v. Arthur*, 90 N. Y. 234.

⁴ *Gibson v. Goldthwaite*, 7 Ala. 281; *Oppenheim v. Wolf*, 3 Sand. Ch. (N. Y.) 371, 571; *McHenry v. Hazard*, 45 Barb. (N. Y.) 657.

⁵ See *Sprague v. West*, 127 Mass. 471; *Hyman v. Cameron*, 46 Miss. 725; *Hathaway v. Foy*, 40 Mo. 540; *M. & O. Plaster Co. v. White*, 44 Mich. 25.

⁶ *Munds v. Cassidy*, 98 N. Car. 558; *Webster v. Hall*, 60 N. H. 7.

⁷ *Mount Holly, &c. Co. v. Ferree*, 17 N. J. Eq. 117; *Tiernan v. Rescaniere's Adm'rs*, 10 G. & J. 217; *Vosburg v. Huntington*, 15 Abb. Pr. 254; *Martin v. Maberry*, 1 Dev. Eq. 169; *Crosby v. Mason*, 32 Conn. 482; see, also, *Osborne v. Taylor*, 12 Gratt. (Va.) 17; *Morse v. Stearns*, 131 Mass. 389.

§ 571. **Independent liability to one claimant.**—The last requirement of the bill of interpleader is that the stakeholder must be under no independent liability to either of the claimants, in respect to the subject-matter of their contention. This liability may arise in one of two ways; in the first place where the agent obligee, or other party asking for interpleader has, in respect to the subject-matter of the dispute, knowledge of the title of one of the claimants, or where he binds himself to one of the claimants by contract to deliver the fund or property in his charge to him in an unconditional manner; he is, in either case, liable for the due performance of his contract, whatever may be the issue of the contention between the two parties. In such a case, he is not permitted to relieve himself from the annoyance of the contending suits, in respect to the subject-matter of his bailment, by filing a bill of interpleader; he is not a disinterested party in respect to the pending dispute.¹

It is also held that the right of filing a bill of interpleader is lost, whenever one of the contending parties has obtained a judgment against the stakeholder in the recognition of his right to the fund or property.² But if the judgment is not definitely settled, or where the case is appealed or the judgment is otherwise resisted by the stakeholder, so that the rights of the parties to the fund in question are not definitely settled, such a party may still relieve himself from further litigation, in respect to the matter, by compelling the defendant to interplead.³ It is also impossible for a stakeholder to file a bill of interpleader where, in stating the cause of the contention, he is obliged to admit himself to being a wrong-doer to either one of the defendants. Such an admission would be proof of an independent liability to that one of the defendants, and would destroy his claim of being a disinterested party.⁴

§ 572. **Interpleader by bailees, agents, tenants, and parties to contracts.**—In the second class of cases, the independent liability of the plaintiff or stakeholder, to one of the contending parties, consists of a legal obligation, arising out of the very nature of the relation existing between them, in respect to the subject-matter of the dispute, and which precludes the plaintiff or stakeholder from recognizing in any way the claims of the other defendant. Where the stakeholder or plaintiff in an action of interpleader is necessarily associated with the

¹ *Crawshay v. Thornton*, 2 My. & Cr. 1, 10-24; *Stuart v. Welch*, 4 Id. 305; *Jew v. Wood*, Cr. & Ph. 185; *Pfister v. Wade*, 56 Cal. 43; *Tyus v. Rust*, 37 Ga. 574; *Hatfield v. McWhorter*, 40 Id. 269; *Cullen v. Dawson*, 24 Minn. 66.

² *Tiernan v. Rescaniere*, 10 G. & J. (Md.) 217; *Am. Tel. Co. v. Day*, 52 N. Y. Super. Ct. 128; *Phila. S. F. Soc. v. Clarke*, 15 Phila. (Pa.) 289; *Cornish v. Tanner*, 1 G. & J. 333; *Un. Bk. v. Kerr*, 2 Md. Ch. 460; *McKinney v. Kuhn*, 59 Miss. 186; *Cheever v. Hodgson*, 9 Mo. App. 565; *French v. Robschard*, 50 Vt. 43.

³ *Hamilton v. Marks*, 5 De G. & Sm. 638; *Griggs v. Thompson*, 1 Geo. Dec. 146.

⁴ See *Desborough v. Harris*, 5 De G. M. & G. 439, 455; *Cochrane v. O'Brien*, 2 Jo. & Lat. 380; *Slingsby v. Boulton*, 1 V. & B. 334; *Morgan v. Filmore*, 18 Abb. Pr. 217; *U. S. v. Victor*, 16 Id. 153; *Mount Holly, &c. Co. v. Ferree*, 17 N. J. Eq. 117; *Dewey v. White*, 65 N. C. 225; *Hatfield v. McWhorter*, 40 Ga. 269; *Tyus v. Rust*, 37 Id. 574; *Quinn v. Green*, 1 Ired. Eq. (N. Car.) 229.

claims of one of the defendants, and he is under a legal obligation to support and protect the claim; in all such cases, he is not permitted, as a general rule, to file a bill of interpleader, because in doing so he would be denying the title of one, which he is obliged by his legal obligation to support and protect. Thus, for example, bailees and agents are not permitted to recognize the claims which other parties might make to property placed in their charge adverse to the interest of the bailor or principal; and hence, in a contention between these two parties over the subject-matter of the bailment or agency, the bailee or agent cannot obtain relief by a bill of interpleader.¹ For the same reason, an attorney cannot file a bill of interpleader against his client and a third person, who makes adverse claims to money which the attorney has collected.² The same principle denies to an administrator the right to interplead a legatee under the will and some third party, claiming a paramount title to the property.³ It is also held, as a general proposition, that a tenant cannot deny the title of his landlord or recognize the paramount title of a third party, unless he has been evicted. As a consequence of this obligation of the tenant to protect the title of his landlord against the adverse claims of others, the tenant in case of such a conflict of title will not be permitted to interplead between his landlord and the stranger claimant to the land.⁴ On the same general principle, parties to a contract cannot escape the liability on that contract, by interpleading the other party with some third person, making adverse claims to the subject-matter of the contract.⁵ For a similar reason, it has been held, independently of statute, that a sheriff who levies by execution against one person, on goods which are claimed to be the property of another, cannot compel the execution creditor and the adverse claimant to the property to interplead.⁶ So, also, is it impossible for a sheriff to compel the opposing claimants of a surplus in his hands after the satisfaction of the execution to interplead; but in this case, for the reason that the

¹ *First Nat. Bk. v. Binniger*, 26 N. J. Eq. 345; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Tyus v. Rust*, 37 Ga. 574; *Hatfield v. McWhorter*, 40 *Id.* 269; *Crane v. Burntrager*, 1 Ind. 165; *White Water, &c. Co. v. Comegys*, 2 *Id.* 469; *Nickolson v. Knowles*, 5 Madd. 47; *Dixon v. Hamond*, 2 B. & Ald. 310, 313; *Cooper v. De Tastet*, Tambl. 177, 181, 182; *Smith v. Hammond*, 6 Sim. 10; *Pearson v. Cardon*, 2 Russ. & My. 606, 609, 610, 612; *Crawshay v. Thornton*, 2 My. & Cr. 1, 19-24; *Cook v. Earl of Rosslyn*, 1 Giff. 167; *Atkinson v. Manks*, 1 Cow. 691, 703-706; *U. S. Trust Co. v. Wiley*, 41 Barb. 477; *Lund v. Seamen's Bank*, 37 *Id.* 129; *United States v. Victor*, 16 Abb. Pr. 153.

² *Marvin v. Ellwood*, 11 Paige, 365; but see *per contra*, *Goddard v. Leech*, *Wright*, (Ohio,) 476.

³ *Adams v. Dixon*, 19 Ga. 513; *Blue v. Watson*, 59 Miss. 619.

⁴ *Seaman v. Wright*, 12 Abb. Pr. 304; *Crane v. Burntrager*, 1 Ind. 165; *Snodgrass v. Butler*, 54 Miss. 45; *Dungey v. Angrove*, 2 Ves. 304, 310; *Woolaston v. Wright*, 3 Anstr. 801; *Smith v. Target*, 2 *Id.* 529; *Johnson v. Atkinson*, 3 *Id.* 798; *Cook v. Earl of Rosslyn*, 1 Giff. 137; *Nickolson v. Knowles*, 5 Mad. 47; *Cook v. Rosslyn*, 1 Giff. 167; *Crane v. Burntrager*, 1 Cart. (Ind.) 469; *Snodgrass v. Butler*, 54 Miss. 45; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Marvin v. Elwood*, 11 Pal. (N. Y.) 365; *Delaney v. Murphy*, 31 Supr. Ct. (N. Y.) 503.

⁵ *James v. Pritchard*, 7 M. & W. 216; *Trigg v. Hitz*, 17 Abb. Pr. 436; *Shehan's Heirs v. Barnett's Heirs*, 6 Mon. 592; *Bost. Bk. v. S. W. & B. Lum. Co.*, 132 Mass. 410.

⁶ *Slingsby v. Boulton*, 1 V. & B. 334; *Shaw v. Caster*, 8 Paige, 339; *Quinn v. Green*, 1 Ired. Eq. 229; *Quinn v. Patton*, 2 *Id.* 48; *Dewey v. White*, 65 N. C. 225.

fund is in possession of the court, and the court can adjust such claims directly and without a resort to an interpleader.¹

Such is the general law, in respect to the inability of the parties mentioned to file a bill of interpleader, and to escape from litigation in such a manner; but this doctrine is not without its limitations, and the limitation is to be found in the principle that, where the obligor, principal, landlord or party to the contract, has respectively transferred his interest in the subject-matter of the contract or conveyance, or has entered into obligations of a doubtful nature with third persons in respect to such subject-matter, and the contention of these two parties is over the effect of this collateral and subsequent agreement concerning the subject-matter, the obligee, agent, tenant, or party to the contract, as the case may be, will not be denied the right to compel these parties to litigate their claims and relieve him from the danger or risk of the excessive litigation; because in all of these cases the attitude of the interpleader is not at all antagonistic to the full recognition of his original obligation to the obligor, principal, landlord, or obligee, as the case may be; but the contest, which he calls upon the other parties to settle, is in respect to their rights to the same under a supposed assignment or transfer of the subject-matter, which is subsequent to the creation of the obligation of the interpleader. Thus, for example, where an obligee, or principal, has assigned his interest in the fund to another by an instrument, the provisions of which are doubtful, and the rights of the parties under the same are consequently uncertain, it is possible for the obligor or tenant to resort to an interpleader, for the purpose of compelling the parties to settle their claims among themselves, and without further cost to himself.² It will also be remembered that, even at common law, an interpleader was allowed to the obligor, when two or more persons made a joint bailment and a subsequent dispute arose under the bailment.³ On the same grounds, a court of equity will grant the relief of interpleader to an attorney, as between his claimant and a person who sets up an antagonistic claim, under an assignment from the client.⁴ So, also, may an executor call upon legatees to settle their conflicting claims under the law of interpleader.⁵ The same principle is applied in the case of landlord and tenant, so that the tenant will be permitted to interplead his landlord

¹ *Parker v. Barker*, 42 N. H. 78; *McDonald v. Allen*, 37 Wis. 108; but see *King v. Green's Ex'rs*, 10 Mo. 195; *Lawson v. Jordan*, 19 Ark. 297. But see *Winfield v. Bacon*, 24 Barb. 154, in which it is held that a receiver was entitled to interplead opposing claimants to the fund in his possession, although it would not have been possible for the court, whose officer the receiver was, to determine directly the proper distribution of the fund.

² *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215-220; *Crawford v. Fisher*, 1 Hare, 436, 440; *Tanner v. European Bk.*, L. R. 1

Exch. 261; *Gibson v. Goldthwaite*, 7 Ala. 281; *Pearson v. Cardon*, 2 Russ. & My. 606; 4 Sim. 218; *Atkinson v. Manks*, 1 Cow. 691; *Schuyler v. Pelissier*, 3 Edw. Ch. 191.

³ *Stuart v. Welch*, 4 My. & Cr. 305; *City Bank v. Skelton*, 2 Blatch. 14; *First Nat. Bk. v. West River R. R.*, 46 Vt. 633; *Perkins v. Trippe*, 40 Ga. 225; see *Mason v. Hamilton*, 5 Sim. 19; *Crellin v. Leyland*, 6 Jur. 733.

⁴ *Gibson v. Goldthwaite*, 7 Ala. 281.

⁵ *Crosby v. Mason*, 32 Conn. 482; see, also, *Osborne v. Taylor*, 12 Gratt. (Va.) 17; *Morse v. Stearns*, 131 Mass. 389.

and opposing claimants to the land, whenever the dispute is over the effect of the transfer or assignment by the landlord of his interest in the property. In all cases of assignment of title to property by the reversioner or landlord, the tenant has a right to call upon them to interplead and save him the risk of two or more suits over the same subject-matter. This is not only the case, where the dispute arises between landlord and tenant; but so, also, in respect to the double assignment in the case of mortgagor and mortgagee, trustee and *cestui que trust*, and the like.¹ It is also permitted to a sub-tenant to interplead the landlord and the original tenant, where it is doubtful, under the facts of the case, to whom the rent is due.² So, also, may the tenant interplead parties, claiming the rights of the lessor, in case of his death, under different title, viz.: as heir and devisee.³ It is also the privilege of the primary obligor, and of all sureties of executory contracts, to interplead the original obligee and one who claims the right to enforce the contract by an assignment, wherever there is doubt or uncertainty in respect to the rights of parties under such an alleged assignment. Thus a maker of a note may compel claimants under the payee to interplead.⁴ So, also, may the vendee interplead the vendor and one claiming rights under the vendor, by contract or by legal process, such as an attaching creditor.⁵ So may the vendor interplead parties claiming antagonistic interests by transfer or descent from the vendee.⁶ Insurance companies may compel adverse claimants to the insurance money to interplead, where their claims are derived from the insured by transfer, assignment or inheritance.⁷ So, likewise, may corporations call upon adverse claimants to their stock to interplead, where their titles are derivative from the stockholder.⁸ The obligor of a note or other contract may file a bill of interpleader, where antagonistic claims to the enforcement of the same, and to the reception of the payment, are asserted by the administrator of the deceased guardian of the payee, and the new administrator appointed by the court.⁹

§ 573. **What the bill of interpleader should contain.**—The bill of interpleader must contain all allegations necessary to set forth the existence of all the requisites to the right of the plaintiff to the rem-

¹ *Dungey v. Angrove*, 2 Ves. Jr. 303, 304, 310, 312; *Cowtan v. Williams*, 9 Ves. 107; *Shulter v. Harvey*, 65 Cal. 153; *Metcalf v. Hervey*, 1 Ves. Sen. 248; *Clarke v. Byne*, 13 *Id.* 383; *Johnson v. Atkinson*, 3 Anstr. 798; *Seaman v. Wright*, 12 Abb. Pr. 304; *Snodgrass v. Butler*, 54 Miss. 45; *Oil Run Petro. Co. v. Gale*, 6 W. Va. 535.

² *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; see, also, *Adams v. Beach*, 1 (Phila.) Pa. 99.

³ *Jew v. Wood*, 3 Beav. 579; *Badeau v. Tylee*, 1 Sandf. Ch. 270.

⁴ *Briant v. Reed*, 1 McCart. 271; *Bryant v. Saltenstall*, 3 J. J. Marsh. 672; *Fahie v. Lindsay*, 8 Oreg. 474.

⁵ *Richards v. Salter*, 6 Johns. Ch. 445; *Johnston v. Lewis*, 4 Abb. Pr., n. s., 150.

⁶ *Farley v. Blood*, 30 N. H. 354.

⁷ *Nelson v. Barter*, 2 H. & M. 334; *Hamilton v. Marks*, 5 De G. & Sm. 638; *Spring v. S. C. Ins. Co.*, 8 Wheat. 268; *Desborough v. Harris*, 3 De G. M. & G. 439, overruling *Fenn v. Edmonds*, 5 Hare, 314.

⁸ *Salisbury Mills v. Townsend*, 109 Mass. 115; *Providence Bk. v. Wilkinson*, 4 R. I. 507; *Cady v. Potter*, 55 Barb. 463; see *Cheever v. Hodgson*, 9 Mo. App. 565.

⁹ *Van Buskirk v. Roy*, 8 How. Pr. 425; *Crosby v. Mason*, 32 Conn. 482; see, also, *Osborne v. Taylor*, 12 Gratt. (Va.) 17; *Morse v. Stearns*, 131 Mass. 339.

edy in question; it must, in other words, affirmatively state that there are conflicting claims to the same thing, fund, or debt, asserted by the defendants, that the opposing claimants are in privity with each other, that the plaintiff is not interested in the issue of the suit, and that he is not under any independent liability to either of the claimants, in respect to the subject-matter of the contention; that he is in danger of being subjected to costly and annoying litigations, that he does not know to which of the parties the superior title or right belongs, that he is ready and willing to deliver the thing or fund, or pay the debt, to the person who is declared lawfully entitled thereto.¹ It is not necessary for the bill to show or set forth the title of either of the defendants to the subject-matter of the dispute.² On the contrary, if in the attempt of the plaintiff to set forth the title of either of the defendants, or both their conflicting titles, the plaintiff showed an intimate acquaintance with the facts and the law of the case; and as set forth by him there is no ground for claiming ignorance or doubt as to the rights of the parties, the bill of interpleader may be demurred to and dismissed; because there is no ground for an interpleader, where the plaintiff makes a clear and satisfactory statement as to which of the parties has the better title.³ So, also, will a bill be subject to demurrer, if the plaintiff denies his liability to either one of the defendants.⁴ It is, also, a settled practice of the court of equity, elsewhere than in Connecticut,⁵ that the bill of complaint in an action for interpleader must be accompanied by an affidavit of the plaintiff, that the suit is not brought in collusion with either of the defendants; and the bill may be demurred to, if this affidavit is omitted.⁶ Where the affidavit is attached to the bill, it is conclusive as to the good faith of the plaintiff and cannot be contradicted by the defendants,⁷ unless, of course, collusion is shown on the face of the bill, when necessarily the relief will be denied.⁸ It is a requisite for the action for interpleader that the plaintiff should bring or pay, or offer to bring or pay into court, whatever is the subject-matter of the dispute between the defendants,

¹ *Snodgrass v. Butler*, 54 Miss. 45; *Starling v. Brown*, 7 Bush, 164; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82; *Pfister v. Wade*, 56 Cal. 43; *Farley v. Blood*, 30 N. H. 354; *Parker v. Barker*, 42 Id. 78; *Atkinson v. Manks*, 1 Cow. 691; *Wilson v. Duncan*, 11 Abb. Pr. 3; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 2 Green Ch. 325; *Briant v. Reed*, 1 McCart, 271; *La. St. Lot. Co. v. Clark*, 16 Fed. R. 20; *Strange v. Bell*, 11 Ga. 103; *Dreyer v. Ranch*, 42 How. Pr. (N. Y.) 22; s.c., 10 Abb., n. s., (N. Y.) 243; *Bell v. Hunt*, 3 Barb. (N. Y.) 391.

² *East & W. India Dock Co. v. Little Dale*, 7 Hare, 57; *Pfister v. Wade*, 56 Cal. 43.

³ *Parker v. Barker*, 42 N. H. 78; *Mohawk, &c. R. R. v. Clute*, 4 Paige, 384; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *Wilson v. Duncan*, 11 Id. 3; *Briant v. Reed*, 1 McCart. 271; *Baker v. Swain*, 4 Jones Eq. 220; *Sulzbacker v. S. & L. Bk.*, 52 N.

Y. Super. Ct. 269; *McDonald v. Allen*, 37 Wis. 108

⁴ *McHenry v. Hazard*, 45 Barb. 657; 45 N. Y. 580; *Hellman v. Schneider*, 75 Ill. 422.

⁵ *Consociated Pres. Soc. v. Staples*, 23 Conn. 544, 555; *Nash v. Smith*, 6 Id. 421.

⁶ *Mount Holly, &c. Co. v. Ferree*, 17 N. J. Eq. 117; *Tyus v. Rust*, 37 Ga. 574; *Snodgrass v. Butler*, 54 Miss. 45; *Starling v. Brown*, 7 Bush, 164; *Biggs v. Kouns*, 7 Dana, 405, 411; *Hamilton v. Marks*, 5 De G. & Sm. 638; *Farley v. Blood*, 30 N. H. 354; *Atkinson v. Manks*, 1 Cow. 691; *Beck v. Stehpani*, 9 How. Pr. 193.

⁷ *Manby v. Robinson*, L. R. 4 Ch. 347; *Langston v. Boylston*, 2 Ves. 101; *Stevenson v. Anderson*, 2 V. & B. 407; and see *Fahie v. Lindsay*, 8 Oreg. 474.

⁸ *Marvin v. Ellwood*, 11 Paige, 365; *Kerr v. Union Bk.* 18 Md. 396; *Williams v. Halbert*, 7 B. Mon. 184.

in respect to which the plaintiff is under obligation to one of them. The entire thing, fund, or debt must be brought into court.¹ Finally, if the bill of interpleader is properly filed, and the action properly begun, the plaintiff is entitled to a decree for the interpleader of the defendants, and his own discharge from every obligation in the transaction, together with provision for his costs, which will be taxed upon the fund in question, and be ultimately paid by the unsuccessful party.²

§ 574. **Interpleader in legal actions under modern statutes.**—Modern statutes have in many particulars modified the requirements of the equitable action of interpleader, not only in regard to the relation of the parties to the subject-matter, but also in respect to the nature of the subject-matter itself. In most cases, however, these statutes only extend the equitable remedy of interpleader to legal actions in general. Wherever two parties make conflicting claims to a fund or debt, which is possessed by a third party, the relief is granted to this third party in all such cases of *bona fide* dispute; but as a general rule, the same rules prevail in the determination of the rights of the parties to the action, as obtained in equity.³ In every case, however, the statute has changed the requisites of the claim to an interpleader in some particulars;⁴ but inasmuch as the legal action of interpleader is beyond the jurisdiction of equity, it is not necessary in this connection to enter upon any explanation of these statutory modifications.

¹ McGarah v. Parther, 1 Blackf. 299; Starling v. Brown, 7 Bush, 164; Farley v. Blood, 30 N. H. 354; Mohawk, &c. R. R. v. Clute, 4 Paige, 384; Atkinson v. Manks, 1 Cow. 691; Williams v. Walker, 2 Rich. Eq. 291; Snodgrass v. Butler, 54 Miss. 45.

² Canfield v. Morgan, Hopk. Ch. 224; Aymer v. Gault, 2 Paige, 284; Badeau v. Rogers, 2 Id. 209; Spring v. S. C. Ins. Co., 8 Wheat. 268; see Laing v. Zeden, L. R. 9 Ch. 736; Aldridge v. Thompson, 2 Bro. Ch. 149; Farley v. Blood, 30 N. H. 354; Manchester Print Works v. Stimson, 2 R. I. 415; Atkinson v. Manks, 1 Cow. 691.

³ Johnson v. Maxey, 43 Ala. 521; Nelson v.

Goree's Adm'r, 34 Id. 565; Starling v. Brown, 7 Bush, 164; Board of Education v. Scoville, 13 Kans. 17; Pfister v. Wade, 56 Cal. 43; Oriental Bank v. Nicholson, 3 Jur., N. S., 857; Slaney v. Sidney, 14 M. & W. 800; Tanton v. Groh, 4 Abb. App. Dec. 358; Vosburgh v. Huntington, 15 Abb. Pr. 254.

⁴ Board of Education v. Scoville, 13 Kans. 17; Pfister v. Wade, 56 Cal. 43; see *ante*, note under § 1324; Tanner v. European Bk., L. R. 1 Exch. 261; Cady v. Potter, 55 Barb. 463; Washington, &c. Ins. Co. v. Lawrence, 28 How. Pr. 435; St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co., 23 Minn. 7.

CHAPTER XXXVI.

RECEIVERS.

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§ 577. **General statement as to jurisdiction of equity.**—The court of equity will, in conformity with the general principles of equity, undertake to afford whatever protection may be necessary for the conservation of the interests of parties litigant in the subject-matter of the suit; and if provision is needed for the custody and care of such subject-matter during the pendency of the suit, and until the decree of the court has been carried out or performed, it will take whatever steps may be necessary to that end. The common method of procedure, under these circumstances, is the appointment of an officer of the court, who is given the name of receiver, to receive and take possession of the property over which the litigation is had, and under the directions of the court to do whatever is necessary with such property for its preservation, and the development of the interest of the parties in the same.¹

§ 578. **Exercise of power discretionary.**—The parties to a suit cannot claim, as a matter of course, a right to the appointment of a receiver; the exercise of this power of appointment by a court of equity is discretionary with the court, and not a matter of course, to be granted upon the demand or request of one of the parties.² But this

¹ *Booth v. Clark*, 17 How. (U. S.) 322, 331; *Crane v. McCoy*, 1 Bond, 422; *Whelpley v. Erie Ry.*, 6 Blatch, 271; *Wilmer v. Atlanta, &c. Ry.*, 2 Woods, 409; *French v. Gifford*, 30 Iowa, 148; *Brown v. Home Sav. Bk.*, 5 Mo. App. 1; *La Societe Francaise v. District Court*, 53 Cal. 495; *Libby v. Rosekrans*, 55 Barb. 202; *Dougherty v. McDougald*, 10 Ga. 121; *Mapes v. Scott*, 4 Ill. App. 268; *Richards v. Barrett*, 5 *Id.* 510; *Baker v. Backus' Adm'r*, 32 Ill. 79; *Mays v. Wherry*, 3 Tenn. Ch. 34; *Cassetty v. Capps*, 3 *Id.* 524; *Delaware, &c. R. R. v. Erie R. R.*, 21 N. J. Eq. 298; *Blondheim v. Moore*, 11 Md. 365; *Haight v. Burr*, 19 *Id.* 130; *Voshell v. Hynson*, 26 *Id.* 83; *Beverley v. Brooke*, 4 Gratt. 187, 208; *Hand v.*

Dexter, 41 Ga. 454; *Reid v. Reid*, 38 *Id.* 24; *Bank of Miss. v. Duncan*, 52 Miss. 740; *Battle v. Davis*, 66 N. C. 252; *Twitty v. Logan*, 80 *Id.* 69; *Crowder v. Moone*, 52 Ala. 320; *Cheever v. Rutland, &c. R. R.*, 39 Vt. 653.

² *La Societe Francaise v. Dist. Court*, 53 Cal. 495; *Milwaukee, &c. R. R. v. Stoutter*, 2 Wall. 521; *Pacific R. R. v. Mo. Pacific Ry. Co.*, 15 Am. Ry. Rep. 80 (U. S. Supr. Ct., Oct. Term, 1877); *Mil. & Minn. R. R. Co. v. Stoutter*, 2 Wall. 440; *Cincinnati, Sandusky & Cleveland R. R. Co. v. Sloan*, 31 Ohio St. 1; 15 Am. Ry. Rep. 376; *Meyer v. Johnson*, 53 Ala. 237; 15 Am. Ry. Rep. 467; *Kelly v. Trustees of Ala. & Cin. R. R. Co.*, 58 *Id.* 489; 21 Am. Ry. Rep. 138.

discretion is not an absolute or arbitrary one; it is to be exercised by the court under the reasonable consideration of the highest interests of all of the parties; and the appointment must be made, whenever it is essential to the protection of the interests of the parties in the subject-matter of the suit. But in order that the appointment may be made or claimed, there must be a concurrence of two circumstances: *First*, that the appointment is necessary for the protection of the property against loss or injury; and *secondly*, that the party asking for the appointment of the receiver will probably succeed ultimately in obtaining the relief, for which the suit was instituted.¹

§ 579. **Cases in which a receiver may be appointed.**—The cases in which a receiver may be appointed may be divided into four classes, varying according to the causes of the danger of loss or injury to the subject-matter of the suit, which in all the cases is the justification for the interference of the court by the appointment of a receiver. The first class of cases contains all those in which there is no person, although entitled, who is capable of taking charge of the property pending the litigation. The incompetency of the party, who would be entitled to take charge of such property, is the reason for the appointment of a receiver. This, of course, includes the cases of infants and lunatics, where an emergency arises and a prompt action is needed to take possession and charge of the property, until the guardian or committee has been appointed.² In this class are also included cases of appointment of receivers to take charge of the estates of decedents, when there is any danger of the loss or misapplication of the property, or income of such estate, while proceedings are being had for the appointment of an administrator, or the determination of the qualification of an executor.³

The second class of cases includes all those, in which all the parties concerned in the subject-matter of the litigation are equally entitled to the possession of the same; but in consequence of the nature of the dispute between them, and the unfriendly relations existing, it is not just or proper that either one of them should be given the control of the property; and they cannot agree among themselves as to its safe custody pending the suit. In such cases a court of equity will have charge of the property, and hold it during the pendency of the suit, for the benefit of both parties. While the danger of loss or

¹ *Blondheim v. Moore*, 11 Md. 365; *Owen v. Homan*, 3 Macn. & G. 378, 412; affirmed 4 H. L. Cas. 997; *Cincinnati, Sandusky & Cleveland R. R. Co. v. Sloan*, 31 Ohio St. 1; 15 Am. Ry. Rep. 376; *City of Rochester v. Bronson*, 41 How. Pr. 78; *Meyer v. Johnston*, 53 Ala. 237; *Rankine v. Elliott*, 16 N. Y. 377; *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160; *Fisher v. The Concord R. R. Co.*, 50 N. H. 200; *Matter of Long Branch & Sea Shore R. R. Co.*, 9 C. E. Green, N. J. Ch. Repts. 398; *State v. Northern Cent. Ry. Co.*, 18 Md. 193.

² *Infants Estates*; *Gardner v. Blane*, 1 Hare, 381; *Butler v. Freeman*, Amb. 301, 303; *Duke of Beaufort v. Berty*, 1 P. Wms. 703. *Estates of Lunatics*: *Mitchell v. Barnes*, 22 Hun, 194; *In re Ferrior*, L. R. 3 Ch. 175, 719.

³ *Tewart v. Lawson*, L. R. 18 Eq. 490; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Osborn v. U. S. Bank*, 9 Wheat. 738; *Schlecht's Appeal*, 60 Pa. St. 172; *Rachel Colvin's Case*, 3 Md. Ch. 278; *Wood v. Hitchings*, 2 Beav. 289; *Veret v. Duprez*, L. R. 6 Eq. 329; *Hitchen v. Birks*, L. R. 10 Eq. 471; *Parkin v. Seddons*, L. R. 16 Eq. 34.

misappropriation of the property is the ordinary justification for the appointment of a receiver, yet it is not necessary to the exercise of such a power, that there should be any charge or danger of fraud or breach of trust. This class includes suits between partners,¹ between joint owners of property,² and, in England particularly, disputes between co-owners of mines and collieries.³ Where parties are not co-owners of the property, but they are conflicting claimants of the land—especially where they are parties claiming conflicting legal titles—the court will ordinarily refuse to interfere by the appointment of a receiver. But where a special case is made out of danger of loss or of fraud, or where possession by one has been acquired and is maintained against the claims of others, in all such extraordinary cases, in the exercise of a wise discretion, and particularly where the plaintiff's right to the property is comparatively clear and certain, a court of equity will interfere and place the property in the charge of a receiver.

§ 580. Continued—Cases in which a receiver may be appointed.

—The third class of cases in which a receiver may be appointed includes a variety of cases, in which the party holding the title to the property is in possession, as a trustee or *quasi trustee* of property, in which several persons have conflicting rights or interests, and for various reasons it is necessary, for the protection of the interests of such persons, that the possession should be taken away from the party holding the legal title, either because there is danger of misuse or neglect of the property, or of a breach of trust. The cases are of a great variety, including suits brought against trustees who have been guilty of a breach of trust,⁴ and under like circumstances, any suit brought against executors and administrators.⁵ So, likewise,

¹ *Hall v. Hall*, 3 Macn. & G. 79; *Whitman v. Robinson*, 21 Md. 30; *Walker v. House*, 4 Md. Ch. 39; *Drury v. Roberts*, 2 *Id.* 157; *Williamson v. Wilson*, 1 Bland Ch. 418; *Speights v. Peters*, 9 Gill, 472; *Roys v. Vilas*, 18 Wis. 169; *Allen v. Hill*, 16 Cal. 113; *Todd v. Rich*, 2 Tenn. Ch. 107; *Sieghortner v. Wissenborn*, 20 N. J. Eq. 172; *Randall v. Morrell*, 17 *Id.* 343, 346; *Renton v. Chaplain*, 1 Stockt. Ch. 62; *Birdsall v. Colie*, 2 *Id.* 63; *Cox v. Peters*, 2 Beasl. 39; *Wolbert v. Harris*, 3 Halst. Ch. 605; *Sloan v. Moore*, 37 Pa. St. 217; *Holden's Adm'r's v. McMakin*, 1 Pars. Eq. Cas. 270; *Bard v. Bingley*, 54 Ala. 463; *Anderson v. Powell*, 44 Iowa, 20; *Law v. Ford*, 2 Palge, 310; *Martin v. Van Schaick*, 4 *Id.* 479; *Garretson v. Weaver*, 3 Edw. Ch. 385; *Smith v. Lowe*, 1 *Id.* 33; *Gregory v. Gregory*, 1 Sweeney, 613.

² *Cassetty v. Capps*, 3 Tenn. Ch. 524; *Williams v. Jenkins*, 11 Ga. 595; *Brenan v. Preston*, 2 De G. M. & G. 813; *Porter v. Lopes*, L. R. 7 Ch. D. 358; *Darcin v. Wells*, 61 How. Pr. 259.

³ *Adams on Eq.*, pp. 247, 354; *Roberts v. Eberhardt*, Kay, 148; *Crawshay v. Maule*, 1 Swanst. 405, 518, 523; *Jefferys v. Smith*, 1 J. & W. 298;

Ferehay v. Wightwick, 1 Russ. & M. 45; *Bentley v. Bates*, 4 Y. & C. Exch. 182.

⁴ *Rollins v. Henry*, 77 N. C. 467; *Battle v. Davis*, 66 *Id.* 252; *Twitty v. Logan*, 80 *Id.* 69; *Chappell v. Boyd*, 56 Ga. 578; *Williams v. Jenkins*, 11 *Id.* 595; *Jones v. Dougherty*, 10 *Id.* 273; *Guernsey v. Powers*, 9 Hun, 78; *Johnson v. Tucker*, 2 Tenn. Ch. 398; *Mays v. Wherry*, 3 *Id.* 34; *Mapes v. Scott*, 4 Ill. App. 268; *Toldervy v. Colt*, 1 Y. & C. Exch. 621; *Earl Talbot v. Hope Scott*, 4 K. & J. 96; *Hlawacek v. Bofman*, 51 Wis. 92; *Davis v. Reaves*, 2 Lea, 649; *Huguenin v. Beasley*, 13 Ves. 105; *Stilwell v. Wilkins*, Jacob, 280; *Clark v. Dew*, 1 Russ. & M. 103; *Jones v. Goodrich*, 10 Sim. 327.

⁵ *Middleton v. Dodswell*, 13 Ves. 266, 268; *Browell v. Reed*, 1 Hare, 434; *Bainbrigg v. Blair*, 3 Beav. 421; *Skinners' Co. v. Irish Soc.*, 1 My. & Cr. 162; *Richards v. Barrett*, 5 Ill. App. 510; *Bowling v. Scales*, 2 Tenn. Ch. 63; *Vose v. Reed*, 1 Woods, 647; *Evans v. Coventry*, 5 De G. M. & G. 912, 916.

⁶ *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Du Val v. Marshall*, 30 Ark. 230; *Powell v. Quinn*, 49 Ga. 523; *Hoge v. Hollister*, 8 Baxt.

a receiver may be appointed in suits brought to enforce specific performance of a contract for the sale of land, against a vendee who is in possession;¹ and suits for the rescission of a contract of sale, where possession has been obtained by such vendee;² suits for the payment of annuities;³ suits for the protection of remainder-men against tenants in possession.⁴ The third class includes other suits, in which the creditors make claim to the property of the debtor; and also suits by creditors, whether such suit be brought to enforce or to obtain a judgment, whenever there is great danger of loss through the insolvency and non-residence of the debtor;⁵ so, also, all suits for the enforcement of liens against property, including judgment liens;⁶ so, also, suits in proceedings in bankruptcy.⁷ The most common class of cases, in which receivers are appointed, are suits to enforce a mortgage when the security is inadequate, and the mortgagor is insolvent, or he is committing acts of destructive waste. In England, it is held that a receiver will be appointed only at the instance of an equitable mortgagee, on the ground that a legal mortgagee has the power of taking possession of the property, whenever it is to his interest to do so.⁸ But in this country, no distinction in respect to the appointment of receivers is drawn between legal and equitable mortgagees; and in every case a receiver will be appointed in this country, where the security is insufficient originally, or it is in danger of depreciation, because of the wrongful conduct of the mortgagor.⁹ The receiver will be appointed, not only in the case of ordinary mortgages, but also in suits for the enforcement of a deed of trust, in the nature of a mortgage.¹⁰ The other class of cases, in which the appointment of a receiver is very often asked for and made, include suits of all sorts

533; *Haines v. Carpenter*, 1 Woods, 262; *Beverly v. Brooke*, 4 Gratt. 187; *Leddel's Ex'r v. Starr*, 19 N. J. Eq. 163; *Anon.*, 12 Ves. 4; *In re Hopkins*, L. R. 19 Ch. D. 61; *Nothard v. Proctor*, L. R. 1 Ch. D. 4; *Randle v. Carter*, 62 Ala. 95.

¹ *Latimer v. Aylesbury, &c. Ry.*, L. R. 9 Ch. D. 385; *Munns v. Isle of Wight Ry.*, L. R. 5 Ch. 414; *Pell v. Northampton, &c. Ry.*, L. R. 2 Ch. 100; *Hall v. Jenkinson*, 2 V. & B. 125; *Boehm v. Wood*, 2 J. & W. 236; *Shakel v. Duke of Marlborough*, 4 Madd. 463; *Taylor v. Eckersley*, L. R. 2 Ch. D. 302; *Phillips v. Eiland*, 52 Miss. 721; *Hughes v. Hatchett*, 55 Ala. 631; *Tufts v. Little*, 56 Ga. 139; *Gunby v. Thompson*, 56 *Id.* 316.

² *Gibbs v. Davis*, L. R. 20 Eq. 373.

³ *Sollory v. Leaver*, L. R. 9 Eq. 22; *Buxton v. Monkhouse, G. Coop.* 41; *Probasco v. Probasco*, 30 N. J. Eq. 108.

⁴ *In re Fowler*, L. R. 16 Ch. D. 723.

⁵ *Johnson v. Farnum*, 56 Ga. 144; *Ballin v. Ferst*, 55 *Id.* 546; *Gregory v. Gregory*, 1 J. & S. 1.

⁶ *Gage v. Smith*, 79 Ill. 219; *Kuhl v. Martin*, 26 N. J. Eq. 60; *Osborn v. Heyer*, 2 Paige, 342; *Anglo-Italian Bk. v. Davies*, L. R. 9 Ch. 275; see *Adams on Eq.*, p. 125; *Hopkins v.*

Worcester, &c. Canal Prop'rs, L. R. 6 Eq. 437.

⁷ *Salt v. Cooper*, L. R. 16 Ch. D. 544; *Ex parte Browne*, L. R. 16 Ch. D. 497; *In re Manchester, &c. Ry.*, L. R. 14 Ch. D. 645.

⁸ *Truman v. Redgrave*, L. R. T. & R. 18 Ch. D. 547; *Peek v. Trinsmaran Iron Co.*, L. R. 2 Ch. D. 115; *Pease v. Fletcher*, L. R. 1 Ch. P. 273; *Lord Crewe v. Edleston*, 1 De G. & J. 93; *Berney v. Sewell*, 1 J. & W. 647; *Brooks v. Greathead*, 1 *Id.* 176; *Reid v. Middleton*, T. & R. 455.

⁹ *Allen v. Dallas, &c. R.*, 3 Woods, 316; *Warner v. Rising, &c. Iron Co.*, 3 *Id.* 514; *Wilmer v. Atlantic, &c. Ry.*, 2 *Id.* 409; *Brasted v. Sutton*, 30 N. J. Eq. 462; *Mahon v. Crothers*, 28 *Id.* 567; *Johnson v. Tucker*, 2 Tenn. Ch. 398; *Williams v. Noland*, 2 *Id.* 151; *Moran v. Johnston*, 26 Gratt. 108; *Phoenix Mut. L. Ins. Co. v. Grant*, 3 McArthur, 220; *Pullan v. Cincinnati, &c. R.*, 4 Bliss, 35; *Price v. Dowdy*, 34 Ark. 285; *Haas v. Chicago Build. Soc.*, 89 Ill. 498; *Des Moines Gas Co. v. West*, 44 Iowa, 23; *Worrill v. Coker*, 56 Ga. 666; *Phillips v. Eiland*, 52 Mass. 721.

¹⁰ *Wilmer v. Atlantic, &c. Ry.*, 2 Woods, 409; *Warner v. Rising, &c. Iron Co.*, 3 *Id.* 514; *Allen v. Dallas, &c. R.*, 3 *Id.* 316.

brought against corporations, either between the corporation and its debtors, or between the corporation and the stockholders. The cases are very numerous and constitute everywhere the chief field for the appointment of receivers.¹

The fourth class of cases contains all those, in which the receiver is appointed after judgment, for the purpose of carrying the decree of the court into effect. Where the decree is rendered in a suit, in which the receiver had been appointed during the pendency of a litigation, he would be continued in charge of the property after judgment for the purpose of carrying such judgment or decree into effect; but if a receiver had not been appointed prior to the judgment, then the court may appoint one at that time, whenever such appointment is necessary. The object of the appointment of a receiver, under such circumstances, is to carry into effect a decree, which could not be otherwise executed by the original process of the court. The most important cases, in which a receiver may be appointed after judgment, are, creditors' suits, suits for the enforcement of all sorts of equitable liens, particularly the liens of the creditors of married women on separate estates of such married women; and, also, suits for winding up the affairs of corporations.²

§ 581. **Effect of appointment of receivers.**—The appointment of a receiver, during the pendency of a suit, does not in anywise constitute a disposition of the rights of the parties litigant in and to the subject-matter of the suit; it is only an interlocutory remedy, designed for the protection of the interests of the parties to the property, and his appointment does not determine any right or title of such parties. His duties involve an impartial protection of the property, and the proper conservation of the same, for the benefit of whomever may be determined to be entitled to the same.³ The appointment of the receiver does not in anywise interfere with the litigant claims of the parties to the suit; and where it is a suit against a corporation, the appointment of a receiver does not in anywise dissolve the corporation.⁴ Nor are the general powers of the directors of the corporation inter-

¹ Vermont, &c. R. R. v. Vt., &c. R. R., 50 Vt. 500; Port Huron, &c. Ry. v. Judge of St. Clair Circuit, 31 Mich. 456; French v. Gifford, 30 Iowa, 143; Hand v. Dexter, 41 Ga. 454; People v. Security Ins. Co., 78 N. Y. 114; 79 *Id.* 267; La Société Française v. District Court, 53 Cal. 495; Kelley v. Alabama, &c. R. R., 58 Ala. 489; Wilson v. Barney, 5 Hun, 257; Redmond v. Enfield Man. Co., 13 Abb. Pr., n. s., 332; Rochester v. Bronson, 41 How. Pr. 78; Brown v. Home Sav. Bk., 5 Mo. App. 1; Freeholders of Middlesex v. State Bk., 28 *Id.* 166; McCullough v. Merch. Loan, &c. Co., 29 *Id.* 217; *In re Long Branch*, &c. R. R., 24 *Id.* 298; Delaware, &c. R. R. v. Erie R. R., 21 *Id.* 298; Union Tr. Co. v. St. Louis, &c. R. R., 4 Dillon, 114; Kennedy v. St. Paul, &c. R. R., 2 *Id.* 448; Whelpley v. Erie Ry., 6 Blatch., 271; Bk. of Bethel v. Pahquioque Bk.,

14 Wall. 333; National Tr. Co. v. Miller, 33 N. J. Eq. 155; Featherstone v. Cooke, L. R. 16 Eq. 298; Hopkins v. Worcester, &c. Canal Proprietors, L. R. 6 Eq. 437; Allen v. Dallas, &c. R. R., 3 Woods, 316; Warner v. Rising, &c. Iron Co., 3 *Id.* 514; Wilmer v. Atlanta, &c. Ry., 2 *Id.* 409; North Car., &c. R. R. v. Drew, 3 *Id.* 691.

² Bryant v. Bull, L. R. 10 Ch. D. 153; Anglo-Italian Bk. v. Davies, L. R. 9 Ch. D. 275.

³ *Ex parte* Evans, L. R. 13 Ch. D. 252; Bolles v. Duff, 54 Barb. 215; Jeffreys v. Dickson, L. R. 1 Ch. 183; State v. Gambs, 68 Mo. 289.

⁴ Kincaid v. Dwinelle, 59 N. Y. 548; Willink v. Morris Canal & Bkg. Co., 3 Green Ch. 377; State v. R. R. Comrs., Vroom, 235; Ahrens v. State Bank, 3 S. Car. (N. S.) 401; Metz Adm'r v. The Buffalo, Corry & Pittsburg R. R. Co., 53 N. Y. 61.

rupted or interfered with, in the appointment of a receiver.¹ It is, of course, the duty of a receiver to, and he does in fact, take possession of all of the property covered by the litigation, and manages the same under the direction of the court.² The property, thus taken possession of, becomes a trust fund in the hands of the receiver, especially charged with a lien in favor of the parties whom the court will ultimately decree to be entitled to such property; and the claims of individual creditors against corporate property will be suspended by the appointment of a receiver, so far as to make it impossible for such claims to be asserted against such property by the levy of execution.³

§ 582. **Duties of receivers.**—It is the duty of a receiver to take into possession the property covered by the litigation and in the care of such property to exercise reasonable prudence and diligence; and where he is guilty of negligence, he becomes liable for the damage that might result therefrom.⁴ He is also obliged to recognize and obey all of the directions of the court in respect to such property. Where he has been guilty of any wrongful use of funds, or of the property placed in his charge, he is, of course, liable for breach of trust.⁵

§ 583. **Powers and authority of receivers.**—The receiver is an officer of the court, and his powers and authority in respect to his office are in general set forth and limited by the order of appointment.⁶ These powers are also subject to revision by the court.⁷ Some powers are limited by the necessities of the case;⁸ as for example, the power to bring and maintain or continue suits in behalf of the property under his charge.⁹ He also has, generally, the power of collecting debts,

¹ *Stevens v. Davison*, 18 Gratt. 819.

² *Mil. & St. Paul R. R. Co. v. The Mil. & Minn. R. R. Co.* and others, 20 Wis. 165; *Rankine v. Elliott*, 16 N. Y. 377; *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Pa. St. 160.

³ *Rankine v. Elliott*, 16 N. Y. 377, 381; *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160.

⁴ *Davenport v. Receivers*, 2 Woods, 519; *Davis v. Gray*, 16 Wall, 203; *Commonwealth v. Young*, 11 Phila. 606; *Stewart v. Lay*, 45 Iowa, 604; *Demain v. Cassidy*, 55 Miss. 320; *Stanton v. Ala., &c. R. R.*, 2 Woods, 506; *Kain v. Smith*, 80 N. Y. 458; *Clark v. Binninger*, 11 J. & S. 126, 344; *Corey v. Long*, 12 Abb. Pr., n. s., 427; *Coe v. N. J., &c. R. R.*, 27 N. J. Eq. 37; *Klein v. Jewett*, 26 *Id.* 474.

⁵ *Hinekey v. Railroad Co.*, 10 Otto, 153; *Stretch v. Gowdey*, 3 Tenn. Ch. 565; *Cowdrey v. Galveston, &c. R. R.*, 3 Otto, 352; *Cartwright's Case*, 114 Mass. 230; *Drake v. Goodridge*, 6 Blatch. 531; *Wall v. Pulliam*, 5 Heisk. 365.

⁶ *Kennedy & Co. v. St. Paul & Pacif. R. R. Co. et al.*, Dill. C. C. R. 448; *Gilbert v. Washington City, Va. Midland & Great Southern R. R. Co.*, 33 Gratt. 586; s. c., 1 Am. & Eng. R. R. Cas. 473; *Moseby v. Burrow*, 52 Tex. 396; *Weems v. Lathrop*, 42 *Id.* 207; *Newbold v. Peoria, &c. R. R.*, 5

Ill. App. 367; *Safford v. People*, 85 Ill. 558; *Tripp v. Boardman*, 49 Iowa, 410; *Bank of Montreal v. Chicago, &c. R. R.*, 48 *Id.* 518; *McIlrath v. Snure*, 22 Minn. 391; *Barron v. Mullin*, 21 *Id.* 374; *Meredith Sav. Bk. v. Simpson*, 22 Kans. 414; *Robinson v. Atlantic, &c. Ry.*, 66 Pa. St. 160; *Gibert v. Washington City, &c. R. R.*, 33 Gratt. 586; *Spinning v. Ohio, &c. Tr. Co.*, 2 Disney, 336; *Johnson v. Gunter*, 6 Bush, 534; *McCombs v. Merryhew*, 40 Mich. 721; *Porter v. Williams*, 9 N. Y. 142; *People v. Security Ins. Co.*, 78 *Id.* 114; 79 *Id.* 267; *Scott v. Elmore*, 10 Hun, 68; *Oleott v. Heermans*, 3 *Id.* 431; *Simmons v. Wood*, 45 How. Pr. 262; *Elmira, &c. Co. v. Erie Ry.*, 26 N. J. Eq. 284; *Receivers v. Paterson Gas Light Co.*, 3 Zabr. 283; *Kennedy v. St. Paul, &c. R. R.*, 5 Dillon, 519; *Stanton v. Ala., &c. R. R.*, 2 Woods, 506; *Cowdrey v. Railroad Co.*, 1 *Id.* 331; *Davis v. Gray*, 16 Wall. 203; *Heermans v. Clarkson*, 64 N. Y. 171; *In re Birmingham, &c. Ry.*, L. R. 18 Ch. D. 155; *Campbell v. Champagne Generale*, L. R. 2 Ch. D. 181; *Ex parte Warren*, L. R. 10 Ch. 232; *Ex parte Jay*, L. R. 9 Ch. 133; *Armstrong v. Armstrong*, L. R. 12 Eq. 614.

⁷ *Kennedy & Co. v. St. Paul & Pacif. R. R. Co. et al.*, 2 Dill. C. C. R. 448.

⁸ *Rankine v. Elliott*, 16 N. Y. 377.

⁹ *Rankine v. Elliott*, 16 N. Y. 377; *Mil. & St.*

making repairs, enforcing the claims against other parties in favor of such property, and the like.¹ It is, however, the duty of the receiver to secure the approval of the court in every case, where such approval can be obtained in advance.² In appointment of receivers of railroads, at the instance of the mortgagees or bondholders, the receiver is often called on, for the preservation of property, to complete the construction of the road and to make repairs on the same.³ But in doing so, the order of the court to that end is required to be taken in advance, for the receiver cannot expend money without an order of the court, except in cases of absolute necessity.⁴ So, also, is it impossible for him to borrow money and give a lien upon the subject-matter of his receivership, without the consent of the court.⁵ Finally, the receiver is often authorized by the court, particularly after the rendition of a decree, to sell the property and to make title to the purchaser of such property. But this, of course, can only be done under the decree of the court.⁶

§ 584. **Suits against receivers.**—The receiver, being an officer of the court, is therefore really not subject to any official liability, except where the court which appoints him permits a suit to be brought against him; for his acts as a receiver are largely, if not altogether, the performance of orders of the court; and, technically, a suit against the receiver would be a suit brought against the court. Hence, in order that any suit may be brought against the receiver, the consent of the court which appoints him must be had, and such action must be maintained in the same court.⁷ The proper form of the suit would be an application by petition to the court for relief from the effects of the acts of the receiver.⁸ If the receiver has been appointed by the state court, then the federal courts cannot recognize any action against such

Paul R. R. Co. v. The Mil. & Minn. R. R. Co. and others, 20 Wis. 165; Manlove v. Burger, 38 Ind. 211; Alexander v. Relfe, 9 Mo. App. 133; Lathrop v. Knapp, 37 Wis. 307; Miller v. Mackenzie, 29 N. J. Eq. 291; Battle v. Davis, 66 N. C. 252; Gadsden v. Whaley, 14 S. C. 210; Searles v. Jacksonville, &c. R. R., 2 Woods, 621; Campbell v. Fish, 8 Daly, 162; Donnelly v. West, 17 Hun, 564; Albany, &c. Ins. Co. v. Van Vranken, 42 How. Pr. 281; Calkins v. Atkinson, 2 Lans. 12; Rockwell v. Merwin, 8 Abb. Pr., n. s., 330; Graver v. Kent, 70 Ind. 428.

¹ Porter v. Kingman, 126 Mass. 141; Pond v. Cooke, 45 Conn. 126; Hoover v. Montclair, &c. Ry., 29 N. J. Eq. 4; Mann v. Fairchild, 3 Abb. App. Dec. 152; Koontz v. Northern Bk., 16 Wall. 196; *Ex parte* Harris, L. R. 2 Ch. D. 423; *Ex parte* Hare, L. R. 10 Ch. 218; Jolly v. Arbuthnot, 4 De G. & J. 224; Screven v. Clark, 48 Ga. 41; Seagram v. Tuck, L. R. 18 Ch. D. 296; *Ex parte* Browne, L. R. 16 Ch. D. 497.

² Crowdry *et al.* v. The Railroad Co., 3 Otto, (98 U. S. Sup. Ct.) 352.

³ Kennedy v. The St. Paul & Pacific R. R. Co., 2 Dillon's C. C. R. 448.

⁴ Meyer v. Johnston, *supra*; Williamson v. Washington City, Va. Midland & Great South-

ern R. R. Co., 33 Gratt. 624; s. c., 1 Am. & Eng. R. R. Cas. 498; Gurney v. Atlantic & Great Western Ry. Co., 58 N. Y. 358; 9 Am. Rep. 520; Cowdrey *et al.* v. Railroad Co., 3 Otto, (93 U. S. Sup. Ct.) 352; but see Dexterville Mfg. & Boom Co. v. Case, 4 Fed. Repr. 873; s. c., 1 Am. & Eng. R. R. Cas. 630.

⁵ Meyer v. Johnson, 9 Am. Rep. 454 (Supr. Ct. Ala., June Term, 1875); s. c., 53 Ala. 237; 15 Am. Ry. Rep. 487; and see Hoover v. Montclair & Greenwood Lake Ry. Co., 29 N. J. Eq. 4; 18 Am. Ry. Rep. 565.

⁶ Metz Admr. v. The Buffalo, Corry & Pittsburgh R. R. Co., 58 N. Y. 61.

⁷ Randall v. Howard, 2 Black, 586; Robinson v. Atlantic & Great West. Ry. Co., 66 Penn. St. 160; *In re* McElrath, 2 Dillon's C. C. R. 460; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 632, 633; Freeman v. Howe, 24 How. 460; Palys v. Jewett, 32 N. J. Eq. 302; Hackley v. Draper, 69 N. Y. 88; 4 T. & C. 614; De Graffenried v. Brunswick, &c. R. R., 57 Ga. 22; Killmer v. Hobart, 8 Abb. N. C. 426; 58 How. Pr. 452; Barton v. Barbour, 3 MacAr. 212; Express Co. v. Railroad Co., 9 Otto, 191; La Crosse Railroad Bridge, 2 Dillon's C. C. R. 465.

⁸ Ohio & Miss. R. R. Co. v. Davis, 23 Ind. 553.

receiver, although it may be brought by a non-resident of the state, or where for some other reason the federal court could ordinarily assume jurisdiction. So, on the other hand, if the receiver be appointed by the federal court, any litigation arising out of the acts of such receiver, must be instituted in such federal court, and the state court cannot assume jurisdiction.¹ On this same general principle, suits brought against a receiver, for injuries suffered by persons through the negligence of the employees of the receiver in the management of a railroad, can only be brought against such receiver in the court appointing him, and with the leave of such court.² And in such an action the liability for such injuries will not be a personal one of the receiver;³ but the court will, on a proper case being made out of negligence and injury, entertain a consideration of the claim as a claim against the property of the railroad.⁴ When the right of recovery for such injury is recognized by a decree of a court, satisfaction of such claim can only be made out of the funds which might be found in the hands of the receiver. All suits for such injuries must be brought against the receiver before his discharge as receiver; but it is customary, in the discharge of a receiver after a sale of the property under foreclosure, or in the decree for foreclosure, to provide that the purchaser shall take the property subject to all claims against the receiver, which remain unsatisfied when the property is transferred and the receiver discharged.⁵ But a receiver is free from liability only for those acts, which he has lawfully done within his authority as a receiver, and which he has done in relation to the management of the property which has been placed in his charge by the decree of the court. Where, however, such a receiver has mistakenly taken possession of property not belonging to the parties litigant, or not constituting a part of the subject-matter of the suit, he is guilty of a conversion, and for such he may be held liable in an action of replevin, in ordinary form brought by the owner of such property.⁶ But wherever a receiver is deemed to be made liable in independent suits brought in other courts for his official acts as receiver, the court

¹ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633; *Milw. & St. Paul R. R. Co. v. Milw. & Minn. R. R. Co.*, 20 Wis. 165.

² *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560, 561.

³ *Hopkins v. Connel*, 2 Tenn. Ch. 323; *Cardot v. Barney*, 63 N. Y. 281; *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560, 561.

⁴ *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560, 561; *Newell v. Smith*, 49 Vt. 255; *Kain v. Smith*, 11 Hun, 552; *Henderson v. Walker*, 55 Ga. 481; *Meara's Adm'r v. Holbrook*, 20 Ohio St. 137; *Potter v. Bunnell*, 20 *Id.* 150; *Hills v. Parker*, 111 Mass. 508; *Klein v. Jewett*, 11 C. E. Green, 474; *Jordan v. Wells*, 3 Woods, 527; *Kennedy v. Indianapolis, C. & L. R. Co.*, 2 *Flippin*, 704; s. c., 10 Repr. 359; 11 Cent. L. J. 89;

Erwin v. Davenport, 9 Heisk. 44; 19 Am. Ry. Rep. 274; and see *Hopkins v. Connel*, 2 Tenn. Ch. 323; *In re McElrath*, 2 Dillon C. C. 460; *In re Easton*, 2 Dill. C. C. R. 460; *Blumenthal v. Brainerd*, 38 Vt. 402; *Newell v. Smith*, 49 Vt. 255; 17 Am. Ry. Rep. 100; *Allen v. Cent. R. R. Co.*, 42 Ia. 683; *Wabash Ry. Co. v. Brown*, 5 Bradw. (Ill.) 590; *Kain v. Smith*, 80 N. Y. 458.

⁵ *Farmers' Loan and Trust Co. v. Cent. R. R. Co.*, 2 McCrary, 181; s. c., 7 Fed. Repr. 537; 1 Am. & Eng. R. R. Cas. 630; but see *Brown v. Wabash Ry. Co.*, 96 Ill. 297; 1 Am. & Eng. R. R. Cas. 626; s. c., 5 Bradw. (Ill.) 590.

⁶ *Leighton v. Harwood*, 111 Mass. 67; *Hills v. Parker*, 111 Mass. 508, 510, 511; *Parker v. Brown*, 8 Paige, 388; *Paige v. Smith*, 99 Mass. 395.

appointing him will protect him from interference by enjoining the prosecution of the other suits.¹

§ 585. **Liability of the corporation for the acts of the receiver.**—Independently of any statutory provision, a corporation whose property has been placed in the hands of a receiver is not liable for any claims for injuries or damages, which have arisen from the management of the corporate property by such receiver. These acts of the receiver are not acts of the corporation, and the corporation has no control over them, so that no action will lie against the corporation for the acts of, or injuries inflicted by, the receiver, or by his servants or employees.² But there are some cases, in which the corporation will be liable for the negligence of a receiver in the management of the corporate property, viz.: where such negligence constitutes the violation of an express trust or duty imposed upon the railroad corporation. The corporation in such a case is liable, although the control and management of the railroad property have been completely taken away from them; it is because the statutory liability is clear and explicit.³ In such a case, the judgment obtained against the corporation cannot support a levy upon the property in the hands of the receiver; but the only remedy for the satisfaction of such judgment is an application for its payment to the court, wherein the receiver has been appointed.⁴

§ 586. **Removal of receiver.**—Inasmuch as the receiver is an officer of the court which appointed him, he can only be removed by such court; no other court can interfere and secure his removal for whatever cause might be suggested.⁵

§ 587. **Compensation of receiver.**—The compensation of a receiver is governed exclusively by the discretion of the court which appoints him, and a claim for compensation constitutes a lien upon the property of the railroad in the hands of the receiver.⁶

§ 588. **The receiver's certificate, how far negotiable.**—When a railroad or other property is placed by the court, on the application of the creditors of the owner, in the hands of a receiver, to be administered upon for the benefit of the creditors, subject to the orders of the court, it is now very common for the court to authorize the receiver to issue certificates, which, in effect, amount to promis-

¹ Rankine v. Elliott, 16 N. Y. 377; Jordan v. Wells, 3 Woods, 527; Vermont, &c. R. R. v. Vt. Cent. R. R., 46 Vt. 792; *Ex parte* Cochrane, L. R. 20 Eq. 282; Russell v. East Anglian Ry., 3 Macn. & G. 104.

² Ohio & Miss. R. R. Co. v. Davis, 23 Ind. 553, 560, 561; see Hopkins v. Connel, 2 Tenn. Ch. 323; Wabash Ry. Co. v. Brown, 5 Bradw. (Ill.) 590; Wiswall v. Sampson, 14 How. 52; Angel v. Smith, 9 Ves. 335.

³ McKinney v. Ohio & Miss. R. R. Co., 22 Ind. 99; Louisville, New Albany & Chi. R. R. Co. v. Cauble, 46 Ind. 277; Ohio & Mississippi R. R. Co. v. Davis, 23 Ind. 553, 560, 561.

⁴ Ohio & Miss. R. R. Co. v. Davis, 23 Ind. 553, 560.

⁵ Coe v. New Jersey Midland Ry. Co., 28 N. J. Ch. 31; 14 Am. Ry. Rep. 9; Cincinnati, Sandusky & Cleveland R. R. Co. v. Sloan, 31 Ohio St. 1; 15 Am. Ry. Rep. 376.

⁶ Special Bk. Comm'rs v. Franklin Sav. Inst., 11 R. I. 557; Mabry v. Brown, 12 Heisk. 597; Brien v. Harriman, 1 Tenn. Ch. 467; Hutchinson v. Hampton, 1 Mont. T. 39; McArthur v. Montclair R. R., 27 N. J. Eq. 77; Jones v. Keen, 115 Mass. 170; Special Bk. Comm'rs v. Cranston Sav. Bk., 12 R. I. 497; Hopfensack v. Hopfensack, 61 How. Pr. 498; Crook v. Findley, 60 Id. 375; Gardiner v. Tyler, 2 Abb. App. Dec. 247.

sory notes, obligating the receiver to pay the amount called for by the certificate out of any moneys in his hands as receiver. It has been very generally held that the receiver's certificates are not negotiable, and that the transferee takes them subject to all existing defenses, although they are made payable to order or to bearer; principally, on the ground that the certificate is drawn on a particular and uncertain fund, and does not create against anyone any absolute and unconditional liability.¹ It has been held that, since receivers cannot issue certificates for any other purpose than to raise funds with which to make necessary repairs, and cannot borrow money for the purpose of building a road, the certificate issued for the prohibited purpose is void in the hands of anyone, if the purpose of that issue is stated on the face of the certificate.²

¹ "Nearly every quality essential to the negotiability of commercial paper is wanting in such certificates. In the first place, they are not payable unconditionally out of any fund; whether, in any event, they are payable in full, depends upon the question whether the fund under the control of the court is sufficient for that purpose. The fact cannot be known exactly upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered. A bill of exchange is not good when drawn payable out of a particular fund that is uncertain and contingent. The

fund out of which payment is to be made must be certain, as well as the obligation of the maker or drawer. Then, again, there is no personal liability upon anyone for the payment of such certificates, and, as we have seen, one essential quality of negotiable paper is the personal liability of the maker." *Turner v. Peoria, &c. R. R. Co.*, 95 Ill. 145, 146; see, also, *Montreal v. Chicago, &c. R. R. Co.*, 48 Iowa, 518; *Newbold v. Peoria & Springfield R. R. Co.*, 5 Brad. 367; *Union Trust Co. v. Chicago & Lake Huron R. R. Co.*, 7 Fed. Rep. 513.

² *Credit Co. v. Ark. Cent. R. R. Co.*, 15 Fed. Rep. 46.

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